STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT IV
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,

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

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT DANE COUNTY

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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.

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether remand to Dane County's Zoning and Land Regulation Committee was the appropriate remedy after the circuit court determined that the "insurance conditions" were prohibited by statute?

   Answered by the circuit court in the negative.

2. Whether the circuit court had authority to remand the case to the Zoning and Land Regulation Committee?

   Although raised by the Respondent before the circuit court, that court did not specifically answer this question.

STATEMENT OF THE CASE

The Respondents, Enbridge Energy Company, Inc., and Enbridge Energy, Limited Partnership operates Line 61, an interstate pipeline that carries corrosive tar sands from Western Canada the length of the State of Wisconsin. They plan to 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 extensive deliberation and fact finding, the Dane County Zoning and Land Regulation Committee (ZLR) imposed insurance conditions on the issuance of a conditional use permit (CUP) for the Respondents' Waterloo Pump Station. These conditions were integral to the issuance of the conditional use permit. A review of the record will demonstrate that the CUP would not have been issued without the insurance conditions.

Subsequent to imposing the insurance conditions the Legislature adopted legislation specifically intended to benefit Enbridge in this case which restricted the authority of counties

to impose such conditions on interstate pipelines. Based upon these statutes, the circuit court determined that the insurance conditions imposed by Dane County were unenforceable as a matter of law and struck them from the CUP.

The ZLR is charged with making factual findings and determining whether a proposed conditional use meets the six (6) standards set forth in Dane County Code of Ordinances 10.255(2)(h). The Wisconsin Supreme Court has held that the ZLR is "best suited" to make these factual determinations. The insurance conditions were clearly integral and material to the issuance of the CUP. Therefore, the circuit court erred by striking the insurance conditions from the CUP yet allowing the remainder of the permit to stand. Rather, the circuit court should have vacated the entire permit and remanded the matter back to ZLR to determine if the permit can be issued without the insurance conditions.

STATEMENT OF FACTS

The Respondents own and operate interstate pipeline systems in the United States and Canada. They are "the owner of the Lakehead System, the United States portion of an operationally integrated interstate pipeline network of over 3,400 miles of pipeline, which transports crude oil from the United States and Western Canada to the eastern United States, over a distance of 1,900 miles." (R.2, p.3, ¶ 8) In 2007-2008, the Respondents installed Line 61, which originates in Superior, Wisconsin, and runs 343 miles across Wisconsin to the Illinois border. (R.2, p.3; ¶ 11) Line 61 crosses North East Dane County through the Town of Medina.

There are 12 pumping stations located across Wisconsin on Line 61. The Waterloo Pump Station is located in the Town of Medina. The Respondents sought to expand the Waterloo Pump Station as part an expansion project to increase the capacity of Line 61 from 400,000 barrels per day (bpd) to 1,200,000 bpd.

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 for the expansion of the Waterloo Pump Station.

The ZLR held their first public hearing on CUP 2291 on October 28, 2014. At that time eight (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 CUP 2291 at its Work Meeting on November 11, 2014. There were 12 registrants in favor of the CUP and 45 against. The matter was postponed until the

ZLR's meeting on December 9, 2014, with the following direction:

> Staff is direct to pursue a condition requiring a surety bond for assurances of spill clean up due to the increase pressure that the pumping station will create on the existing line. Staff will work with Risk Management and Corporation Counsel to determine the language of a surety bond. The bond shall list Dane County as 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. (R.8, p.91; App. 106)

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

> 6. That Dane County be included as a named insured party of comprehensive Environmental Impairment Liability Insurance, purchased by the petitioner, to ensure enough resources to cover complete cleanup of a spill of crude or dilbit within Dane County. The Environmental Impairment Liability (EIL) Insurance policy should be written by 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.

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).

The Respondents agreed to fund retention of an insurance expert. Mr. David J. Dybdahl, a recognized expert in environmental risk management was retained at Enbridge's expense. Mr. Dybdahl's report was extensive and is 30 pages long. His findings and conclusions based upon the Petitioners' 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;
- 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. 109-112).

After receiving Mr. Dybdahl's report, the ZLR next considered CUP 2291 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. 113-132). A motion was made and approved to grant CUP 2291 with 12 conditions, including what has been referred to in this litigation as the "insurance conditions":

> 7. Enbridge shall procure and maintain liability insurance as follows:

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

(R.8, pp. 106-109; App. 133-136) 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 CUP 2291 the Legislature adopted a provision in the 2015 Budget Bill granting the Respondents relief. 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."

Dane County has not disputed that Wis. Stat. § 59.70(25) applies to Respondent's Line 61 and renders the insurance conditions included in CUP 2291 unenforceable.

The Respondents appealed the ZLR decision to the Dane County Board of Supervisors, which held a hearing on December 3, 2015. During that hearing, one of the members of the ZLR, 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. 137). 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. 140, 141). The County Board voted 27-2 to affirm the decision of the ZLR.

The Respondents 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 of CUP 2291 were prohibited by Wis. Stat. §§ 59.70(25) and 59.69(2)(bs). (R.9; pp, 416, 417; App. 139, 140). 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 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.55, pp. 96, 97; App. 144, 145). 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 argued that the insurance conditions were an integral part of the issuance of CUP 2291. Therefore, the County argued that rather than simply excising the insurance conditions from CUP 2291, 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. 146, 147) 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. 148-149) 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. 150)

Subsequent to the September 27, 2016 hearing, the individual parties who had intervened objected to the form of the Order prepared by Respondents' counsel. 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.51; pp. 1, 2; App. 101, 102) The Respondents filed a Notice of Entry of Order on November 30, 2016. (R.52, pp. 1, 2; App. 102, 103) Dane County filed a Notice of Appeal on December 20, 2016.

ARGUMENT

I. REMAND TO ZLR IS THE APPROPRIATE REMEDY.

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

DCO § 10.255(2) (h) states that ZLR shall not grant a CUP unless it makes findings that six (6) standards are met, including:

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

> establishment, maintenance or operation of the conditional use;

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

The circuit court determined that the insurance conditions as adopted by ZLR in CUP 2291 are unlawful. As the Supreme Court held in *Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals of the City of Milwaukee*, 284 Wis. 2d 1, 22, 700 N.W.2d 87, 97 (2005), the ZLR "is the body best suited to make such factual determinations,…" Therefore 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.

In *Adams v. State Livestock Facilities Siting Review Bd.*, 327 Wis. 2d 676, 787 N.W.2d 941 (2010), 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. In that case, the court approved the reversal of the specific conditions without reversal of the entire permit, but also stated:

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

Id, at 955, ¶ 51.

This may well be that other day. The ZLR acted in good faith on April 14, 2015 when it approved CUP 2291 with the insurance conditions. Nothing in state law prohibited imposition of those conditions at that time. Only after approval of CUP 2291 did the Legislature adopt a statutory provision specifically designed to benefit Enbridge. The debate regarding financial responsibility and formulation of the insurance conditions was the sole reason that this CUP took over six (6)months to resolve. There is absolutely nothing in the record to indicate that the ZLR would have granted the CUP without the insurance conditions. The

circuit court should have not usurped the zoning agency's responsibility. Therefore, this matter should have been remanded to the ZLR for findings consistent with the court's ruling that the insurance conditions are unlawful.

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

variance, or permit granted will be held invalid." 3 Arden H. Rathkopf, *The Law of Zoning and Planning*, § 60.38 (2016).

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

In *Board of Selectmen of Stockbridge v. Monument Inn, Inc.*, 8 Mass. App. Ct. 158, 163-64, 391 N.E.2d 1265, 1268 (Ct. App. 1979) the Massachusetts Court of Appeals held the "the judgment affirmed the issuance of the special permit but made it subject to the eight restrictions both parties 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 Com'n of Westport*, 38 Conn. App. 171, 173, 659 A.2d 746, 747 (1995), *citing, Parish of St. Andrew's Church v. Zoning Board of Appeals*, 155 Conn. 350, 354-55, 232 A.2d 916 (1967).

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

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

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

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

Id., quoting *Federal Power Commission*, 344 U.S. at 20, 73 S.Ct. 85. (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 Environmental Services, City and County of Honolulu v. Land Use Comm.,* 127 Hawaii 5, 275 P.3d 809 (2012). There, the court held that remand is necessary unless *the only* conclusion the agency could have reached was issuance of the permit without the condition. *Id.*, at 18, 822; *citing, Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 105 S.Ct. 1598 (1985). For other cases supporting remand if a material or integral condition is stricken see: *Hochberg v. Zoning Comm.*

of the Town of Washington, 24 Conn. App. 526, 589 A.2d 889 (1991); *Board of Appeals of Dedhem v. Corporation Tifereth Israel*, 7 Mass. App. Ct. 876, 386 N.E.2d 722 (1979); *O'Donnell v. Bassler*, 289 Md. 501, 425 A.2d 1003 (Md. Ct. App. 1981); *Orloski v. Planning Bd. of Ship Bottom*, 226 N.J. Super. 666, 545 A.2d 261 (Law Div. 1988); *Alperin v. Mayor and Tp. Committee of Middletown*, 91 N.J. Super. 190, 219 A.2d 628 (Ch. Div. 1966).

Issuance of CUP 2291 without the insurance conditions was ***not*** the only conclusion ZLR could have reached. A cursory review of the record establishes that ZLR never considered issuing the permit without the insurance conditions. The insurance conditions were integral to ZLR's findings and decision. The circuit court should not have usurped the ZLR's authority and rewritten the permit. The matter should be remanded to ZLR so that they may 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. THE COURT HAS AUTHORITY TO REMAND THIS CASE TO THE ZLR.

Regardless of whether this case involves statutory certiorari review under Wis. Stat. § 59.694(10) or common law certiorari review, the court has inherent authority to remand this case to the ZLR. In light of the circuit court's determination that the insurance conditions in CUP 2291 are void and unenforceable, the ZLR should be afforded the opportunity to determine whether the CUP could be granted without the insurance conditions. Contrary to the Respondents' argument to the circuit court, there is no statutory prohibition to such a remand.

The circuit court had inherent authority to remand this case to the ZLR regardless of whether it was exercising statutory or common law certiorari jurisdiction. The argument that a certiorari court could not remand a matter to the agency or tribunal it's reviewing makes no sense and simply is not supported by the law.

It is the Respondents' position that this case is subject to statutory certiorari review pursuant to Wis. Stat.

§ 59.694(10). That statute provides that "the court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review." If the court reverses the decision brought up for review, remand to the lower tribunal is the obvious remedy. The Supreme Court has held that remand is appropriate when exercising statutory certiorari of zoning decisions, because "the Board is the body best suited to make such factual determinations,..." *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of the City of Milwaukee*. 284 Wis. 2d 1, 22, 700 N.W.2d 87, 97 (2005). For cases involving Wis. Stat. § 59.964(10) review see: *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 469 N.W.2d 831 (1991); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 421, 577 N.W.2d 813 (1988); *State v. Waushara County Bd. of Adjustment*, 271 Wis. 2d 547, 679 N.W.2d 514 (2004); *Osterhues v. Bd. of Adjustment for Washburn County*, 282 Wis. 2d 228, 698 N.W.2d 701 (2005).

Wisconsin courts conducting common law certiorari review have historically and consistently remanded cases in appropriate circumstances, particularly when the record is insufficient to address the issues raised. *Westel-Milwaukee Co., Inc. v. Walworth County*, 205 Wis. 2d 244, 254, 556 N.W.2d 107, 111 (Ct. App. 1996). This includes certiorari review of county zoning decisions. Indeed, in *Keen v. Dane County Board of Supervisors*, 269 Wis. 2d 488, 676 N.W.2d 154 (Ct. App. 2003), the Court of Appeals remanded a decision granting a CUP to Dane County's ZLR (then called ZNR). *Id.,* at 500. Likewise, in *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 39, 498 N.W.2d 842, 853 (1993), the Supreme Court remanded a zoning case after common law certiorari review.

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

for ZLR to determine whether CUP 2291 should be granted without insurance requirements.

CONCLUSION

Dane County's Zoning and Land Regulation Committee (ZLR) has the authority to grant conditional use permits not the circuit court. Certainly the court has authority to judicially review the County's exercise of its zoning authority, but the court's jurisdiction is limited to correcting legal error, not rewriting permits.

Dane County's Zoning Ordinance requires the ZLR to make factual findings that six (6) conditions are met before a conditional use permit can be issued. In this case, the ZLR spent over six (6) months in consideration of CUP 2291 and most of that time was spent focused on the Respondent's responsibility for clean up of a potential spill. After extensive study and consultation with an insurance expert ZLR approved CUP 2291 with the "insurance conditions." ZLR never considered granting CUP 2291 without some type of financial responsibility condition. It is indisputable that the

insurance conditions were a material and integral part of the CUP and that it would not have been issued without them.

The Legislature adopted Wis. Stat. §§ 59.70(25) and 59.69(2)(bs). No matter how seedy and undemocratic the Legislature's methods may have been, or how disingenuous the Respondents' claims that they played no role may be, those statutes are the law. Therefore, the County has not contested the enforceability of the insurance conditions. But that does not validate the circuit court's decision to simply rewrite CUP 2291 by excising the insurance conditions and allowing the permit to stand. The ZLR is authorized by law to issue conditional use permits and as the Supreme Court recognized in *Lamar Central Outdoor, Inc.,* the best suited to make the factual determinations associated with issuance of a conditional use permit.

The record before the circuit court is not sufficient to determine whether the permit could have been issued without the insurance conditions. Rather than rewriting the permit, the circuit court should have reversed and remanded the entire

matter to the ZLR to determine whether the permit can satisfy the six (6) standards contained in Dane County's ordinance without the insurance conditions or with alternative conditions. For the foregoing reasons the circuit court should be reversed and the matter remanded to the ZLR.

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CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rules contained in sec. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,197 words.

Dated this _____ day of March, 2017.

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CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(12)

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

Dated this ____ day of March, 2017.

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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 s. 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 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 ____ day of March, 2017.

_____

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