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STATE OF WISCONSIN
SUPREME COURT
Consolidated Case Nos. 16 AP 2503 and 17 AP 0013
Dane County Case Nos. 16 CV 0008 and 16 CV 0350

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

v. **Case No. 16 AP 2503**

DANE COUNTY,
Respondent-Appellant,

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

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

COURT OF APPEALS DECISION DATED MAY 24, 2018

DANE COUNTY'S RESPONSE BRIEF AND APPENDIX

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

ROBERT CAMPBELL, HEIDI CAMPBELL, KEITH
REOPELLE, TRISHA REOPELLE, JAMES HOLMES,
JAN HOLMES AND TIM JENSEN,
Plaintiffs-Appellants,
v.

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

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

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INTRODUCTION

Enbridge grandly asserts that this case raises substantial issues that "creates substantial statewide risks." In support of this, they broadly claim that every unit of local government across the state "that exercise land-use permitting authority- stand 'always eager' to impede property rights." (Petr.'s Br. 25.) To support this absurd red-herring argument they cite to the U.S. Supreme Court's decision in *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017), completely out of context.[1] This is illustrative of Enbridge's attempt to confound and confuse what is really a very simple and straightforward issue.

Enbridge operates a pipeline Line 61 that transports corrosive tar sands the length of the State of Wisconsin. They applied for a conditional use permit (CUP) to expand a

[1] *Murr* involved a constitutional regulatory takings claim. The Court was explaining the concept of property rights in the context of the Court's regulatory takings jurisprudence, and stated "Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." But the other "persisting interest" that the Court considers in this context is "the government's well-established power to 'adjust rights for the public good.'"*Murr*, 137 S. Ct. at 1943 (citing *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

pumping station located in the Town of Medina that would double the pumping capacity of Line 61 from 400,000 barrels per day to 1.2 million. Enbridge has a history of pipeline spills with costs of remediation running into the billions of dollars. Based upon these facts, and after consultation with an environmental insurance expert, the Dane County Zoning and Land Regulation Committee (ZLR) imposed insurance conditions on the issuance of the CUP. These conditions were integral to the issuance of the CUP. A review of the record clearly demonstrates that the CUP would not have been issued without the insurance conditions.

The CUP was granted on April 14, 2015. Subsequently, the Legislature intervened and adopted legislation as part of the 2015 Budget Bill specifically intended to benefit Enbridge in this case. Wis. Stat. § 59.70(25), which was effective July 14, 2015, limits the ability of a county to require insurance on interstate hazardous pipelines. Based upon this new legislation the circuit court struck the insurance conditions from the CUP but allowed the remainder of the permit to stand.

Zoning in general, and the issuance of CUPs in particular, is an exercise of the county's police powers. The ZLR is the body charged with determining whether it is in the public interest to issue a CUP. Dane County Code of Ordinances (DCO) § 10.255(2)(h) requires the ZLR to determine whether a proposed conditional use meets six standards before a CUP can be granted. This Court has determined that a body such as ZLR "is the body best suited to make such factual determinations…" *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of the City of Milwaukee*, 2005 WI 117, ¶ 40, 284 Wis. 2d 1, 700 N.W.2d 87.

By striking the insurance conditions but allowing the remainder of the CUP to stand, the circuit court exceeded its authority and effectively rewrote the permit. The circuit court should have vacated the entire permit and remanded the matter back to ZLR. They are the appropriate body to determine whether the standards for issuance of a CUP can be met.

Enbridge argues that remand is not appropriate because Dane County has conceded that Wis. Stat. § 59.69(2)(bs) and

59.70(25) expressly preempts "the imposition of the Insurance Requirements in a CUP." (Petr.'s Br. 1.) That statement is inaccurate for two reasons. First, the express language of § 59.69(2)(bs) prohibits a county as part of its CUP approval process from imposing a condition that is expressly preempted by state law. That statute did not exist when this CUP was approved and is therefore irrelevant to this case. Furthermore, that statute only expressly preempts a county from requiring additional insurance, and does not prohibit other conditions related to insurance.[2] Second, § 59.70(25) only renders a county's requirement of additional insurance unenforceable so long as the pipeline operator maintains the requisite comprehensive general liability insurance mandated by the statute. Enbridge's position that there is no on-going statutory insurance requirement is absurd.

Finally, Enbridge relies heavily upon this Court's holding in *Adams v. State Livestock Facilities Siting Review*

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[2] Condition 8 included a requirement that Enbridge provide proof of insurance to Dane County on demand.

Bd., 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404, for their argument that remand was not required. *Adams* is clearly distinguishable and Enbridge vastly overstates its precedential value. The court of appeals correctly distinguished *Adams* and found "a complete disconnect between the context in that case and the context here." *Enbridge Energy Co., Inc. v. Dane Cty.*, Nos. 16AP2503 and 17AP13, unpublished slip op., ¶ 108 (Wis. Ct. App., May 24, 2018). (App. 197.) This Court's decision in *Adams* noted the unusual circumstances and unique procedural posture of the case. *Adams*, ¶¶ 63, 65. The Court also expressly limited the scope of *Adams* by stating "Our holding today regarding the Siting Board's authority is a narrow one….We do not address situations that may arise with respect to other agencies, and we craft no exceptions to the well-settled rules of administrative law." *Id.* n.29.

This case is straightforward and the law well settled. If a court invalidates conditions in a permit that were integral to the issuance of the permit, the appropriate remedy is to invalidate the entire permit and remand the entire matter to the

agency charged with fact finding and issuance of the permit. In this case the circuit court usurped the authority of the ZLR and exceeded its authority by rewriting the CUP.

STATEMENT OF CASE

Enbridge has detailed its plans to expand its Line 61 that runs the length of the state, including through the Town of Medina in Dane County. This planned expansion will increase the capacity of Line 61 from 400,000 barrels per day (bpd) to 1,200,000 bpd. To increase the capacity Enbridge sought to expand the Waterloo Pump Station located in the Town of Medina.

The Waterloo Pump Station is located in the A-1EX, Exclusive Agricultural Zoning District. A pipeline is a conditional use in the A-1EX district pursuant to § 10.123(2)(b)3(c) of the Dane County Zoning Code. Therefore, on August 19, 2014, the Respondents applied for a conditional use permit (CUP) for the expansion of the Waterloo Pump Station.

The ZLR held their first public hearing on the CUP on October 28, 2014. At that time 8 individuals representing Enbridge registered in support of granting the CUP, as well as 27 other individuals. Sixty-eight individuals registered in opposition, including representatives of the advocacy groups 350 Madison, Sierra Club – John Muir, and Four Lakes Group Sierra Club. A motion was adopted by ZLR to postpone action due to opposition at the public hearing. (R.8, p. 84; App. 105.)

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

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

> environmental study be conducted after clean-up.

ZLR also requested that Enbridge produce documentation regarding proof of insurance for a catastrophic event[3]. (R.8, p. 91; App. 106.)

The CUP was next on ZLR's agenda at its meeting on January 27, 2015. At that meeting a motion was made and seconded to approve the CUP with nine conditions including condition number six that stated:

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

[3] Enbridge never satisfied this request.

ZLR took no action on that motion. A motion was then adopted "that the Conditional Use Permit be postponed to investigate the possibility of retaining an insurance expert, as well as an environmental risk assessment, for the purposes of determining the insurance needs of the proposal." (R.8, pp. 102-103; App. 107-108.)

Enbridge agreed to fund retention of an insurance expert. Mr. David J. Dybdahl, a recognized expert in environmental risk management was retained at Enbridge's expense. In the proposed Scope of Work, Mr. Dybdahl stated:

> Preferably the complete General Liability and Excess Liability Insurance policies will be supplied to the consultant. If a complete copy of the policies is not supplied these sections of the policies would be necessary at a minimum to conduct the insurance coverage review.
> a) the insuring agreement,
> b) pollution exclusions and pollution give packs,
> c) Definitions sections and any other provisions specifically relevant to these sections in the General Liability insurance policy in order to evaluate the adequacy of insurance coverage for a pipe line spill.
> d) If any of the excess layers deviate from the Primary General Liability insurance policy on the coverage related to pollution events, those deviations should be supplied.

e) Other sections as requested to clarify items in the above sections.

(R.8, p.183.)

Enbridge correctly states at p. 8 of its Brief that "During this process, Enbridge ***notified*** ZLR that it carried $700 million of comprehensive general liability ("CGL") insurance that included coverage for sudden and accidental pollution liability." Indeed Enbridge did "notify" ZLR and Mr. Dybdahl of its insurance coverage, but it never provided proof of coverage.[4] Mr. Dybdahl stated in his report that Enbridge declined to provide him with any of the actual insurance policies, claiming they contained trade secrets. Rather Enbridge's senior insurance manager met with Mr. Dybdahl and provided a summary of Enbridge's insurance program. Mr. Dybdahl stated in his report that he did not read any of the actual insurance policies. Mr. Dybdahl did state that he found their summary credible and sufficient to evaluate the insurance coverage. (R.8, p. 207; App. 113.) But, neither Mr. Dybdahl

[4] At the time of review of Enbridge's insurance Act 55 had not been adopted making proof of insurance less relevant.

nor any Dane County official has ever seen actual documentation of Enbridge's insurance coverage.

Mr. Dybdahl's report was extensive and is 30 pages long. It evaluated the insurance Enbridge claimed it had in April 2015.[5] His findings and conclusions based upon the summary of Enbridge's liability insurance program, their 2014 financial statements and the government sponsored oil spill response programs were summarized in the Executive Summary of the Report:

- Enbridge is strictly liable under U.S. environmental laws to pay to clean up an oil spill at one of their lines;
- Between the General Liability insurance coverage that Enbridge purchases with its modified Pollution Exclusion, the current liquid assets of Enbridge including profits and the funds available in government sponsored oil spill clean-up funds, there are sufficient liquid assets and other financial resources available in 2015 to fund the remediation of a Maximum Probable Loss (MPL) spill from line 61 in Dane County;

[5] Mr. Dybdahl noted in his report that "The current insurance policies will expire on May 1st [2015] and new insurance policies will be purchased. Where the current insurance policies are a gauge on what insurance Enbridge may have in the future, there are no guarantees that Enbridge will be able to maintain these high levels of insurance in the future. (The recommended insurance levels anticipate this contingency.)" (R.8, p. 207, App. 113.)

- Enbridge has proven in the past to pay for oil spill clean ups in a responsible manner through a combination of partially recoverable General Liability insurance proceeds and profits from ongoing operations;
- The very healthy financial picture of Enbridge today is not necessarily predictive of the future ability of Enbridge to meet the financial obligations associated with an oil spill over the duration of the Conditional Use Permit;
- Enbridge Energy Partners is only partially insured in both "Limits of Liability" and the scope of the insurance coverage for a known potential magnitude oil spill arising from one of their pipelines;
- The $700 million of General Liability insurance coverage that Enbridge currently purchases is less than the known loss cost of the $1.2 billion Enbridge oil spill in 2010 on Line 6B in Michigan;
- Enbridge purchases a General Liability insurance policy which contains a pollution exclusion and defined exceptions to the pollution exclusion for spills which meet certain time element requirements;
- There is ongoing insurance coverage litigation associated with the Enbridge Line 6B spill in 2010 that highlights the insurance coverage ambiguity inherent in a General Liability insurance policy containing a Pollution Exclusion exceptions to the exclusion instead of genuine Pollution Insurance or more accurately Environmental Impairment Insurance;
- Controversy over these missing coverages in the General Liability insurance policies

currently purchased by Enbridge lie at the core of the Line 6B insurance coverage litigation involving $103[000,000] in uncovered insurance proceeds for the Line 6B spill;

- Subject to the Pollution Exclusion, the Enbridge General Liability insurance policies insure "Property Damages" and do not include specific insurance coverages for clean-up costs, restoration costs and natural resources damages normally associated with an oil spill;
- Enbridge does not currently purchase Environmental Impairment Liability (EIL) insurance on Line 61. In contrast to the General Liability insurance policies which only apply to liability arising from "Property Damage," EIL insurance policies contain specific insurance coverage for "Clean-up Costs, Restoration Costs" and "Natural Resources Damages" associated with an oil spill.

Mr. Dybdahl added that "[b]ecause the proposed conditional use is of unlimited duration, risk factors which may be encountered decades into the future need to be incorporated into the permitting process today. The county may not be able to add changes to the permit related to risk management issues in the future. These future risk factors could include:

- The potential (likely) down turn in the use of fossil fuels over time;

- Reduced cash flow and profitability for Enbridge as a result of a general down turn in the throughput of crude oil in pipelines;
- A general down turn in their business would lead to the reduced ability of Enbridge to maintain robust safety and loss control protocols and to upgrade their pipelines over time;
- Overtime, the aging pipeline systems would become more prone to spills, and;
- In the above scenario, Enbridge may not have the liquid assets that they have today to pay for a significant spill at the same time they are more likely to have a spill due to aging infrastructure.

Based upon the foregoing findings and conclusions, and his over 30 years of insurance and risk management experience, Mr. Dybdahl recommended the following:

- That Enbridge agree to indemnify and hold harmless Dane County for pollution losses per the terms as outlined in Enbridge's proposal titled "CONDITIONAL USE PERMIT ("CUP") CONDITIONS";
- That Enbridge procures and maintains liability insurance, including Environmental Impairment Liability Insurance, making Dane County an Additional Insured to a level equal to 10% of the Line 6B loss costs, $125,000,000;
- As part of this overall liability insurance requirement, Enbridge should purchase $25,000,000 of EIL insurance on the proposed pumping station in Dane County;

- Technical insurance specifications for General Liability Insurance and Environmental Impairment insurance appear in Appendix A.

(R.8; p. 198, pp. 200-202; App. 109, App. 110-112.)

After receiving Mr. Dybdahl's report, the ZLR next considered the CUP at its April 14, 2015 meeting. At that meeting, the ZLR was solely concerned with necessary insurance conditions for the CUP. (R.9, pp. 470-489; App. 116-135.) A motion was made and approved to grant the CUP with 12 conditions, including what has been referred to in this litigation as the "insurance conditions":

> 7. Enbridge shall procure and maintain liability insurance as follows:
> $100,000,000 limits in General Liability insurance with a time element exception to the pollution exclusion (currently in place), and $25,000,000 of Environmental Impairment Liability insurance. Enbridge shall list Dane County as an Additional Insured on the total $125,000,000 of combined liability insurance.
>
> 8. The required General Liability Insurance and Environmental Impairment Liability insurances shall meet the technical insurance specifications listed in Appendix A of the insurance consultant's report, which is incorporated herein by reference.

(R.8, pp. 106-109; App. 136-139.) Appendix A of the insurance consultant's report which was incorporated into Condition 8, included a provision titled "Evidence of Insurance" that stated: "Upon request by Dane County, Enbridge shall furnish a certificate of insurance to the county which accurately reflects that the procured insurances fulfill these insurance requirements." (R.8, pp. 222-223; App. 114-115.) Clearly the ZLR adopted the insurance requirements directly from Mr. Dybdahl's report and they were an integral component of the ZLR's approval of CUP 2291.

Not coincidentally, shortly after approval of the CUP the Legislature adopted a provision in the 2015 Budget Bill intended to provide Enbridge relief in this case. Section 1923e of 2015 Wisconsin Act 55 created Wis. Stat. § 59.70(25) that became effective on July 14, 2015, and states: "A county may not require an operator of an interstate hazardous pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution

liability." Act 55 also created Wis. Stat. § 59.69(2)(bs), which states: "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." It is also important to note that at the time Mr. Dybdahl reviewed Enbridge's insurance and when ZLR imposed the insurance conditions the Legislature had not yet adopted Act 55.

What happened next has been obfuscated by Enbridge in an attempt to confuse the issues in this case. Enbridge's reference to a "[July 24, 2015] CUP" and its description of the actions of the ZLR on September 29, 2015 are inaccurate. There has only been one issuance of CUP 2291, and that was by the ZLR on April 14, 2015.

On July 24, 2015, the Zoning Administrator purported to reissue CUP 2291 with the insurance conditions removed. But, the effective date of the permit continued to be listed as April 21, 2015. Regardless, there was no legal authority for the Zoning Administrator to amend or revise a CUP. Pursuant

to DCO § 10.255, only the ZLR has authority to issue or amend a CUP. After learning that CUP 2291 had been revised, the Chair of ZLR placed the matter on the agenda for the September 29, 2015 meeting. At that meeting the Chair stated:

> This is the discussion and possible action of the conditions of approval for CUP 2291 that is the Enbridge pumping station. And I requested this item be put on the agenda because I was learning for the first time at our last meeting that the [CUPs] were reissued after the state legislative action, And it was my opinion that – that that action was not proper, that what should have been released as the permit should have been reflective of the committee action, even though one – you know, one of the conditions was rendered unenforceable by state legislative action… I don't think the Conditional Use Permit application should have been changed in there that didn't reflect committee action.

(R.8, pp. 584-585.) The minutes of that meeting reflect the following action:

> A motion was made by KOLAR, seconded by MATANO, to direct the Zoning Administrator to have Conditional Use Permit #2291 reflect the exact conditions of approval as approved by the Zoning and Land Regulation Committee on April 14, 2015. A note shall be added to the conditional use permit which identifies that the County's ability to enforce conditions 7 & 8 are affected by the State Budget Bill, 2015 Wisconsin Act 55, that was enacted on July 12,

> 2015. The relevant portion of 2015 Act 55 is Section 1923e: 59.70(25) of the statutes is created to read: 59.70(25) Interstate hazardous liquid pipelines. A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage for sudden and accidental pollution liability. The Zoning Administrator did not have the authority to revise the conditions of approval as noted in the Zoning Administrator's letter dated 7/24/2015.

(R.8, p. 125)

The Respondents appealed the ZLR decision to the Dane County Board of Supervisors, which held a hearing on December 3, 2015. During that hearing, members of the ZLR clearly demonstrated that the insurance conditions were integral to the approval of the CUP. Supervisor Al Matano, stated that this wasn't the normal CUP proceeding. He stated "the committee did our due diligence. We worked on this for many, many months." (R.9, p. 410; App. 140.) Supervisor Patrick Miles, the Chair of ZLR, summarized the committee's actions:

> And we determined, as the committee, through consultation with Corp[oration] Counsel and through the recommendations from the insurance

> expert, that the insurance requirement was proper and necessary given that–by our insurance consultant's recommendations, that there are gaps in the general commercial liability coverage. Supervisor Matano pointed to a couple of them being – you know, the term "sudden accidental." That doesn't cover something that's discovered after 30 days.

(R.9, pp. 417-418; App. 143-144.) The County Board voted 27-2 to affirm the decision of the ZLR. [6]

Enbridge filed this action for certiorari in Dane County Circuit Court on January 4, 2016. At a hearing on July 11, 2016, the Honorable Peter C. Anderson ruled that the insurance conditions were prohibited by Wis. Stats. §§ 59.70(25) and 59.69(2)(bs). (R.9, pp. 416-417; App. 142-143.) Subsequent to that ruling, the County then moved that the matter be remanded back to the ZLR and stated:

> I would assert that if you — certainly if you look at the deliberations of the Zoning Committee and probably the County Board as well, these conditions aren't severable. I think it's unlikely this Conditional Use Permit would have been issued without the insurance conditions because they thought it was necessary to protect the

[6] The County Board's review of the CUP was not *de novo* and required a ¾ majority to reverse the decision of the ZLR. That provision was subsequently rescinded and CUP appeals now go to the Board of Adjustment.

> public's interest. Therefore, I'd recommend that the Court remand this matter back to the Zoning Committee to take a look at whether to even issue this Conditional Use Permit without the insurance conditions because clearly those conditions were an integral part of even issuing the permit.

(R.57, pp.96-97; App. 147-148.) The court then ordered that the issue of appropriate remedy be briefed for a subsequent hearing.

At a hearing held September 27, 2016, the County renewed its argument that the insurance conditions were an integral part of the issuance of the CUP. Therefore, the County argued that rather than simply excising the insurance conditions and effectively rewriting the permit, the matter should be remanded to ZLR. This would afford ZLR the opportunity to determine whether the six (6) standards in Dane County's Zoning Ordinance for issuing a CUP could be met without the insurance conditions. (R.57, pp. 22-23; App. 149-150.) The circuit court rejected this argument and determined that it was not appropriate to authorize the County or ZLR to take further action regarding the CUP. (R.57, pp. 43-44; App.

151-152.) The court determined that "the more straightforward thing to do is …to strike the insurance requirements that were found invalid in the previous ruling…" (R.57, p. 45; App. 153.)

The circuit court held a final hearing on November 11, 2016. At that time the wording of the court's Decision and Order was approved and signed. The court's Decision and Order as it pertains to the County's appellate issues stated:

> (a) Petitioner's Petition for Writ of Certiorari in Case No. 16-CV-0008 is granted.
> (e) Conditions #7 and 8 in Conditional Use Permit No. 2291 are void and unenforceable as a matter of law;
> (f) Conditions #7 and 8 are hereby stricken from Conditional Use Permit No. 2291.

(R.52, pp. 1-2; App. 101-102.) The circuit court struck Condition 8 in its entirety even though it included provisions that only related to insurance and were clearly not prohibited by Wis. Stat. § 59.70(25).

The Respondents filed a Notice of Entry of Order on November 30, 2016. (R.53, pp. 1-2; App. 103-104.) Dane County filed a Notice of Appeal on December 20, 2016.

On May 24, 2018, the court of appeals issued a decision remanding the case back to the ZLR. As to the appropriate remedy, the court held:

> We now explain why we conclude that, consistent with the request for relief of the County and one of two alternative requests made by the landowners, this matter should be remanded to the circuit court, with directions that the circuit court return it to the zoning committee. The alternative remedies urged by Enbridge (severing permit conditions 7 and 8) and the landowners (that we "order the immediate restoration of" permit conditions 7 and 8) would each improperly deprive the zoning committee of the opportunity to consider what valid permit conditions, insurance or otherwise, may be adequate to satisfy the permitting standards established by ordinance, *see* Dane County Ordinance § 10.255(2)(h), with the benefit of a correct understanding of the Act 55 insurance limitation. ***The zoning committee is the body best suited to evaluate the facts and weigh appropriate conditions***. As our supreme court has noted, "[t]he role of courts in zoning matters is limited because zoning is a legislative function." ***Town of Rhine***, 311 Wis. 2d 1, ¶ 26.

Enbridge Energy Co., Inc. v. Dane Cty., Nos. 16AP2503 and 17AP13, unpublished slip op., ¶ 98 (Wis. Ct. App., May 24, 2018). (App. 192-193.) (emphasis added).

The court of appeals considered whether Enbridge had in fact demonstrated whether it carries the insurance to trigger the Act 55 insurance limitation.[7] But, they ultimately concluded that even if Enbridge carries that insurance the appropriate remedy is still to return the matter to the ZLR. (*Id.* ¶ 99, App. 193.) The court stated:

> Central to our remedy conclusion is the undisputed fact that potential insurance conditions are integral to the consideration of a permit. That is, the insurance conditions placed in the permit by the zoning committee are necessarily intertwined with other potential conditions and integral to the permit, because less insurance coverage might logically call for more protection through different conditions and vice versa. A hypothetical based on condition 3 of the permit illustrates this integral-to-the-permit concept. Condition 3 provides that Enbridge must construct a "spill containment basin" around the pumping station sufficient to contain pipeline flow for at least 60 minutes. Depending on the insurance that the zoning

[7] Enbridge has asserted that Dane County made an admission that Enbridge carried sufficient insurance to trigger the preemptive provisions of Wis. Stat. § 59.70(25). In the pleadings cited by Enbridge the County admitted that Enbridge had "notified" it that it carried $700 Million of Commercial General Liability ("CGL") Insurance, which includes Sudden and Accidental Pollution Liability Coverage. (Petr.'s App. 114 ¶ 32 and Petr.'s App. 101 ¶ 13). The County admitted in its Answer that it was "notified." Not that Enbridge had the insurance. Although the County may have accepted Mr. Dybdahl's conclusions regarding Enbridge's insurance, it never admitted this factual assertion and Enbridge never provided proof in the form of actual insurance policies.

> committee finds Enbridge carries- including such presumably critical features as pollution exclusions, and exceptions to exclusions, coverage limits, and maximum self-insured retention amounts-the committee might reasonably decide that there should be a larger spill containment basin, or perhaps a basin with additional safety or environmental protection features.

(Id. ¶ 100, App. 193-194.) Regarding the appropriateness of remand, the court concluded:

> With the integral-to-the-permit concept in mind, the County makes a persuasive argument for remand based upon the fact that the zoning committee "never considered granting the [permit] without some type of insurance or financial responsibility condition," and "[t]here is no record to indicate whether [the zoning committee did or could" issue a permit lacking insurance conditions that the committee believes satisfy the standards under Dane County Ordinance § 10.255(2)(h).

(*Id.* ¶ 101, App. 194.) The court recognized that Wis. Stat. § 59.70(25) does not require the zoning committee to issue a permit "whenever an operator carries the specified insurance. Indeed, the insurance limitation does not change the authority of a zoning committee to exercise its own discretion in

determining whether a permit should be granted." (*Id.* ¶ 105, App. 196.)

STANDARD OF REVIEW

Enbridge correctly recites the appropriate standard for certiorari review of a zoning decision. On certiorari review, this Court reviews the record of the ZLR, "rather than the judgment or findings of the circuit court or the decision of the court of appeals. *AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm.*, 2017 WI 52, ¶ 9, 375 Wis. 2d 329, 895 N.W.2d 368. But, this case primarily involves a question of law that is reviewed by this Court *de novo*, with no deference to the decision of the circuit court.

The circuit court determined that the insurance conditions were "unenforceable as a matter of law" as a result of the adoption of § 59.70(25). That statute was enacted after ZLR's decision and imposition of the insurance conditions in the CUP. Clearly the insurance conditions were integral to the issuance of the permit. The legal question raised in this case is whether the circuit court should have remanded the entire CUP

back to ZLR rather than excising the insurance conditions and allowing the permit to stand. This is a question of law "and courts review questions of law independently from the determinations rendered by the municipality or the circuit court." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 54, 332 Wis. 2d 3, 796 N.W.2d 411.

Enbridge erroneously asserts that the Court should apply a "highly deferential" erroneous exercise of discretion standard. In support of that argument they cite *Prince v. Vandenberg*, 2016 WI 49, 369 Wis. 2d 387, 882 N.W.2d 371. That case involved the partition of real estate which this Court recognized is an equitable remedy. The Court concluded that "we review the circuit court's partition decision under the 'highly deferential' erroneous exercise of discretion standard, which we apply to equitable remedies." *Id.* ¶ 16. Enbridge also cites to *Duhame by Corrigal v. Duhame*, 154 Wis. 2d 258, 262-63, 453 N.W.2d 149 (Ct. App. 1989), which involved imposition of a constructive trust. As that is also an equitable remedy, the court held that the standard of review was abuse

of discretion. Enbridge's argument must fail however, because this Court has conclusively determined that a certiorari court does not sit in equity. *Town of Delafield v. Winkelmen*, 2004 WI 17, ¶¶ 30-31, 269 Wis. 2d 109, 675 N.W.2d 470. The law is clear that this Court reviews questions of law *de novo*, without deference to the circuit court or court of appeals.

ARGUMENT

I. THE APPROPRIATE REMEDY WAS REMAND TO ZLR.

The insurance conditions were clearly integral to the issuance of the permit. ZLR never considered issuing the permit without the insurance conditions. Contrary to Enbridge's assertion, there is no right to a CUP. The ZLR is the agency charged with making findings as to whether issuance of a CUP is in the public interest. The circuit court's decision to simply strike the insurance conditions exceeded the proper role of the court and usurped the authority of the ZLR.

Zoning authority is an exercise of the County's police powers, to protect the health, safety and welfare of the public

and encourage well-reasoned growth. *Town of Rhine v. Bizzell,* 2008 WI 76, ¶ 62, 311 Wis. 2d 1, 751 N.W.2d 780. A zoning ordinance may provide for conditional uses that are not permitted as of right but are "those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner." *Id.* ¶ 20 (citing *State ex rel. Skelly Oil Co. v. Common Council, City of Delafield*, 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973)).

Dane County's Zoning Ordinance authorizes the ZLR to issue CUPs. DCO § 10.255(2)(b) states:

> The zoning committee is authorized by Wis. Stat. § 59.69(2)(bm) to grant conditional use permits. Subject to sub. (c), the zoning committee, after a public hearing, shall, within a reasonable time, grant or deny any application for conditional use. ***Prior to granting or denying a conditional use, the zoning committee shall make findings of fact based on evidence presented and issue a determination whether the prescribed standards are met. No permit shall be granted when the zoning committee or applicable town board determines that the standards are not met, not shall a permit be denied when the zoning committee and applicable town board determine that the standards are met.***

(emphasis added) The applicable standards are set forth in DCO § 10.255(2)(h):

> 1. That the establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare;
> 2. That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by establishment, maintenance or operation of the conditional use;
> 3. That the establishment of the conditional use will not impede the normal and orderly development and improvement of surrounding property for uses permitted in the district;
> 4. That adequate utilities, access roads, drainage and other necessary site improvements have been or are being made;
> 5. That adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets; and
> 6. That the conditional use shall conform to all applicable regulations of the district in which it located.

The ZLR is authorized to impose conditions to secure compliance with the standards in sub (h).[8]

[8] DCO § 10.255(2)(i) states: *Conditions and guarantees.* Prior to the granting of any conditional use, the town board and zoning committee may stipulate such conditions and restrictions upon the establishment, location, construction, maintenance and operation of a conditional use as deemed necessary to promote the public health, safety and general welfare of the community and to secure compliance with the standards and requirements specified in subsection (h) above… In all cases in which conditional uses are granted, the town board and zoning committee shall require such evidence and guarantees as it may deem necessary as proof that the

There is nothing in the record to indicate whether ZLR would or could make findings that the standards were met without the insurance conditions. A review of the record indicates that at the various hearings held by ZLR on the CUP from October 2014 to April 2015, the primary concern was Enbridge's financial ability to remediate a catastrophic spill.

After adoption of Act 55, the circuit court determined that the insurance conditions were unenforceable. The court then struck the insurance conditions but allowed the remainder of the permit to stand. In essence the court rewrote the permit. The circuit court should have invalidated the entire permit and remanded the matter back to ZLR to make findings as to whether the CUP can be issued without the insurance conditions or with alternative conditions. As this Court held in *Lamar Centr. Outdoor, Inc. v. Bd. of Zoning Appeals of the City of Milwaukee*, 2005 WI 117, ¶ 40, 284 Wis. 2d 1, 700 N.W.2d 87, the ZLR "is the body best suited to make such

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conditions stipulated in connection therewith are being and will be complied with.

factual determinations,…" *See also,* Patricia E. Salkin, *American Law of Zoning* 5th Ed., Vol. 2 § 14.17.

Enbridge places great reliance upon *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 44. However, the court of appeals correctly distinguished *Adams*, and found "a complete disconnect between the context in that case and the context here." *Enbridge Energy Co., Inc. v. Dane Cty.*, Nos. 16AP2503 and 17AP13, unpublished slip op., ¶ 108 (Wis. Ct. App., May 24, 2018). (App. 197.)

In *Adams* this Court considered whether it was appropriate for the Livestock Facilities Siting Board to approve a permit without conditions that had been imposed by the town. That case involved application of the Siting Law, Wis. Stat. § 809, which was created to "strictly limit the ability of political subdivisions to regulate the livestock facility siting process," and mandating the issuance of permits unless certain findings are made by the political subdivision. *Adams*, 2012 WI 85, ¶¶ 1-5. The Court concluded that the town had

impermissibly imposed the conditions, and that the siting board could reverse the improper conditions while letting the permit stand. *Id.* ¶ 2, 60-65. The Court, however, recognized "the unusual circumstances of the case," and the "unique procedural posture." *Id.* ¶¶ 63, 65.

This Court expressly limited the precedential scope of *Adams*. The Court noted the holding of the case was limited to application of the Siting Law and that "Our holding is compelled by the unusual circumstances of the case. *Id.* ¶ 63. More importantly the Court stated that:

> ***Our holding today regarding the Siting Board's authority is a narrow one.*** We hold that when, as here, a political subdivision imposes conditions not authorized by the Siting Law or ATCP 51, the Siting Board may modify the conditions so as to render them in conformity with the Siting Law. In such a circumstance, the Siting Board need not return the farm operator to the beginning of the application process, which it has already properly completed. ***We do not address situations that may arise with respect to other agencies, and we craft no exceptions to the well-settled rules of administrative law.***

Id. n.29 (emphasis added)

Adams involved a very specific statute that applies to a very limited circumstance. The town did not have the authority to impose the conditions. That was not the case here when the conditions were imposed. The ZLR acted in good faith on April 14, 2015 when it approved the CUP with the insurance conditions. Nothing in state law prohibited imposition of the insurance conditions at that time. Only after approval of the CUP did the legislature adopt a provision in Act 55 specifically designed to benefit Enbridge. The debate regarding financial responsibility and formulation of the insurance conditions was the sole reason that this CUP took over six months to resolve.

Enbridge clings tightly to *Adams* because the "well-settled rules of administrative law are squarely against them. *Adams* simply has no applicability to this case and there is no reason to extend the scope of *Adams* beyond the Siting Law. There are well established rules of common law that control this case.

By striking the insurance conditions but allowing the permit to stand the circuit court usurped the zoning agency's

responsibility. This matter should have been remanded to the ZLR for determination as to whether a permit could be issued without the insurance conditions or with alternative conditions.

Remand is consistent with the established common law of zoning. "Where conditions that were integral to the approval of a permit are held invalid, the appropriate remedy is to reverse the permit approval, not sever the invalid conditions." Patricia E. Salkin, *American Law of Zoning* 5th Ed., Vol. 2 § 14.17.

> Where site-specific conditions imposed by a zoning decision are found by a reviewing court to be illegal or unreasonable, the conditions may be held void and set aside, at least, where the condition held invalid is not deemed to be an essential or integral part of the zoning authority's decision…**[BUT]**…Where the condition imposed is found to be illegal or unreasonable but the reviewing court further determines that the condition was an integral or essential part of the zoning authority's decision, then the underlying rezoning, variance, or permit granted will be held invalid."

Arden H. Rathkopf, *The Law of Zoning and Planning*, § 60.38 (2016) (emphasis added).

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

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

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

In *President and Directors of Georgetown College v. District of Columbia Bd. of Adjustment*, 837 A.2d 58 (D.C. Ct. App. 2003), the District of Columbia Court of Appeals relied upon U.S. Supreme Court administrative law precedent in determining that a case should be remanded to the zoning

authority when conditions of a permit were determined to be invalid. The Court noted that in *Federal Power Comm'n v. Idaho Power Co.,* 344 U.S. 17 (1952):

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

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

> When the [Court of Appeals] decided that the license should issue without the conditions, it usurped an administrative function. There doubtless may be situations where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate. ***But the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter***

> ***once more goes to the Commission for reconsideration***.

Id. (quoting *Federal Power Comm'n*, 344 U.S. at 20 (emphasis added))

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

1988); *Alperin v. Mayor and Tp. Committee of Middletown*, 91 N.J. Super. 190, 219 A.2d 628 (Ch. Div. 1966).

Issuance of the CUP in this case without the insurance conditions was ***not*** the only conclusion ZLR could have reached. A cursory review of the record establishes that ZLR never considered issuing the permit without the insurance conditions. Indeed the majority of their deliberations was regarding insurance. Imposition of the insurance conditions was not prohibited by state law at the time the permit was issued. The insurance conditions were integral to ZLR's findings and decision. As the U.S. Supreme Court held, "the function of a reviewing court ends when an error of law is laid bare." *Federal Power Comm'n*, 344 U.S. at 20. The circuit court should not have usurped the ZLR's authority and rewritten the permit. At the time the circuit court concluded the insurance conditions were invalid, the matter should have been remanded to ZLR for reconsideration. As a matter of law, it is the ZLR that must make findings as to whether the

standards set forth in Dane County Code of Ordinances § 10.255(2)(h) can be met without the insurance conditions.

II. EQUITY DOES NOT REQUIRE THAT THE COURT ROTELY STRIKE THE INSURANCE CONDITIONS AND LEAVE THE REMAINDER OF THE CUP INTACT.

Enbridge erroneously argues that "equity" requires a remedy of striking the insurance conditions without regard to whether they were material or integral to the issuance of the CUP. That argument must fail for two reasons. First, a court exercising certiorari jurisdiction does not sit in equity. Second, Enbridge cannot rely upon equity because they have no right to a CUP.

This Court has conclusively determined that a certiorari court does not sit in equity. *Town of Delafield v. Winkelmen*, 2004 WI 17, ¶¶ 30-31, 269 Wis. 2d 109, 675 N.W.2d 470. In support of its equitable argument, Enbridge quotes a treatise on remedies that states a remedy must be a "means of carrying into effect the substantive right," and must reflect "the policy behind that right as precisely as possible." (Petr.'s Br. 31, quoting, Dan B. Dobbs, *Law of Remedies* 27 (2d ed. 1992)).

The fallacy of this argument is that Enbridge has no right. The law in Wisconsin is very clear that unlike a permitted use under a zoning ordinance, there is no right to a conditional use. *Bizzell*, 2008 WI 76, ¶ 20; *AllEnergy Corporation*, 2017 WI 52, ¶¶ 54, 55.

III. WIS. STAT. § 59.70(25) IMPOSES AN ONGOING OBLIGATION ON THE PIPELINE OPERATOR TO MAINTAIN THE REQUISITE INSURANCE AND DOES NOT PROHIBIT A CONDITION REQUIRING PROOF OF INSURANCE.

The court of appeals correctly determined that the limitation on the counties ability to require insurance in Wis. Stat. § 59.70(25) only applies so long as the pipeline operator maintains the requisite insurance. The court also held that neither Wis. Stat. §§ 59.69(2)(bs) or 59.70(25) "prevents a county from requiring that the operator, upon request, provide proof that it continues to carry the specified insurance." *Enbridge Energy Co., Inc. v. Dane Cty.*, Nos. 16AP2503 and 17AP13, unpublished slip op., ¶¶ 66-69 (Wis. Ct. App., May 24, 2018). (App. 180-181.) Enbridge argues that the court of appeals erred by construing § 59.70(25) to impose a

continuing duty on the pipeline operator to demonstrate compliance with the insurance requirement of that section. They further claim that the only time the pipeline operator is required to "carry" the requisite insurance is the point at which they apply for the CUP. (Petr.'s Br. 21-22) Ignoring the fact that the Act 55 insurance limitations was special interest legislation specifically intended to benefit Enbridge, they now ask this Court to construe the statute in such an absurd way as to render the statutes insurance requirements meaningless.

Section 59.70(25) imposes a narrow limitation on counties. It says that if a pipeline operator "carries" the identified type of insurance, then the county may not require the operator to obtain additional insurance. Nothing in the Act 55 insurance provisions expressly or impliedly limits the application solely to that moment in time when the CUP application was filed.

Two axioms of statutory interpretation are important here. First, this Court has clearly stated that "[w]e assume that the legislature's intent is expressed in the statutory language."

State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Second, statutory language is interpreted "to avoid absurd or unreasonable results." *Id*. ¶ 46. There is nothing in the Act 55 statutory language that expresses any legislative intent to limit the insurance requirement in § 59.70(25) to a "snap shot" in time when the pipeline operator applies for a CUP. Furthermore, such an interpretation is absurd and unreasonable. Presumably by preempting a county's ability to impose insurance requirements, the Legislature intended to protect the public by requiring the pipeline operator to carry a baseline of comprehensive liability insurance coverage that includes coverage for sudden and accidental pollution liability.[9]

The Legislature did not intend to deny counties "oversight" of CUPs as asserted by Enbridge. (Petr.'s Br. 21.) Oversight is inherent in the very nature of conditional uses. The specific context of §§ 59.69(2)(bs) and 59.70(25) involves

[9] Curiously Wis. Stat. § 59.70(25) does not require any specific amount of insurance coverage.

applications to counties by pipeline operators for conditional use permits. Context is important to the meaning of a statute. *Id.* ¶ 46. In construing § 59.70(25) the court of appeals correctly considered the nature of conditional use permits. They quoted this Court's holding in *Bizzell* that "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*." *Bissell*, 2008 WI 76, ¶ 20. The court also relied upon this Court's holding in *AllEnergy* that held that a conditional use is legislatively determined compatible in a particular area "provided certain conditions are met." *AllEnergy*, 2017 WI 52, ¶ 53, quoting *Delta Biological Resources, Inc. v. Board of Zoning Appeals of the City of Milwaukee*, 160 Wis. 2d 905, 912, 467 N.W.2d 164 (Ct. App. 1991). The Legislature prohibited counties from requiring additional insurance IF the pipeline operator "carries" the requisite liability insurance. That obligation must be on-going or it eviscerates the entire purpose of the CUP which is to permit the use exclusively in a "controlled manner."

Condition 8 of CUP 2291 included a requirement that Enbridge provide proof of insurance "upon request by Dane County." The court of appeals correctly determined that the Act 55 insurance limitation does not prevent "a county from requiring that the operator, upon request provide proof that it continues to carry the specified insurance." They based this on the finding that the express preemption language of Act 55 imposes a "strikingly narrow limitation on county action." The court held:

> 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 gets triggered, namely, preventing the county from requiring the operator *to obtain insurance*. This says nothing about *other conditions related to insurance*, including any reasonable requirements that counties might use *related to* insurance, whether or not the operator makes the required showing to trigger the Act. This is significant in part because the Act does not restrict counties in their ability to include conditions requiring proof of insurance at any time, at specified intervals, or any such.

Enbridge Energy Co., Inc. v. Dane Cty., Nos. 16AP2503 and 17AP13, unpublished slip op., ¶ 66 (Wis. Ct. App., May 24, 2018). (App. 180-181.)

Although not binding on this Court, the court of appeals' analysis correctly construes the limits of § 59.70(25). If the pipeline operator "carries" the requisite insurance specified in the statute, the county cannot require additional insurance. But, nothing in the statute prevents the county from imposing a condition requiring the pipeline operator to provide proof of insurance as long as uses are exercised pursuant to the conditional use permit. If the pipeline carrier fails to continue to carry the requisite insurance, nothing in § 59.70(25) prohibits the county from taking remedial action.

CONCLUSION

This case does not raise grave issues of statewide concern as asserted by Enbridge. It involves a well settled question of zoning law and administrative law. The ZLR is the body that is charged with determining whether it is in the public interest to grant a CUP. After a public hearing and

considering the evidence they must make findings as to whether the six standards in DCO § 10.255(2)(h) can be met. The ZLR spent over six months considering CUP 2291. Their concern was focused on the financial responsibility of Enbridge in case of a catastrophic spill. They made findings and determined that the insurance conditions were necessary to meet the CUP standards. The record clearly indicates that the insurance conditions were integral and material to the issuance of the CUP.

The circuit court determined that the insurance conditions were rendered "void and unenforceable" by the adoption of § 59.70(25). Even though some of the provisions of Condition 8 were clearly not prohibited by § 59.70(25), the court struck both conditions from the permit and allowed the remainder of the permit to stand. Since the insurance conditions were clearly integral to the issuance of the permit, the court exceeded its authority and usurped the authority of the ZLR. The proper remedy was to void the entire permit and remand the matter back to the ZLR. They are the appropriate

body charged by law with determining whether the CUP can be issued without the insurance conditions.

For the foregoing reasons this Court should affirm the decision of the court of appeals and remand the case back to the Dane County Zoning and Land Regulation Committee for proper consideration of whether to grant a CUP in light of the adoption of Wis. Stat. § 59.70(25).

Dated this ______ day of October, 2018.

____
David R. Gault
Assistant Corporation Counsel
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CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(8)(b) and (c)

I hereby certify that this document conforms to the rules contained in s. 809.19(8)b) and (c) for a response produced with a proportional serif font. The length of this response is 8,767 words.

Dated this ____ day of October, 2018.

____

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CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(12)

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

Dated this ____ day of October, 2018.

____

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CERTIFICATION

I hereby certify that filed with this response, either as a separate document or as a part of this document, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of October, 2018.

____
David R. Gault
Assistant Corporation Counsel

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