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SUPREME COURT OF WISCONSIN

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

Appeal No. 17AP0013

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.

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

Appeal No. 16AP2503

Plaintiffs-Appellants,

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

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INTRODUCTION

This case comes before the Court in an unusual posture. Enbridge challenges Dane County's imposition of certain insurance conditions (the "Insurance Requirements") in a conditional use permit ("CUP") on grounds that those conditions are prohibited under Wisconsin law. Dane County *concedes*, as it has throughout this litigation, that Wisconsin statutes expressly preempt the imposition of the Insurance Requirements in a CUP. Yet, despite Dane County's concession, the court of appeals acquiesced in the County's decision to disregard the statutory directive and "returned" the matter to the County zoning committee to reconsider whether the CUP should be issued at all. The court of appeals did so based on the claim of a third-party citizens group ("Citizens") who lacked authority to bring such a claim in the first place.

This Court should require Dane County to follow the express directive of the Wisconsin legislature. The court of appeals decision conflicts with the plain language of Wisconsin Statutes sections 59.69(2)(bs) and 59.70(25), which together prohibit counties from imposing insurance conditions on interstate pipelines when the pipeline already satisfies certain pollution insurance requirements. Dane County does not dispute here that Enbridge satisfied those requirements and that the legislature overrode its authority to impose the Insurance Requirements. That should be the end of this matter; the circuit court properly concluded that the Insurance Requirements should be stricken with the remainder of the CUP left intact.

The court of appeals decision remanding the case for reconsideration by the County zoning committee is based on three fundamental errors of law. First, the court misapplied section 59.70(25) to the undisputed facts of this case. Enbridge demonstrated to Dane County that it maintained a robust insurance program that included insurance coverage within the meaning of the statute. The statute therefore preempts the imposition of the Insurance Requirements, as even Dane County concedes. The imposition of those conditions in the CUP is a violation of state law.

Second, the court of appeals compounded its error on the merits by concluding that, even if the Insurance Requirements were invalid, the proper remedy is to remand to Dane County to reconsider, among other things, whether it would have issued the CUP without the Insurance Requirements. Because the Insurance Requirements are preempted, however—and particularly because Dane County *knew* they were preempted when it imposed them—the proper remedy is to strike the Insurance Requirements from the CUP, just as the circuit court did. That a remand is unwarranted here is also supported by this Court's decision in *Adams v. State Livestock Facilities Siting Review Board*, 2012 WI 85, ¶ 64, 342 Wis. 2d 444, 820 N.W.2d 404, which held that it would be "absurd" to require a permit applicant "to return to the beginning of the application process" when a permitting authority imposes conditions that lack a foundation in law.

Finally, the court of appeals erroneously concluded that the Citizens had authority to bring a citizen suit to enforce the Insurance Requirements. To become part of these consolidated cases, the Citizens relied on Wisconsin Statutes section 59.69(11), which provides that compliance with a county "zoning ordinance" "may . . . be enforced by . . . the county or an owner of real estate within the district affected by the regulation." But this section does not grant the citizens authority to enforce a particular condition in a CUP. Moreover, even if a property owner could enforce a CUP condition as a general matter, the Citizens had no authority to enforce the Insurance Requirements in this case.

STATEMENT OF THE ISSUES

I. Wisconsin law expressly preempts counties from imposing certain insurance requirements on pipeline operators as conditions in a conditional use permit. Can a county, while conceding that state law prevents it from enforcing a particular insurance requirement, nonetheless include that requirement as a condition in a CUP granted to a pipeline operator?

In Enbridge's certiorari challenge to two conditions in an approved CUP issued by Dane County, the circuit court held that state statutes preempt both conditions. That court declared them void and unenforceable and struck them from the CUP. The court of appeals reversed.

II. If the holder of an approved CUP successfully challenges a particular condition in that permit as unlawful—but not the permit in its entirety—is striking the unlawful condition a proper remedy? Does this Court's remedy jurisprudence under *Adams v. State Livestock Facility Siting Review Board* apply to land-use permitting more generally?

Enbridge challenged two particular conditions in an otherwise approved CUP. After ruling that the challenged conditions were unlawful, the circuit court struck those conditions and left the remainder of the permit intact, ending the case. The court of appeals held that because the conditions in question—lawful or not—were "integral to the permit," Dane County should have yet another opportunity to consider whether to issue the previously approved permit (as well as any conditions included in it), even though Enbridge had challenged only a part of it. To reach this conclusion, the court of appeals relied on

caselaw reviewing permit *denials*, but it did not apply the reasoning of *Adams*, 2012 WI 85—this Court's only analogous land-use case addressing remedies on review of an *approved* permit, which held that it would be "absurd" to require a permit applicant "to return to the beginning of the application process"—particularly when the permitting authority knew the challenged conditions were unlawful.

III. Wisconsin law permits property owners, under certain circumstances, to enforce a county "zoning ordinance." Under this law, (1) can a property owner bring a citizen suit to enforce a particular condition in a CUP issued by a county, and (2) if so, can a property owner bring a citizen suit to enforce that condition when the county concedes that the condition is unenforceable?

Wisconsin Statutes section 59.69(11) provides that compliance with a county "zoning ordinance" "may . . . be enforced by . . . the county or an owner of real estate within the district affected by the regulation." The Citizens brought a suit to enforce particular conditions in Enbridge's CUP. The circuit court dismissed the citizen suit. The court of appeals held that section 59.69(11) authorizes such a suit because permit conditions amount to ordinances. The court of appeals also ruled that the Citizens could bring their suit even though Enbridge and Dane County were involved in a pending certiorari action about whether the conditions had been lawfully imposed in the first instance, and even though Dane County had conceded that the conditions were unenforceable.

STATEMENT OF THE CASE

I. Enbridge plans to expand its existing operations in Dane County.

Through an operationally integrated international and interstate pipeline network of over 3,400 miles, Enbridge provides critical energy infrastructure to the public. (P-App.107–8/R.2 ¶¶ 1, 2, 9, 11; P-App.100–1/R.7 ¶¶ 1, 5; R.8:231–35.)[1] Wisconsin is home to multiple Enbridge pipelines, including "Line 61," which originates near Superior and extends through the Illinois border, terminating at an Enbridge facility in Pontiac, Illinois, where it connects with other interstate pipelines. A small but indispensable portion of Line 61 passes through Dane County.

Line 61 transports liquid petroleum with the help of multiple pump stations. For several years, Enbridge has operated a pump station in Dane County in the Town of Medina. (R.8:138, 233, 241–42.) To satisfy growing demand, Enbridge acquired additional land on which to build an expanded pump station and related improvements. (P-App.109–10/R.2 ¶ 15; P-App.101/R.7 ¶ 7.) Known as the Waterloo Pump Station, the expanded facility triples Line 61's capacity without the need for additional pipelines. (R.8:232.)

Enbridge designed the Waterloo Pump Station to comply with regulatory requirements, to minimize the impact to

[1] This is a consolidated appeal of cases 16AP2503/16CV350 and 17AP13/16CV8. With one exception, record numbers refer to the record in 17AP13/16CV8. The exception is R.1 from 16AP2503/16CV350, which is cited in this brief as "R.1[2503/350]."

surrounding neighbors and land uses, and to protect the public. (R.8:232–34.) The facility has been built using the latest construction methods and techniques. It is monitored 24 hours a day from a state-of-the-art control center designed to identify and respond to any oil releases quickly. If needed, multiple on-site detectors and transmitters will promptly initiate shutdown and isolation protocols. Graded soil and clay berms insulate the surrounding area by routing drainage to a designated, contained area. (R.8:233.) Expanding the Waterloo Pump Station, in short, will not heighten the risk of an oil release in the area. (R.8:231–35, 241–42.)

II. Enbridge applies for zoning approval but encounters repeated obstacles.

On April 23, 2014, Enbridge applied to Dane County for a zoning permit to expand the Waterloo Pump Station and related improvements. After initially issuing a zoning permit to Enbridge, the Dane County Zoning Administrator later contended that the Waterloo Pump Station required a CUP. (P-App.112/R.2 ¶ 23; P-App.101/R.7 ¶ 9.) On August 19, 2014, Enbridge applied for a CUP. (P-App.112/R.2 ¶ 24; P-App.101/R.7 ¶ 10.)

A. Late 2014–April 2015: Enbridge cooperates in the CUP approval process.

After the Town of Medina approved a CUP with only two conditions in October 2014, (P-App.113/R.2 ¶ 28; P-App.101/R.7 ¶ 12; R.8:138, 144), the Dane County Zoning and Land Regulation Committee ("ZLR") held a public hearing on Enbridge's CUP

application but postponed taking action. During several subsequent meetings, ZLR continued to postpone action. (P-App.114/R.2 ¶ 29; P-App.101/R.7 ¶ 13.) Over the course of the CUP approval process, Enbridge agreed to a number of accommodations that ZLR requested. (P-App.114/R.2 ¶¶ 30–31; P-App.101/R.7 ¶ 13.)

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.[2] (P-App.114/R.2 ¶ 32; P-App.101/R.7 ¶ 13.) In addition, Enbridge informed ZLR that up to $4 billion in funds were available through the Oil Spill Liability Trust Fund administered by the U.S. Coast Guard. (P-App.114–15/R.2 ¶ 33; P-App.101/R.7 ¶ 13; R.8:218–19.) *See* 33 U.S.C. §§ 2701–61. Enbridge also agreed to provide funds to hire a consultant, David Dybdahl, to advise ZLR on insurance issues. (P-App.115/R.2 ¶ 34; P-App.101/R.7 ¶ 14.). Enbridge met with the consultant and provided a briefing on the scope and terms of its insurance coverage.

In a public meeting on April 14, 2015, Mr. Dybdahl reported to ZLR the details of Enbridge's insurance program. He confirmed that Enbridge carried CGL insurance that included coverage for sudden and accidental pollution liability. (R.8:198, 201.) Dybdahl expressly stated that his report addressed the "sudden and accidental pollution liability coverage *that Enbridge has* today." (R.8:209 (emphasis added).) Coverage for "[s]udden

[2] While the CUP application was pending, that amount increased to $860 million in coverage. (R.9:317.)

and accidental pollution liability," Dybdahl continued, "is what Enbridge shows for insurance coverage in their financial statements today." (*Id.*) While Dybdahl used the phrase "time element" to describe Enbridge's pollution coverage, he confirmed that this term is interchangeable with "sudden and accidental pollution liability coverage." (R.9:474–75, 811–12.) He also confirmed Enbridge's other representations about the Oil Spill Liability Trust Fund. (R.8:218; P-App.161–62/R.9:317–18.)

B. April–May 2015: ZLR approves a CUP with Insurance Requirements; Enbridge appeals.

On April 14, 2015, ZLR approved a CUP with several conditions, two of which—Conditions Nos. 7 and 8, i.e., the Insurance Requirements—are relevant here. First, ZLR required Enbridge to purchase and maintain a separate environmental-impairment-liability ("EIL") insurance policy with coverage limits of $25,000,000. (P-App.115/R.2 ¶ 35; P-App.102/R.7 ¶ 15.) Second, ZLR required Enbridge to procure and maintain CGL coverage of $100,000,000: (a) from an insurance company "with an A.M. Best rating of at least A, XII," (b) with a self-retention limited to $1 million for both the CGL and EIL coverage, (c) that requires certain notices from the insurance carriers, and (d) that requires Enbridge to waive its subrogation rights. (P-App.115/R.2 ¶ 35; P-App.102/R.7 ¶ 15.) The CUP was issued on April 21, 2015. (P-App.116/R.2 ¶ 36; P-App.102/R.7 ¶ 15.) On May 4, 2015, Enbridge appealed ZLR's decision to impose the Insurance Requirements to the Dane County Board of

Supervisors ("County Board"). (P-App.116/R.2 ¶ 36; P-App.102/R.7 ¶ 15.)

C. July 2015: After Wisconsin enacts law prohibiting certain insurance conditions in CUPs, Dane County issues a new CUP without the Insurance Requirements.

Before the County Board took any action on Enbridge's appeal, the state enacted 2015 Wisconsin Act 55. (P-App.116/R.2 ¶ 37; P-App.102/R.7 ¶ 15.) Among other things, Act 55 created the following two statutory sections:

- Wis. Stat. § 59.69(2)(bs): "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."
- Wis. Stat. § 59.70(25): "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 that includes coverage for sudden and accidental pollution liability."

These provisions took effect on July 14, 2015.

One day after Act 55 took effect, senior zoning staff notified Enbridge that its pending CUP appeal had been removed from the July 16, 2015 County Board agenda, stating that "the appeal is moot since the county cannot enforce the insurance requirements of CUP #2291 that were the subject of the Enbridge appeal." (P-App.116/R.2 ¶ 38; P-App.102/R.7 ¶ 15.) The County Corporation Counsel's office then issued an opinion letter, dated July 17, 2015, concluding:

> By the express language of the statute, effective July 14, 2015 the county is prohibited from requiring the [Insurance Requirements]. When the CUP was approved is irrelevant. The [Insurance Requirements] are rendered unenforceable prospectively by the language of § 59.70(25).

(P-App.398/R.8:130.) The letter also stated that "Dane County has no authority to require Enbridge to obtain additional insurance coverage." (*Id.*)

Based on the opinion letter, the Zoning Administrator issued a revised CUP on July 24, 2015, describing the changes in state law and removing the unenforceable Insurance Requirements. (P-App.116–17/R.2 ¶ 39; P-App.102/R.7 ¶ 15.) Acting in reliance on this reissued CUP, which contains no Insurance Requirements, Enbridge spent approximately $10 million on construction expenses. (P-App.167–68/R.9:323–24.) No party has ever appealed the July 24, 2015 CUP.

D. August–October 2015: An advocacy group convinces ZLR to reconsider Enbridge's CUP and reinstate the Insurance Requirements.

On August 10, 2015, the advocacy organization 350 Madison filed with ZLR a "Petition for Reconsideration and Rescission of the Conditional Use Permit and Imposition of a Trust Fund Requirement." 350 Madison did not file an appeal with the County Board seeking review of the revised July 24 CUP. (P-App.117/R.2 ¶ 40; P-App.102/R.7 ¶ 15.)

After 350 Madison filed its petition, the County Corporation Counsel issued another opinion letter to ZLR, dated August 24, 2015, concluding that "[ZLR] cannot reconsider or rescind the [July 24, 2015] CUP granted to Enbridge for the pumping station at this time" due, in part, to Enbridge's "vested

rights in the CUP." (P-App.117/R.2 ¶ 41; P-App.102/R.7 ¶ 15.) Based on this letter, ZLR discussed but took no direct action on 350 Madison's petition. 350 Madison did not file an appeal with the County Board seeking review of ZLR's "no action" decision. (*Id.*)

Despite the County Corporation Counsel's opinion that ZLR could not "reconsider or rescind the [July 24, 2015] CUP," ZLR nevertheless did so. On September 29, 2015, ZLR voted to "direct the Zoning Administrator to have Conditional Use Permit #2291 reflect the exact conditions of approval as approved by [ZLR] on April 14, 2015." (R.8:125; R.9:253–54.) That is, it ordered that the Insurance Requirements be reinserted into the CUP. In an apparent nod to their illegality, ZLR directed that a "note shall be added to the conditional use permit which identifies that the County's ability to enforce [the Insurance Requirements] are affected by [Act 55]." (*Id.*) At ZLR's direction, the Zoning Administrator issued a CUP on October 9, 2015, which included the Insurance Requirements with a note identifying the change in state law under Act 55. (R.8:133.)

E. October–December 2015: Enbridge appeals to the County Board.

On October 19, 2015, Enbridge appealed to the County Board ZLR's decision to impose the Insurance Requirements in the October 9, 2015 CUP. (P-App.119/R.2 ¶ 45; P-App.103/R.7 ¶ 19.) *See* Wis. Stat. § 59.694; Dane Cty. Code § 10.255(2)(j)(2015). On December 3, 2015, the County Board held a hearing on Enbridge's appeal—both the prior May 4, 2015 appeal, which was

still pending, as well as the October 19, 2015 appeal. (P-App.119/R.2 ¶ 46; P-App.103/R.7 ¶ 20.) At the hearing, Enbridge informed the County Board that "Enbridge had $700 million worth of general liability insurance which included sudden and accidental pollution coverage. That, by the way, has since been raised to $860 million." (P-App.161/R.9:317.) No contrary evidence was ever introduced.

During deliberations, a number of County Board supervisors and members of the public asserted that although state law currently prohibited Dane County from enforcing the Insurance Requirements, (1) Dane County could potentially enforce the Insurance Requirements in the future if state law changed, (P-App.189, 241, 251, 272/R.9:345, 397, 407, 428); and (2) state law might not prohibit a citizen suit to enforce the otherwise unlawful Insurance Requirements, (P-App.210, 257/R.9:366, 413). Immediately following the hearing, the County Board dismissed both of Enbridge's appeals and upheld ZLR's April 14, 2015 and September 29, 2015 CUP decisions imposing the Insurance Requirements. (P-App.119/R.2 ¶ 47; P-App.103/R.7 ¶ 21.)

III. Enbridge brings a certiorari review action in circuit court challenging the Insurance Requirements, and the Citizens file a separate injunction action seeking to enforce those conditions.

On January 4, 2016, Enbridge filed a petition for writ of certiorari in Dane County Circuit Court, challenging Dane County's decision to impose the Insurance Requirements in the CUP but not the approval of the CUP in its entirety. (P-App.106–

29/R.2.) Over a month later, on February 8, 2016, the Citizens (a group of local landowners) filed a separate action in circuit court requesting an injunction to enforce the Insurance Requirements. (P-App.402–14/R.1.) Enbridge moved to dismiss the Citizens' complaint. (P-App.55/R.52:2.) The circuit court consolidated the cases. (P-App.94–95/R.12.)

On July 11, 2016, the circuit court declared the Insurance Requirements void and unenforceable as a matter of law. (P-App.416/R.39.) Following a hearing on September 27, 2016, the circuit court ordered that the Insurance Requirements be stricken from the CUP. (P-App.415/R.47.) In a subsequent final decision and order, the circuit court: (1) granted Enbridge's petition for writ of certiorari; (2) deemed the Citizens "intervening respondents" in the certiorari case, with no right in that capacity to challenge Dane County's findings (in the proceedings at the county level) related to Enbridge's insurance coverage; (3) granted Enbridge's motion to dismiss the Citizens' complaint; (4) declared the Insurance Requirements void and unenforceable as a matter of law; and (5) struck the Insurance Requirements from the CUP. (P-App.54–55/R.52.) Dane County and the Citizens both appealed, and the appeals were consolidated. (R.54, 55.)

The court of appeals reversed and remanded, basing its disposition on three main rulings. (P-App.48.) First, according to the court of appeals, Act 55 does not apply to the Insurance Requirements because Enbridge failed to show—despite the unrebutted evidence in the record and the County's admission to

the contrary—that it "carries" the CGL insurance required to trigger the state preemption under Act 55. (P-App.24–39.) Second, the court of appeals held that the Citizens had authority to bring their suit and, regardless of Dane County's own contrary admission, the Citizens had independent standing to argue that Act 55 did not apply to the Insurance Requirements. (P-App.18–24.) Third, the court of appeals held that the appropriate remedy was to remand to the circuit court with directions to return the matter to ZLR for further proceedings, a remedy that applied "whether or not there was a showing that Enbridge carries the insurance that triggers Act 55 insurance limitation." (P-App.39–47.) This Court granted Enbridge's petition for review.

STANDARD OF REVIEW

This consolidated appeal involves two cases and three issues.

The first issue is unique to the certiorari case and requires this Court to review the actions of Dane County. On appeal from a circuit court's decision in an action for certiorari review of a zoning board's decision, this Court reviews the decision of the board, not that of either lower court. *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶ 41, 362 Wis. 2d 290, 865 N.W.2d 162; *Kraus v. City of Waukesha Police & Fire Comm'n*, 2003 WI 51, ¶ 10, 261 Wis. 2d 485, 662 N.W.2d 294.

Certiorari review, moreover, is limited to the county record. *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cty. Bd. of Adjustment*, 131 Wis. 2d 101, 121, 388 N.W.2d 593 (1986). The well-established four-part standard the Court applies on

certiorari review looks at (1) whether the zoning board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the determination in question. *Oneida Seven Generations*, 2015 WI 50, ¶ 41. While a reviewing court grants deference to a zoning committee on matters of a discretionary nature, questions of law are reviewed *de novo*. *See Ottman v. Town of Primrose*, 2011 WI 18, ¶ 59, 332 Wis. 2d 3, 796 N.W.2d 411. The question of whether the state has preempted local governmental action is a matter of law that this Court reviews independently. *Adams*, 2012 WI 85, ¶ 24.

The second issue involves a question of appropriate remedy. A circuit court's decision on whether to grant a particular remedy based on equitable or factual considerations is reviewed by this Court 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; *see also Duhame by Corrigal v. Duhame*, 154 Wis. 2d 258, 262–63, 453 N.W.2d 149 (Ct. App. 1989).

The third issue—whether the Citizens had authority to enforce the CUP's Insurance Requirements in their own injunction action—involves the interpretation of statutory language. "The interpretation of a statute is a question of law" that this Court reviews *de novo*. *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 30, 382 Wis. 2d 1, 913 N.W.2d 131.

ARGUMENT

I. Dane County acted unlawfully when it intentionally imposed conditions in the CUP that are preempted by state law.

Under Wisconsin law, a condition in a CUP is unlawful if it is preempted by state law. Wis. Stat. § 59.69(2)(bs). Wisconsin statutes expressly preempt a county's imposition of insurance conditions on a pipeline company when the company already carries a CGL insurance policy with coverage for sudden and accidental pollution. Wis. Stat. § 59.70(25). Dane County does not dispute that Enbridge carries the appropriate insurance coverage. The undisputed evidence before ZLR and the County Board demonstrated that Enbridge carried more than $700 million in CGL insurance, which includes coverage not only for sudden and accidental pollution discharges, but *any* accidental pollution discharge discovered by Enbridge within 30 days of the release and reported to the insurer in a timely manner. State law thus preempts the Insurance Requirements—and Dane County acted unlawfully when it imposed them.

A. Wisconsin state statutes preempt the Insurance Requirements.

Wisconsin Statutes section 59.69(2)(bs) prohibits counties from "impos[ing] on a permit applicant" any CUP conditions that are "expressly preempted by federal or state law." Enacted at the same time as section 59.69(2)(bs) as part of Act 55, section 59.70(25) provides that "[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 that includes coverage for sudden and accidental pollution liability." Read together, these statutes both preempt the Insurance Requirements and prohibit Dane County from including them in the CUP. Dane County required Enbridge to obtain two types of insurance other than the CGL insurance that it already maintained. (P-App.115/R.2 ¶ 35; P-App.102/R.7 ¶ 15.). This is the rare case where both the permit applicant and Dane County agree that those Insurance Requirements were invalid. Dane County does not dispute that Enbridge is an interstate hazardous liquid pipeline operator. And, more importantly, Dane County does not dispute that Enbridge carries the necessary insurance required to trigger section 59.70(25)'s preemption.

In fact, throughout this litigation, Dane County has consistently admitted that Enbridge "carries" the "comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." Wis. Stat. § 59.70(25). Dane County admitted in pleadings[3] that Enbridge had notified ZLR that it was carrying insurance with sudden and accidental pollution liability coverage and, as a result, 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

[3] Admissions in pleadings are binding judicial admissions. *Sands v. Menard*, 2016 WI App 76, ¶ 32 n.8, 372 Wis. 2d 126, 887 N.W.2d 94, *aff'd*, 2017 WI 110, 379 Wis. 2d 1, 904 N.W.2d 789. A judicial admission is "conclusive on the party making it" and "forecloses the admitter from contradicting the admission." *Id.* (quoting Ted M. Warshafsky & Frank T. Crivello II, 11 *Wis. Practice Series: Trial Handbook for Wis. Lawyers* § 18:02 (3d ed. 2005)).

this Court, Dane County has repeatedly conceded that "[t]he circuit court correctly determined that [its] insurance conditions were rendered unenforceable by the adoption of Wis. Stat. §59.70(25)." (Cty.'s Resp. to Pet. for Review at 2; *see id.* at 13 ("Dane County has not disputed that Wis. Stat. § 59.70(25) applies to Petitioner's Line 61 and renders the insurance conditions included in the CUP unenforceable."); *id.* at 21.)[4]

Dane County's concessions are fully supported by the undisputed factual record. Enbridge notified ZLR that it carried $700 million of CGL insurance that included coverage for sudden and accidental pollution liability. (P-App.114/R.2 ¶ 32; P-App.101/R.7 ¶ 13; *see also* P-App.161/R.9:317.)[5] Enbridge also briefed Dane County's insurance expert, Mr. Dybdahl, as part of the permitting proceedings. Dybdahl expressly stated that his report addressed the "sudden and accidental pollution liability coverage *that Enbridge has* today." (R.8:209 (emphasis added).) Dybdahl explained to ZLR that "time element" insurance covers a pollution discharge, provided that Enbridge discovers the discharge within 30 days and reports it to the insurer within 90

[4] Dane County has not wavered from this position. In a July 17, 2015 opinion letter, the County Corporation Counsel stated that because Enbridge was carrying "comprehensive general liability insurance on the pipeline and its facilities that includes sudden and accidental pollution liability coverage," the Insurance Requirements had been "rendered unenforceable prospectively by the language of § 59.70(25)." (P-App.398/R.8:130.) In its opening brief to the court of appeals, Dane County reiterated that it "has not disputed that Wis. Stat. § 59.70(25) applies to [Enbridge's] Line 61 and renders the insurance conditions included in CUP 2291 unenforceable." (Cty.'s Opening Br. in Ct. App. 13.)

[5] The Citizens, too, have admitted in their answer "that Enbridge notified ZLR that it carried $700 million of General Liability Insurance, including a Sudden and Accidental exception to the pollution exclusion." (P-App.71/R.19:16.)

days. (R.9:811–12.) While Dybdahl used the phrase "time element" to describe Enbridge's pollution coverage, he confirmed that this term is interchangeable with "sudden and accidental pollution liability coverage," the type of coverage required to trigger preemption under section 59.70(25). (R.9:474–75, 811–12.) It provides coverage not only for sudden and accidental discharges, but for *any* accidental discharge discovered within 30 days.

Even the language of the Insurance Requirements in the CUP confirms that Enbridge carries sudden and accidental pollution liability coverage through "a time element exception to the pollution exclusion." Condition No. 7 of the CUP provides: "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)*." (P-App.400/R.8:177 (emphasis added).) Thus, the note added to the CUP "identifies that the County's ability to enforce [the Insurance Requirements] are affected by [Act 55]." (R.8:125; R.9:253–54.)

Enbridge's insurance therefore satisfies section 59.70(25)'s requirement for "sudden and accidental" insurance coverage. And it covers the range of potential incidents that might occur along the pipeline. As Enbridge's representative explained to ZLR, "the likelihood of a release not being discovered within 30 days is virtually none." (R.9:821.) Indeed, Enbridge has expended millions of dollars to improve its monitoring and

improve its ability to detect spills, as required by federal law. (*Id.*)

B. The court of appeals erroneously concluded that Enbridge had not satisfied section 59.70(25)'s preemptive requirements.

Despite the conclusive evidence in the record, the court of appeals nevertheless held that Enbridge had not demonstrated that it "carries" the requisite insurance under section 59.70(25). From there, the court concluded that Dane County could, at any point in time, demand that Enbridge produce proof of necessary insurance, thus effectively providing the very oversight that the legislation denies to counties. To reach this conclusion, the court erroneously interpreted section 59.70(25) as imposing a "continuing duty" on a pipeline operator to "demonstrate compliance" with the section. (P-App.28.)

This erroneous interpretation resulted from the court's reading of section 59.70(25) in isolation. But doing so violates a basic canon of statutory construction. As this Court has long observed, "statutory language is interpreted in the context in which it is used; 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; *accord CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶ 24, 380 Wis. 2d 399, 909 N.W.2d 136 ("[L]aws addressing the same subject should be interpreted harmoniously, if possible.")

Instead of reading section 59.70(25) in isolation, the Court must read it together with section 59.69(2)(bs). Indeed, these two

sections were both enacted on the same day as part of Act 55; they are topically related; and they are codified in neighboring statutory sections. When sections 59.69(2)(bs) and 59.70(25) are read together, as they must be, one can discern that for section 59.70(25) to have a preemptive effect, the point at which an interstate hazardous liquid pipeline operator must "carry" the requisite insurance coverage is the point at which the county "imposed" a particular requirement "[a]s part of its approval process for granting a conditional use permit." *See* Wis. Sat. § 59.69(2)(bs). Here, the County Board took final action to approve a CUP for Enbridge with the Insurance Requirements on December 3, 2015. *See supra* pp. 12–13. At that point, Enbridge had demonstrated, without any evidence to the contrary, that it "carries comprehensive general liability insurance coverage" throughout the relevant time period (and before and after). Wis. Stat. § 59.70(25). *See supra* pp. 10–13, Argument Part I.A. Dane County *does not dispute and has never disputed* this critical factual point.

There is also no valid dispute that Enbridge's insurance includes "coverage for sudden and accidental pollution liability" as required by section 59.70(25). The court of appeals' suggestion that this definition may not be satisfied here results from confusion about the nature of Enbridge's coverage as demonstrated in the undisputed record. The court of appeals' assertion that Enbridge's policy would not provide coverage for unexpected or unintended pollution, (*see* P-App.38–39), has no foundation in the record. That the policy requires discovery of

the discharge within 30 days says nothing about whether the discharge itself was expected or intended. It is simply a common precondition of coverage that does not alter the basic nature of the pollution coverage.

The record confirms that the "time element" insurance maintained by Enbridge encompasses "sudden and accidental" coverage. *See supra* pp. 10–13, Argument Part I.A. Indeed, the coverage is even broader than "sudden and accidental" coverage. It covers *all* accidental discharges provided only they are discovered within 30 days. *Id.* Thus, Enbridge's insurance coverages meets even the court of appeals' definition of "sudden and accidental," which it read to require that a discharge be both "abrupt or immediate" and "unexpected or unintended." (P-App.38.)

The court of appeals relied on *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990), in concluding that Enbridge had not satisfied its burden of demonstrating that its insurance covered "sudden and accidental" discharges. (P-App.33–39.) But *Just* is inapposite as a source for interpreting section 59.70(25), and the court of appeals conclusion results from a misreading of this Court's decision in that case.

Just involved an insurance coverage dispute involving a policy with coverage for "sudden and accidental" pollution liability. The insurance company argued that the phrase (specifically the word "sudden") included a temporal element and meant "abrupt or immediate" while the insureds argued that it meant "unexpected and unintended." *Id.* at 745.

The court of appeals read *Just* to hold that "sudden and accidental" is ambiguous as a matter of law and, thus, should be read to mean *both* "abrupt or immediate" and "unexpected or unintended." But that was plainly not this Court's holding in *Just*. Instead, this Court held that because the phrase was susceptible to multiple meanings, it must be construed against the insurer under Wisconsin law. The insured was entitled to coverage on the basis that the release was "unexpected or unintended" even if it would not have coverage solely under the time element "abrupt or immediate" construction of the term.

Resolving the ambiguity in *Just* is irrelevant to determining whether Enbridge's CGL policy provides coverage for "sudden and accidental" pollution. There is no dispute that Enbridge's policy covers pollution under the time element exception. And, *of course*, that pollution exception provides coverage for spills that are neither expected nor intended from the standpoint of the insured—the alternative would be spills that are *expected or intended* from the standpoint of the insured, which means intentional pollution. "Unexpected or unintended" coverage is a *narrower* form of coverage, and applies to accidental spills. That Enbridge's "time element" pollution coverage contains discovery and reporting deadlines does not render it any less "sudden and accidental," as it was not uncommon to include such limitations in "sudden and accidental" coverage. *See, e.g.*, *St. Paul Surplus Lines Ins. Co. v. Davis Gulf Coast, Inc.*, No. CIV.A. H-11-0403, 2012 WL 2160445 (S.D. Tex. June 13, 2012) (interpreting sudden and accidental pollution coverage with 30

day discovery requirement); *Henryetta Medical Center v. Roberts*, 242 P.3d 537, 533–34 (Ok. Civ. App. 2010) (same); *Constance v. Austral Oil Exploration Co.*, No. 212CV1252LEADCASE, 2016 WL 902574 (W.D. La. Mar. 3, 2016) (same).

Despite consistently admitting during the permitting proceedings that it could not enforce the Insurance Requirements, Dane County persisted in including them in the CUP. *See supra* pp. 10–13. Dane County rationalized its decision on the basis that state law might change in the future. (P-App. 189, 241, 251, 272/R.9:345, 397, 407, 428.) But Dane County cannot avoid the preemptive effect of present law by speculating that the law may change in the future. This is an invitation to lawlessness. Rationalizations like this, and the local government action they support, should be rejected by the Court.

C. The court of appeals decision creates substantial issues under both state and federal law.

Dane County's knowing avoidance of an express legislative directive, amplified by the court of appeals, creates substantial statewide risks. Local governments across Wisconsin—72 counties plus numerous towns, villages, and cities that exercise land-use permitting authority—stand "always eager" to impede property rights. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017). The court of appeals decision will embolden those local governments to follow Dane County's lead in dodging legislation that preempts local land-use regulations.

Indeed, the risk of allowing Dane County's and the court of appeals' actions to stand is vividly illustrated by this case. To

operate a single component of its business, Enbridge must obtain permits from not just one but multiple local governments. This is the reality of operating a long energy pipeline that traverses the state. Dane County's actions, when replicated by other local governments, could subject Enbridge and other pipeline operators to numerous, inconsistent insurance requirements in every jurisdiction from Superior to the Illinois border. That would no doubt threaten the health and existence of the highly critical energy pipeline industry in Wisconsin.

These risks underscore why the legislature enacted Act 55 in the first place. Recognizing how a patchwork of local regulations could burden the energy pipeline industry, the legislature decided to preempt certain aspects of local land-use authority. To that end, Act 55 fosters a policy of statewide consistency and predictability for the energy pipeline industry. It is not for Dane County or the court of appeals to second-guess the legislature's policy determination—let alone defy it.

Act 55's policy of consistency and predictability also allows Enbridge to best allocate its resources to secure sufficient insurance to cover its potential liabilities. Unfortunately, Dane County's actions and the court of appeals decision would actually have a detrimental impact on the breadth and effectiveness of Enbridge's insurance coverage. The Insurance Requirements would require Enbridge to obtain insurance other than the CGL insurance required by state statute. It is not commercially possible, however, to both maintain Enbridge's large, system-wide CGL coverage, which itself provides coverage for sudden

and accidental releases, while also obtaining the asset-specific EIL coverage required by Dane County. Enbridge already acquires the entire insurance market's capacity available to Enbridge for its CGL coverage, and that coverage applies to Enbridge's pipeline network as a whole. Requiring Enbridge to also obtain EIL coverage for a single asset would entail approaching similar insurers that currently provide CGL coverage and those insurers would, in all likelihood, reduce the limit, and thus the amount, they offered on Enbridge's CGL coverage. Liability insurance is finite and has limitations. If piecemeal insurance requirements like Dane County's were allowed to stand, they would dissect Enbridge's broad, comprehensive coverage into significantly smaller-limit individual policies dedicated to segments of pipe or specific pump stations. This would be detrimental to ensuring coverage on the network as a whole—not only in terms of smaller coverage limits but because of the challenge of obtaining multiple asset-specific insurance policies in the first instance. The ultimate impact would be insuring single assets at the expense of others and at lower levels.

Finally, allowing the Insurance Requirements to survive would raise a number of issues under federal law. An insurance condition imposed by Dane County could disrupt Enbridge's ability to operate its Line 61 pipeline in interstate commerce, thereby raising significant issues under the Commerce Clause. U.S. Const. Art. I § 8. Also, any insurance condition intended to address safety concerns, such as the Insurance Requirements,

would raise issues under the broad preemption provision of the federal Pipeline Safety Act. 49 U.S.C. § 60104(c). The Wisconsin statutes should be construed to avoid these serious constitutional concerns, not to create them.

II. In Enbridge's challenge to only certain conditions of an otherwise approved CUP, the proper remedy is to strike the unlawful conditions.

While zoning appeals often arise after a local government denies a permit, in this case, Dane County *granted* Enbridge a CUP that included conditions preempted by state law. Permit in hand, Enbridge went to court, challenging *only* the unlawful CUP conditions—not the approved CUP in its entirety.

When a permit holder such as Enbridge challenges only certain conditions of an otherwise approved CUP, the proper remedy is to strike the unlawful conditions to the otherwise valid permit. Here, statutory language,[6] analogous precedent, equity, and efficiency concerns all support that approach here. By contrast, any remedy involving remand to ZLR or the County Board would be inequitable—and would amount to no remedy at all.

The circuit court recognized as much and, to that end, ordered the Insurance Requirements stricken from Enbridge's CUP. This Court reviews that remedial decision under the

[6] Certiorari review of a county zoning decision is governed by Wisconsin Statutes section 59.694(10). Upon a successful challenge, this section authorizes a court to "reverse or affirm, wholly or partly, or . . . modify, the decision brought up for review." By its plain language, this section contemplates a court "modify[ing]" the county's decision, including by striking unlawful conditions from an approved CUP.

"highly deferential" erroneous exercise of discretion standard. *Prince Corp.*, 2016 WI 49, ¶ 16.

A. This Court has, in an analogous context in *Adams*, stricken unlawful conditions in an otherwise approved CUP.

As a remedy in a recent, analogous land-use case, this Court modified a CUP by striking unlawful conditions. *Adams*, 2012 WI 85, ¶¶ 60–65. In *Adams*, dairy farm Larson Acres obtained a CUP with seven conditions from the Town of Magnolia. *Id.* ¶¶ 8–12. Like Enbridge here, Larson Acres challenged some of the CUP conditions as preempted by state law—in particular, the "livestock facility siting and expansion" law under Wisconsin Statutes section 93.90. *Id.* ¶¶ 1–2, 5. Larson Acres brought its challenge before the state Livestock Facility Siting Review Board (the "Siting Board"), which reviews livestock facility permitting decisions similar to how a certiorari court reviews other land-use permitting decisions. *Id.* ¶¶ 1–2, 13–16; *see* Wis. Stat. § 93.90(5).

The Siting Board determined that the challenged conditions in the CUP were unlawful. *Adams*, 2012 WI 85, ¶ 16. Under the livestock facility siting law, when the Siting Board determines that a challenge is valid, it "shall reverse the decision of the political subdivision." Wis. Stat. § 93.90(5)(d). To that end, the Siting Board in *Adams* "modified the CUP, striking conditions one, three, five, and seven as invalid, narrowing condition two as overbroad, and affirming the unchallenged conditions (four and six)." *Adams*, 2012 WI 85, ¶¶ 16, 60.

On *de novo* review of the Siting Board's decision, this Court agreed that the Town had imposed conditions in Larson Acres' CUP that were unlawful under the livestock facility siting law. *Id.* ¶¶ 24–26, 52, 59, 66. The Court also affirmed the Siting Board's remedy modifying the CUP by striking the unlawful conditions. *Id.* ¶¶ 60–65. At the same time, the Court rejected the Town's request to remand the CUP for reconsideration by the Town. *Id.* In sum, when a permit holder challenged particular conditions in a CUP but not the entire CUP, and when that permit holder prevailed on the merits, this Court determined that the proper remedy was to strike the unlawful conditions and otherwise leave the CUP intact—without remand. *Id.* ¶ 61.

Although the court of appeals here did not apply *Adams*, that case provides this Court's only law on the proper remedy when a permit holder challenges *part* of an *approved* permit. That is especially true under the language of sections 59.69(2)(bs) and 59.70(25). Dane County is prohibited by those statutes from imposing the Insurance Requirements altogether. A remand that would permit Dane County to reverse its decision and deny the permit altogether would effectively authorize it to make the unlawful Insurance Requirements the deciding factor in its permitting decision. Where it lacks the power under state law to impose those requirements, it surely cannot deny a permit *because* it lacks that power. Otherwise, the entire legislative purpose of the statutory provisions would be defeated.[7]

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[7] Other cases, including *Lamar* (on which the court of appeals relied), have addressed only remedies on review of permit *denials*. *Lamar Cent. Outdoor,*

B. The proper remedy here is to strike the Insurance Requirements and otherwise leave the approved CUP intact—without remand.

An order striking the unlawful Insurance Requirements—without remanding the decision to Dane County for further proceedings—is also the proper remedy here. As supported and foreshadowed by *Adams*, such a remedy fully comports with notions of equity and efficiency.

Equity requires a remedy of striking the Insurance Requirements. As a "means of carrying into effect the substantive right," a remedy must fairly relate to that right and reflect "the policy behind that right as precisely as possible." Dan B. Dobbs, *Law of Remedies* 27 (2d ed. 1992). This principle, at its most basic, mandates that a litigant who wins on the merits must not be made worse off than when the case began.

As the Court in *Adams* admonished, it "would be absurd for the Siting Board to tell Larson, which filed an application more than four years ago and was entitled to a permit shortly thereafter, that it was required to return to the beginning of the application process because of the Town's mistake." *Adams*, 2012 WI 85, ¶ 65. Similarly, it would be "absurd" to require Enbridge to essentially restart the permitting process when Enbridge has been seeking a permit from Dane County since April 2014, and when Dane County's intentionally unlawful action in imposing the Insurance Requirements prompted the current case. Why should a permit holder who succeeds in challenging a *portion* of a

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Inc. v. Bd. of Zoning Appeals of City of Milwaukee, 2005 WI 117, ¶¶ 23–24, 284 Wis. 2d 1, 700 N.W.2d 87.

CUP end up with less than when it started the challenge? Remanding this case to ZLR or the County Board would do just that: it would effectively strip Enbridge of its approved CUP and corral Enbridge back at the starting gate.

Striking the Insurance Requirements is also a more efficient remedy than remanding to ZLR or the County Board. In *Adams*, "the Town committed the initial error that the [Siting Board] was required by law to rectify. The Town imposed the impermissible, extra-legal conditions." *Id.* ¶ 63. "It would make little sense, therefore, to read the Siting Law as prohibiting the Siting Board from correcting the problem in as efficient a manner as possible." *Id.* The *Adams* Court also expressed concern about the length of the local approval process, noting that a remand "would only . . . 'reward' farm operators challenging invalid CUPs by returning them to the beginning of the application process." *Id.* ¶ 64. Here, too, Dane County's lengthy permitting process, pocked by numerous delays and broken promises already encountered *ad infinitum*, would provide no remedy to Enbridge. It would "make little sense" to subject Enbridge to additional proceedings before Dane County, when Enbridge has been seeking a lawful CUP for years and Dane County has demonstrated it is willing to contravene state law.

Finally, it is simply incorrect to conclude, as the court of appeals did, that Dane County never had the opportunity to consider Enbridge's CUP without the Insurance Requirements included in it. (P-App.41.) To the contrary, Dane County *knew* the Insurance Requirements were unlawful when it acted on the

CUP. *See supra* pp. 10–13. ZLR and the County Board thus had several opportunities to reconsider the CUP after the state enacted Act 55 and preempted the Insurance Requirements. If those bodies believed that the CUP could not be issued without the Insurance Requirements, they had multiple opportunities to deny the permit or to devise alternative conditions. Instead, with full knowledge that the new statutes had been enacted and that the Insurance Requirements were unenforceable, Dane County nonetheless repeatedly reaffirmed the CUP without any additional conditions. In effect, Dane County already approved Enbridge's CUP sans the Insurance Requirements, which means that, contrary to the court of appeals decision, the Insurance Requirements were not "integral to the permit." (*See* P-App.40–42.) Dane County should not get another opportunity to impose additional conditions on Enbridge after losing on the merits in a challenge to the existing CUP.

In deciding to return the CUP to ZLR, the court of appeals abdicated its judicial duty. Because "zoning is a legislative function[,]" (P-App.40 (quoting *Town of Rhine v. Bizzell*, 2008 WI 76, ¶ 26, 311 Wis. 2d 1, 751 N.W.2d 780)), the court reasoned it had no ability to scrutinize how Dane County knowingly issued Enbridge's CUP with unenforceable conditions. All it could do, it concluded, was let Dane County have another chance. (*See* P-App.40–43.)

But this reasoning, far from "effectively usurp[ing] the authority of [ZLR]," (P-App.42), actually enables Dane County to effectively usurp the authority of the judicial branch. While

enacting zoning ordinances may indeed be a legislative function, issuing CUPs is not. Issuing CUPs involves a quasi-judicial exercise of authority, conceptually and procedurally distinct from legislative ordinance enactment. *See Allstate Ins. v. Metro. Sewerage Comm'n of Milwaukee Cty.*, 80 Wis. 2d 10, 17, 258 N.W.2d 148 (1977); 83 Am. Jur. 2d Zoning and Planning § 834. Moreover, the court of appeals' quotation from *Bizzell* ignores context: *Bizzell* involved a *constitutional* challenge to an *ordinance*, thereby implicating broad separation-of-powers concerns. This case, by contrast, does not involve a constitutional challenge to an ordinance. And in any event, a court need not and should not completely defer to the admittedly unlawful actions of a county.

Ultimately, extending the remedy jurisprudence of *Adams* and striking the unlawful Insurance Requirements is the only path that provides relief. Any other path—especially one involving remand—would provide no remedy to Enbridge and would ensure that anyone who obtains a CUP could never mount a genuine challenge to its conditions. Under such a state of affairs, instead of denying permits, enterprising local governments could always bury unlawful conditions in approved CUPs. Then, once the illegality of a condition is exhumed, the permit holder would face an unbearable choice: live with the restriction, or become ensnared in a Kafkaesque challenge process. To ensure that these risks do not become reality, the Court should strike the Insurance Requirements.

III. The Citizens had no authority to bring a citizen suit to enforce the Insurance Requirements.

The Citizens initially became involved in these consolidated cases when they filed a citizen suit against Enbridge, asking the circuit court for an injunction. (P-App.404–14/R.1[2503/350].) They argued that Wisconsin Statutes section 59.69(11) gave them authority to "enforce and compel compliance with" Condition No. 7 of Enbridge's CUP, which is one of the Insurance Requirements. (P-App.405/R.1[2503/350] ¶ 3; P-App.412/R.1[2503/350] ¶ 66.)

The Citizens' argument, adopted by the court of appeals, lacks merit. While certain property owners can bring citizen suits to enforce county zoning ordinances, they have no authority to enforce CUP conditions. Further, even if property owners could enforce CUP conditions as a general matter, the Citizens here still could not enforce the Insurance Requirements.

A. Wisconsin Statutes section 59.69(11) permits property owners to enforce county "zoning ordinances"—not CUP conditions.

Wisconsin Statutes section 59.69(11) governs the enforcement of county "zoning ordinance[s]."[8] That section provides that "[c]ompliance with such ordinances may . . . be enforced by injunctional order at the suit of the county or an

[8] Section 59.69(11) is entitled "[p]rocedure for enforcement of *county zoning ordinance*." (Emphasis added.) Titles and headings of statutory sections may be used to interpret the meaning of a statute. *State v. Grandberry*, 2018 WI 29, ¶ 21 n.13, 380 Wis. 2d 541, 910 N.W.2d 214; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 221 (2012).

owner of real estate within the district affected . . . ." "Such ordinances" ultimately refers back to county zoning ordinances.

1. The text of section 59.69(11) reveals that it contemplates the enforcement of only zoning *ordinances*. A "zoning ordinance," as that term is used in section 59.69, does not include a specific CUP condition.

The relevant language in section 59.69(11) traces back, nearly word for word, to Wisconsin's original county zoning enabling act, first enacted in 1923 as section 59.90(4). L. 1923 c. 388, § 1.[9] Contemporaneous definitions of the words "ordinance" and "permit" show that, just like today, the terms were not understood to be synonyms. *Compare* "Ordinance," *Black's Law Dictionary* (3d ed. 1933) *with* "Permit," *id.*

A century ago and today, nothing in section 59.69 suggests that the term "ordinance" diverges from the common understanding of what an ordinance is—a "municipal *legislative* device[], formally *enacted*, that address[es] *general* subjects in a permanent fashion"—not a specific permit or a term in that permit. *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 25, 373 Wis. 2d 543, 892 N.W.2d 233 (emphases added); *accord* 56 Am. Jur. 2d Municipal Corporations § 285.

In contrast to "ordinances" and "zoning ordinances," "[p]ermits, certificates of approval, or like instruments," are generally "required *under* zoning ordinances for the erection or alteration of certain buildings, or for the commencement and

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[9] "Compliance with such ordinances may be also enforced by injunctional order at the suit of such county or the owner or owners of such real estate within the district affected by such regulation."

conduct of certain businesses, activities or uses." 8 McQuillin Mun. Corp. § 25:179.15 (3d ed.) (emphasis added). If a distinct thing is required "under" an ordinance, it logically is not an ordinance itself.

Further, the procedure by which an *ordinance* is enacted differs in kind from the procedure by which a *permit*, including a CUP, is issued. To enact an ordinance, a "legislative" undertaking, a county board must "formally enact[]" it, *Wis. Carry*, 2017 WI 19, ¶ 25, by reaching a "majority vote of a quorum or by such larger vote as may be required by law," Wis. Stat. § 59.02(2). A county "*zoning* ordinance," to which section 59.69(11) explicitly refers, is an even more unique creature than a typical ordinance: section 59.69(5) outlines a specific procedure that counties must follow to enact a zoning ordinance.

A CUP, by contrast, is not legislatively "enacted" or "adopted" under section 59.02(2) or 59.69(5). Rather, it is the product of a quasi-judicial process administered by a zoning committee, which may be comprised wholly or partially of members who are not elected members of the county board of supervisors. *See* Wis. Stat. §§ 59.69(2)(a)1., (5e); *Allstate*, 80 Wis. 2d at 17 (1977); 83 Am. Jur. 2d Zoning and Planning § 834. Enbridge's CUP was issued according to this latter procedure—not according to the procedure for enacting an ordinance or a "zoning ordinance."

Finally, Dane County Ordinances contain separate enforcement procedures. Section 10.25(5)(a) covers enforcement of the provisions of Dane County's zoning *ordinance*. Section

10.255(2)(m), by contrast, sets forth a specific procedure applicable when the holder of a CUP is not complying with its terms. "If the zoning committee finds that the standards in subsection (2)(h) and the conditions stipulated therein are not being complied with, the zoning committee . . . may revoke the conditional use permit." Dane Cty. Code § 10.255(2)(m). The latter section, specifically applicable to CUPs, says nothing about "injunctional orders" or citizen suits. *Cf. Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 20, 316 Wis. 2d 47, 762 N.W.2d 652 (reiterating principle of legislative interpretation that a more specific provision controls). Thus, even under Dane County Ordinances, permits are conceptually and functionally different from ordinances—and are enforced differently, too.

2. Caselaw also shows that section 59.69(11) does not provide for private enforcement of CUP conditions. This Court recently discussed what constitutes a "zoning ordinance" in *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362. The plaintiffs in *Zwiefelhofer*, like Enbridge here, challenged a municipal regulation. In this Court, only one question remained: whether the regulation was a "zoning ordinance." *Id.* at 494. To answer that question, the *Zwiefelhofer* Court considered the various "traditional[]" "characteristics" of a "zoning ordinance," evaluating them in light of the particular circumstances of the case. *Id.* at 506–10.

Specifically, the Court identified six factors that support classifying a municipal regulation as a "zoning ordinance":

1. Zoning ordinances typically divide a geographic area into multiple zones or districts.
2. Within the established districts or zones, certain uses are typically allowed as of right and certain uses are prohibited by virtue of not being included in the list of permissive uses for a district.
3. Zoning ordinances are traditionally aimed at directly controlling *where* a use takes place, as opposed to *how* it takes place.
4. Zoning ordinances traditionally classify uses in general terms and attempt to comprehensively address all possible uses in the geographic area.
5. Zoning ordinances make a fixed, forward-looking determination about what uses will be permitted, as opposed to case-by-case, ad hoc determinations of what individual landowners will be allowed to do.
6. Zoning ordinances allow certain landowners whose land use was legal prior to the adoption of the zoning ordinance to maintain their land use despite its failure to conform to the zoning ordinance.

Id.; *see also* "Zoning Ordinance," *Black's Law Dictionary* (10th ed. 2014). The Court then applied the six factors to the municipal regulation at issue, ultimately concluding that the Town of Cooks Valley had not adopted a "zoning ordinance." *Id.* at 513–23.

Applying the *Zwiefelhofer* factors to the municipal regulation at issue here—the CUP's Insurance Requirements—reveals that the Insurance Requirements do not constitute a "zoning ordinance."

3. Although the Citizens and the court of appeals below relied on *Town of Cedarburg v. Shewczyk* to support their injunction action, that case is inapposite. 2003 WI App 10, 259 Wis. 2d 818, 656 N.W.2d 491. The parties in that case disputed whether the Shewczyks were violating a CUP condition and whether the Shewczyks had a right to a new permit. *Id.* ¶¶ 1–12. Based on its own ordinances, which purported to give the Town

the ability to seek injunctive relief to enjoin violations of its zoning ordinance, the Town sought an injunction to stop the Shewczyks from violating one specific condition in their CUP. *Id.* ¶¶ 8, 17. The court sided with the Town, ruling that the Town could sue to enjoin a violation of a CUP condition because "noncompliance with the terms of a CUP is tantamount to noncompliance with a Town ordinance." *Id.* ¶ 16.

Shewczyk does not apply here for three reasons. First and most notably, *Shewczyk* considered only a municipality's enforcement authority—not private enforcement authority. The *town* sought to enforce a condition in a CUP it had issued; no private citizens were attempting to enforce the condition. Second, *Shewcyzk* grounds its reasoning exclusively in the text of Wisconsin Statutes Chapter 62, which does not apply to counties. *Compare* Wis. Stat. ch. 62 *with* ch. 59 (Counties). In that regard, the language of section 62.23 differs dramatically from the language of section 59.69. Section 62.23(7)(f), which governs the enforcement of city zoning ordinances, expressly contemplates citizen suits to enforce "any ordinance *or other regulation* . . . ." Regardless of whether "other regulation" includes CUPs, the citizen-suit authority granted by section 62.23(7)(f) is broader than the citizen-suit authority under section 59.69(11), which applies only to county zoning ordinances. Third, applying *Shewczyk* would conflict with the text of section 59.69: as described above, the plain meaning of section 59.69 indicates that CUPs differ from county zoning ordinances.

In addition, the *Shewczyk* court's reasoning is internally flawed. For one, although the municipality at issue in *Shewczyk* was a *town*, the court of appeals based its decision on Wisconsin Statutes chapter 62, which applies only to *cities*. *Id.* ¶ 16 (citing Wis. Stat. § 62.23(7)). For another, the court reasoned as follows:

> 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.

Id. (emphases added). The second sentence does not "thusly" follow from the first. That CUPs and their conditions are "governed by" ordinances does not necessarily mean that CUP conditions *are* ordinances; in fact, the "governed by" language suggests that CUP conditions are *not* the same as ordinances. All in all, *Shewczyk* does not provide any useful guidance.

B. Even if citizens could enforce CUP conditions under section 59.69(11), the Citizens here had no authority to enforce the Insurance Requirements.

Even if the language of Wisconsin Statutes section 59.69(11) were construed to authorize citizen suit enforcement of CUP conditions as a general matter, it does not authorize the Citizens' suit against Enbridge to enforce Condition No. 7 of the Insurance Requirements. Section 59.69(11) allows a property owner to pursue enforcement when the county has failed to do so. It does not endow the Citizens with a *greater* enforcement right than Dane County. The Citizens have acknowledged that "[t]he same injunctive statute that authorizes counties to enforce their zoning ordinances, § 59.69(11), Wis. Stats., provides an

equivalent right for owners of property in the same zoning district to do so." (P-App.409–10/R.1[13/350] ¶¶ 34–35 (emphasis added).) If Dane County itself is precluded from enforcing the Insurance Requirements under section 59.69(11), then the Citizens are, too.

Section 59.69(11) contemplates enforcement of only "county zoning ordinance[s]" that have been "enacted in pursuance" of section 59.69. One part of section 59.69—subsection (2)(bs)—prohibits counties from imposing CUP conditions that are preempted by state law. If a CUP condition is preempted by state law, it is not "enacted in pursuance" of section 59.69, and hence, it is not enforceable under section 59.69(11). As explained above, section 59.70(25) preempts the Insurance Requirements, meaning they were not "enacted in pursuance" of section 59.69. *See supra* Argument Part I. Thus, neither Dane County nor the Citizens can rely on section 59.69(11) to enforce them.

Examined from another angle, section 59.69(2)(bs) precludes counties from *imposing* preempted CUP conditions. Section 59.69(11), somewhat differently, deals with *enforcement* of lawful requirements. Read together, the valid imposition of a requirement must precede enforcement of that requirement; a requirement that has not been validly imposed cannot possibly be enforced. At the time the Citizens brought their suit to enforce the Insurance Requirements, Enbridge and Dane County were already involved in a certiorari dispute about whether the Insurance Requirements had been lawfully imposed, or whether they were preempted. Particularly given that such a dispute was already pending, the question of *imposability* must be decided

before the question of *enforceability*. In their injunction action, then, the Citizens could not possibly have demonstrated any violation of a zoning ordinance, as required for a citizen suit under section 59.69(11).

During the permit approval process and in litigation, Dane County has consistently admitted that the Insurance Requirements were unenforceable. (P-App.104/R.7 ¶ 35 ("Section 59.70(25) prohibits the County from enforcing the [Insurance Requirements] that are the subject of this action."); Cty.'s Opening Br. in Ct. App. 13 (conceding that Dane County "has not disputed that Wis. Stat. § 59.70(25) applies to [Enbridge's] Line 61 and renders the insurance conditions included in CUP 2291 unenforceable"); Cty.'s Resp. to Pet. for Rev. 13 ("Dane County has not disputed that Wis. Stat. § 59.70(25) applies to Enbridge's] Line 61 and renders the insurance conditions included in the CUP unenforceable."))[10] These admissions are particularly important, because Dane County *issued* the permit. If the permit issuer concedes it does not have authority to enforce a permit, logic and equity would dictate that nobody else has authority, either. Yet the Citizens still brought their own suit, somehow rationalizing that section 59.69(11) permitted them, but not Dane County, to enforce the Insurance Requirements. (P-App.409–10/R.1[2503/350] ¶¶ 34–35.)

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[10] The Citizens, too, "admit[ted]" in their answer "that Enbridge notified ZLR that it carried $700 million of General Liability Insurance, including a Sudden and Accidental exception to the pollution exclusion." (P-App.71/R.19:16.)

In the end, the 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 59.69(11) to sidestep the legislature's policy determination. Indeed, when the legislature eliminated Dane County's authority to enforce the Insurance Requirements, the Citizens' authority, being parallel, also ended. Leaving the court of appeals' decision in place and allowing the Citizens to enforce the unlawful Insurance Requirements "would change the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987).

* * * *

There are two additional points that are relevant to the Court's decision making.

First, the Citizens became involved in these consolidated cases by filing their injunction suit *to enforce* Condition No. 7 of the Insurance Requirements as written. (P-App.405/R.1 [2503/350] ¶ 3; P-App.412/R.1[2503/350] ¶ 66.) It was only through this injunction suit that the Citizens joined the pending certiorari dispute between Enbridge and Dane County. The Citizens never brought their own certiorari action challenging the CUP's terms (including the content of the Insurance Requirements) or the issuance of the CUP. As explained above, the Citizens had no authority to bring their injunction suit in the first instance. With no viable citizen suit and no independent

certiorari petition, the Citizens vanish from this case entirely. Thus, even though the court of appeals ruled that the Citizens could participate in the certiorari case, that ruling does not matter if the Citizens never had the ability to bring their injunction suit in the first instance. As intervening respondents in the certiorari case, which solely involved Enbridge's challenge to the Insurance Requirements, the Citizens had no authority to challenge Dane County's determinations during the permitting process let alone challenge the validity of CUP in its entirety.

Second, if the Court agrees that the Citizens had no authority to bring their injunction suit (because section 59.69(11) does not allow for private enforcement of CUP conditions), then the Court need not interpret either section 59.69(2)(bs) or 59.70(25) (because Dane County concedes the challenged conditions are unenforceable). Conversely, if the Court agrees with Enbridge's interpretation of sections 59.69(2)(bs) and 59.70(25), then the authority of the Citizens is irrelevant and the issue is moot.

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.

Dated this 4th day of October, 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 10,995 words.

Dated this 4th day of October, 2018.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wisconsin Statutes section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court and the court of appeals; and (3) portions 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 first names and last initials 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 4th day of October, 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 4th day of October, 2018.

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HAND DELIVERY CERTIFICATION

I hereby certify that on October 4, 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 4th day of October, 2018.

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