STATE OF WISCONSIN
COURT OF APPEALS -- DISTRICT IV

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

Petitioners-Respondents,

v.

Appeal No. 2016-AP-2503
Circuit Court Case No. 2016 CV 0008

DANE COUNTY

Respondents-Appellants,

DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE, and ROGER LANE, in his official capacity as the Dane County Zoning Administrator,

Respondents.

ROBERT and HEIDI CAMPBELLS, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES, and TIM JENSEN,

Plaintiffs-Appellants,

v.

Appeal No. 2017-AP-0013
Circuit Court Case No. 2016 CV 0350

ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY LIMITED PARTNERSHIP WISCONSIN,

Defendants-Respondents.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WISCONSIN STATUTES CITED

§59.69 Planning and zoning authority.

(1) PURPOSE. It is the purpose of this section to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; to permit the careful planning and efficient maintenance of highway systems; to ensure adequate highway, utility, health, educational and recreational facilities; to recognize the needs of agriculture, forestry, industry and business in future growth; to encourage uses of land and other natural resources which are in accordance with their character and adaptability; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to encourage the protection of groundwater resources; to preserve wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds. To accomplish this purpose the board may plan for the physical development and zoning of territory within the county as set forth in this section and shall incorporate therein the

§990.01(1) General rule. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.

Dane County Ordinances §10.123 A-1 EXCLUSIVE AGRICULTURE [A-1(EX)] DISTRICT.

(3) Conditional uses in the A-1 Exclusive Agriculture District. The following uses require a Conditional Use Permit in this district:

c) Transportation, communications, pipeline, electric transmission, utility, or drainage uses, not listed as a permitted use above.

Dane County Ordinances §10.255 ZONING COMMITTEE

(b) Authority. Subject to sub. (c), the zoning committee, after a public hearing, shall, within a reasonable time, grant or deny any application for conditional use. Prior to granting or denying a conditional use, the zoning committee shall make findings of fact based on evidence presented and issue a determination whether the prescribed standards are met. No permit shall be granted when the zoning committee or applicable town board determines that the standards are not met, nor shall a permit be denied when the zoning committee and applicable town board determine that the standards are met. 29

(h) Standards. No application for a conditional use shall be granted by the town board or zoning committee unless such body shall find that all of the following conditions are present: 34

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

6.That the conditional use shall conform to all applicable regulations of the district in which it is located.

(i) Conditions and guarantees. Prior to the granting of any conditional use, the town board and zoning committee may stipulate such conditions and

restrictions upon the establishment, location, construction, maintenance and operation of the conditional use as deemed necessary to promote the public health, safety and general welfare of the community and to secure compliance with the standards and requirements specified in subsection (h) above,

(j) Appeal. Any person aggrieved by the grant or denial of a conditional use permit, or the county board supervisor of the district in which the affected parcel is located, may appeal the decision of the town board or zoning committee to the county board. Such appeal must specify the grounds thereof in respect to the findings of the zoning committee, town board or both, the reason why the appellant is aggrieved and must be filed with the office of the zoning administrator within 20 days of the final action. The zoning administrator shall transmit such appeal to the county clerk who shall file such appeal with the county board. The county board shall fix a reasonable time for the hearing of the appeal and give public notice thereof as well as due notice to the applicant and the appellant(s) and decide the same within a reasonable time. The action of the zoning committee, town board or both, shall be deemed just and equitable unless the county board by a three-fourths vote of supervisors present and voting reverses or modifies the action appealed from. An appeal from a decision of the zoning committee, town board or both, shall be taken to the county board. No other entity of county government has jurisdiction to hear any such appeal and the avenue of appeal provided for herein is exclusive, notwithstanding any appeal procedure as may be authorized by state law for specific conditional uses..... 27, 31, 32

k) Effect of denial of application. No application for a conditional use which has been denied wholly or in part shall be resubmitted for a period of one year from the date of said denial, except on the grounds of new evidence or proof of change of conditions found to be valid by the zoning committee.

(m) Revocation of a conditional use permit. 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, after a public hearing as provided in subs. (2)(f) and (g), may revoke the conditional use permit. Appeals from the action of the zoning committee may be as provided in sub. (2)(j). 2, 7, 10, 11, 12, 16, 21

§10.26 BOARD OF ADJUSTMENT

4) Stays. An appeal shall stay all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken shall certify to the board of adjustment after the notice of appeal shall have been filed with him or her that by reason of facts stated in the certificate a stay would cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by a restraining order, which may be granted by the board of adjustment or by a court of record on

application on notice to the officer from whom the appeal is taken and on due cause shown. 32

6) Powers of the board of adjustment. The board of adjustment shall have the following powers:
(a) To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of sections 59.69, 59.692 or 87.30, Wis. Stats., or of any ordinance adopted pursuant thereto.
(b) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

STATEMENT OF ISSUES FOR REVIEW

1. Did either the Dane County Board or the Zoning Committee find that, in 2015, Enbridge had " Sudden and Accidental Pollution Liability Insurance" as part of Enbridge's General Liability policy, within the meaning of Wis. Stats. §59.70(25)?

The Circuit Court answered: Yes

2. Does the requirement of Wis. Stat. §59.70(25) that a hazardous liquid pipeline company carry "sudden and accidental" pollution insurance impose a continuing obligation on a pipeline company to demonstrate that if has such insurance to exempt it from additional insurance requirements by counties?

The Circuit Court Answered: No

3. Was the Dane County Zoning Committee's issuance of a Conditional Use Permit to Enbridge on April 21, 2015 a final action subject to the law in effect at that time, or did Enbridge's action in appealing the Conditional Use Permit to the Dane County Board stay it from being a final action?

The Circuit court answered: The appeal to the County Board stayed the Conditional Use Permit.

4. Rather than remove conditions from the Conditional Use Permit, should the matter be remanded to the Zoning Committee to decide whether the insurance provision is prohibited, and whether the CUP would have been approved under §10.255 (2) (b) and (h), Dane Co. Ordinance without those requirements?

The Circuit Court answered: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs/Co-Respondents -Co-Appellants, Campbells et al., ("Campbells") request oral argument and respectfully request that this Court's decision be published.

STATEMENT OF THE CASE

This case centers around a controversy over a proposal by Enbridge Energy Company and its subsidiaries, affiliates and limited partners ("Enbridge") to double the capacity of its existing tar sands oil pipeline through Wisconsin. They are doing that by constructing or expanding 13 large pumping stations along the corridor, including one new station in Dane County.

Because Enbridge caused the worst inland oil spill in U.S. history from a similar pipeline in Michigan in 2010, which cost $1.2 billion to partially remediate and caused protracted litigation with Enbridge's insurer, Dane County's zoning committee required Enbridge to purchase a $25 million Environmental Clean-up

Insurance policy. The purpose of this insurance requirement which was effected through a local zoning conditional use permit, was to assure the availability of funds to cover clean up, restoration and emergency response costs and damages to natural resources in case of an accident in the County. ("Environmental Clean-up Insurance Requirement")

As Enbridge described their existing insurance (having declined to provide the policies claiming that they contained "trade secrets"), R 8:208 it would not cover these costs and would not cover leaks or spills not discovered or reported within a certain time limit. R 8:212

Enbridge opposed the Environmental Clean-up Insurance Requirement and appealed the zoning committee decision to the Dane County Board. While the administrative appeal was pending, the state legislature adopted a statute in the 2015-16 Budget Bill prohibiting counties from requiring more than one kind of insurance from hazardous liquid pipeline companies.

The Dane County Board denied Enbridge's appeal and Enbridge petitioned the Circuit Court for a writ of certiorari to have the conditions removed. Separately, landowners living near the pipeline sought injunctive relief to have the conditions enforced. After the cases were consolidated by the Circuit Court., the Circuit Court found that the new statute applied and granted Enbridge's writ and Motion to Dismiss the Campbells' case November 11, 2016. The court refused to remand the permit to the County and instead removed two of the conditions from

the permit. The County and a group of landowners including the Campbells separately appealed from that same Circuit Court decision, and the original two lawsuits remain consolidated on appeal.

STATEMENT OF FACTS[1]

Enbridge's pipeline system. That part of Enbridge's Lakehead System at issue in this case is transporting hazardous bitumen, (more commonly known as tar sands oil), from the Fort McMurray-Hardisty area in the Athabascan tar sands oil fields of Alberta, Canada through Wisconsin to a refinery in Flanagan, Illinois (Line 61) and from there to the Houston-Port Arthur area in Texas largely for export. R. 8:4 and 21; R. 9:199 and 317

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

Bitumen or tar sands oil, like tar, it is too viscous to flow through pipelines without substantial modifications. First, it has to be mixed with a diluent, which is toxic, volatile and explosive. Secondly it needs to be heated to approximately

[1] As Enbridge acknowledges in its Brief in Support of Motion to Dismiss ("Brief in Support") at 3, "In considering a motion to dismiss a complaint for failure to state a claim, all properly pleaded facts are taken as admitted." All of the facts below are set forth in Plaintiffs' Complaint for Injunction.

140°F. Heating the tar sands increases the rate of corrosion. Thirdly, it must be accelerated with pumps under high pressure reaching 1200 pounds per square inch (psi). Increasing the pressure to this degree exacerbates the incidence of stress fractures in the pipeline. All of these modifications increase the probability of a break in the pipeline. R. 8:22, 90 and 119

So too, the consequences to the physical environment are irreversible. During oil spills the diluent can evaporate, releasing hazardous air pollutants. If the bitumen reaches a waterway it will sink vastly increasing the difficulty and costs to clean up. R. 8:6

Enbridge's safety record. In 2010, another Enbridge tar sands pipeline in Michigan, Line 6B, ruptured, discharging approximately one million gallons of tar sands oil into adjoining wetlands, Talmadge Creek and the Kalamazoo River. In part because of the unusual characteristics of tar sands, which sinks instead of floating in water, it was the worst inland oil spill in U.S. history. Fifty families had to be evacuated due to dangerously elevated ambient levels of the carcinogen, benzene, and 320 people reported symptoms consistent with exposure to crude oil. Partially remediating the site from the oil spill cost $1.2 billion, still leaving approximately 180,000 gallons of the bitumen unrecovered in the riverbed. R. 9:109 and 119

In the aftermath, Enbridge was severely criticized by the National Transportation Safety Board ("NTSA") for not replacing the pipeline five years earlier in 2005 when the pipe's fatal defect was first detected. NTSA also

criticized Enbridge for refusing to fix 329 of the 390 other known defects in the line and for failing to detect the 75,000 gallon per hour leak from the 6 feet 8 inch gash that precipitated the spill for more than 17 hours. NTSA pointed out the inconsistencies in Enbridge's representations noting that 10 days earlier Enbridge had testified to Congress that it could quickly detect and stop even the smallest leaks; and for a complete breakdown of Enbridge's culture of safety. R. 8:429

This led the regulators to compare Enbridge's response to the disaster to "Keystone Kops." NTSA also criticized the Pipeline Hazardous Material Safety Administration (the federal agency responsible for regulating pipelines) for "weak regulation" and "ineffective oversight." It further observed that the remote pipeline sensors that the agency relied upon to insure operators were warned of accidents only detected 5% of pipeline spills. R. 8:510 and 549

Kalamazoo was not an anomaly for Enbridge. Between 1999 and 2013, Enbridge pipelines saw an average of 71 spills leaking 500,000 gallons per year, or more than one oil spill every week. This included a recent pipeline spill of more than 50,000 gallons of light oil from Line 14 near Grand Marsh, Wisconsin, in 2012. R. 8:428

Wisconsin pipeline expansion. The year before the Kalamazoo accident, Enbridge completed construction of Line 61 in Wisconsin to carry tar sands oil. Line 61 transverses the State diagonally for approximately 343 miles from Superior through Dane County into Delavan. No Environmental Impact Statement was required for Line 61, only an environmental assessment prepared by the

Wisconsin DNR and US Army Corps of Engineers. R 2:4 Line 61 is a 42" line now carries less than half its capacity, and is not subject to the increased pressures to be provided by the pumping stations. R. 8:4

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

Conditional Use Required under the Dane County Zoning Ordinance ("Zoning Ordinance"). The Phase 2 Improvement is subject to the conditional use process because the parcel the pumping station is to be located upon is zoned "A-1 Exclusive".(See: §10.123(3)(c), Dane Co. Ordinance.)

Dane County Zoning Committee proceedings. Between August 19, 2014 and April, 21, 2015, the Zoning Committee considered Enbridge's application for a conditional use permit pursuant to the applicable requirements and standards set forth in Section 10.255 of the Zoning Ordinance. R. 8:50-126 and 8:164-169 The Committee held four public hearings on the application, R. 8:50-126, and also commissioned an independent expert risk analysis of the Project by David Dybdahl.[3] R. 8:198-227 Mr. Dybdahl provided the only expert testimony to the

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[2]The so-called Waterloo Pump Station is actually located near Marshall, in the town of Medina, Dane County, not in either the town or city of Waterloo, Jefferson County.

Zoning Committee on the Environmental Clean-up Insurance Requirement. Enbridge presented no other expert to contradict or refute any of the opinions offered by Mr. Dybdahl. In addition the Zoning Committee considered the testimony of several members of the public who identified the increased risks and unacceptable threats to the physical environment posed by the project.

On April 8, 2015, Mr. Dybdahl submitted his report to the Committee. He concluded that:

1. Due to a likely reduction in fossil fuel use and resulting financial down turn for Enbridge, coupled with aging pipe lines more prone to spill, Enbridge may not have liquid assets to pay for a more likely spill in the future;
2. Enbridge's existing $700 million General Liability insurance was less than the known $1.2 billion cost of the 2010 Enbridge Michigan spill, and contained a pollution exclusion that was "time limited" and did not cover clean-up costs, restoration costs or natural resources damages, so it only partially insured the County for damages from an oil spill;
3. Ongoing litigation over the insurance coverage for Enbridge's 2010 Line 6B spill in Michigan resulted from disputes over the pollution exclusions in

[3]Mr. Dybdahl is a nationally prominent expert on environmental risks, and holds graduate degrees in risk management and insurance from the University of Wisconsin Madison where he is a guest lecturer. He has advised the Department of Defense, the Environmental Protection Agency and the Department of Energy on environmental insurance issues, and advised the World Bank on insuring the remediation of Chernobyl. Among his many publications, he authored the chapter on environmental risks and loss control in the standard textbook for the Chartered Property and Casualty Underwriters. R.8:201

Enbridge's insurance policy, and led to $103 million in unrecovered insurance costs because Enbridge had no environmental impairment coverage;

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

5. By making the cleanup policy secondary to the primary insurers, Enbridge will not incur higher premiums to secure the Environmental Clean-up Insurance if in fact its representations are true regarding: i) the safety of the Project; ii) that there is no risk of it defaulting: iii) that it will not be denied "Sudden and Accidental Pollution Liability Insurance"; and iv) that the federal insurance pools will not prove inadequate. In his opinion insurance underwriters will consider these representations in setting the premium. Only if the free market disagrees with Enbridge's representations will it have to pay significantly higher insurance premiums. R 8:202-213

Pursuant to its authority under Section 10.255(h) of the Zoning Ordinance, the Zoning Committee on April 14, 2015 determined that the standards for a conditional use set forth in §10.255 (2) (b) and (h)(1-6) of the Zoning Ordinance could not be satisfied unless certain conditions were included on the approval of this risky project. They adopted many of Mr. Dybdahl's recommendations, and specifically conditioned the approval of the pump station permit on Enbridge securing and maintaining for the life of the pipeline project $100 million in General Liability and $25 million in Environmental Impairment Liability insurance. Further, the insurance would name the County as an additional insured, be provided by an insurer with an AM Best rating of at least A, and Enbridge would be required to provide evidence of coverage at the County's request. These requirements were included in the Conditional Use Permit #2291 ("Conditional Use Permit") as Conditions #7 and 8. The Conditional Use Permit is included in the Appendix. Condition #7 and 8 read as follows:

> 6. 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.
>
> 7. 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.

("Environmental Clean-up Insurance Requirement Conditions")

Finality of Conditional Use Permit. Under the Zoning Ordinance and the stated terms of the permit, the Conditional Use Permit became final and effective

on April 21, 2015 when it was mailed to Enbridge after being approved by the Town of Medina. R. 8:164-169 Zoning Ordinance at §10.255 (2) (j). Enbridge filed an appeal to the Dane County Board May 4, as allowed by Dane County Ordinance §10.255(2)(j) "…within 20 days of the **final action**…" of the zoning committee. Emphasis added

Legislative intervention. On July 2, 2015, the State Legislature interceded through an anonymously authored amendment to the Budget Bill. It directly affected the Conditional Use Permit and the Environmental Clean-up Insurance Requirement Conditions approved by the County. When the Joint Finance Committee introduced its Super Amendment to the Budget Bill, (2015 Assembly Bill 21), it included as the 55th of its 67 provisions a proposed new subsection amending Wis. Stat. §59.70, County Zoning, Environmental Protection and Land Use, barring counties from requiring additional insurance for hazardous liquid pipeline companies. Joint Finance Committee, Motion 999, p. 18, ¶55, dated July 2, 2015. This amendment contained highly technical language and the terms of art used were *sui generis* to Enbridge's dispute with the County. The Budget Bill became a part of the final 2015 State Budget effective on July 13, 2015, as §59.70(25), 2015 Wisconsin Act 55, stating:

> "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."** Emphasis added

("Budget Bill")

Dane County Zoning Committee Proceedings –Post Budget Bill.

On September 29, 2015 the Zoning Committee met for the purpose of reversing the Zoning Administrator's unauthorized action on July 24, 2015 in removing Conditions 7 and 8 from the Conditional Use Permit. The Zoning Committee determined that the Zoning Administrator's action was unauthorized and outside the scope of his authority. It unanimously rejected a motion that the Budget Bill made the Environmental Clean-up Insurance Requirement Conditions unenforceable. It voted to deny Enbridge's request to delete the Environmental Clean-up Insurance Requirement Conditions. R. 8:766-779 The Zoning Committee never received any evidence or made any finding on the issue of whether Enbridge had "Sudden and Accidental Pollution Liability Insurance".

Dane County Board Proceedings –Post Budget Bill. On October 19, 2015, Enbridge appealed to the Dane County Board from the Zoning Committee's refusal to remove the Environmental Clean-up Insurance Requirement Conditions from the Conditional Use Permit, R. 8:3-18 On December 3, 2015, the Board heard the appeal. It voted 27 to 2 to uphold the decision of the Zoning Committee. R. 590-591 This was the one and only instance in which the Environmental Clean-up Insurance Requirement Conditions ever came before and were considered by the County Board. The County ordinance governing appeals presumes that the Zoning Committee's actions are just and equitable unless three fourths of the supervisors votes to overturn them. DCO §10.255(2)(j). The County Board upheld both the Zoning Committee's decision in April to require the Environmental Clean-up Insurance Requirement Conditions and the Zoning

Committee's refusal in September to remove the Environmental Clean-up Insurance Requirement Conditions. At no time did Enbridge present to the County Board any evidence that it had "Sudden and Accidental Pollution Liability Insurance". The County Board certainly did not make any determination on that question.

Circuit Court proceedings. On January 2, 2016, Enbridge petitioned the Circuit Court for common law review of Dane County's actions, asking the court to find the Environmental Clean-up Insurance Requirement Conditions unlawful and to remove them from the Conditional Use Permit. Separately, on February 8, 2016, affected landowners sought injunctive relief under Wis. Stats. §59.69(11), to have the conditions enforced. In response, Enbridge filed a Motion to Dismiss on March 2, 2016. R2. 5:1-15 Both cases were consolidated by the Circuit Court on April 18, 2016. After briefing and argument, Judge Anderson decided during a lengthy oral ruling on July 11 that the newly-enacted law applied because the permit was not final, but "pending" until the board denied Enbridge's appeals, and that there was "substantial evidence" that "the Board" (e.s.) had determined that Enbridge had the necessary insurance to trigger the application of the law and that "it did not apply". On November 11, 2016, the Circuit Court signed its Decision and Order granting Enbridge's certiorari petition, excising the Environmental Clean-up Insurance Requirement Conditions from the Conditional Use Permit and granting Enbridge's Motion to Dismiss the Campbells' complaint for an injunction.

ARGUMENT

I. The Appellate Standard of Certiorari Review is De Novo, and Review is of the Decision of the Zoning Committee.

Certiorari review is of the record before the administrative body and not the Circuit Court. See *Clark v. Waupaca County BOA*, 186 Wis. 2d 300, 303, 519 N.W.2d 782 (Ct. App. 1994), *Murr v. St. Croix Cty. Bd. of Adj*., 2011 WI App 29, ¶19, 332 Wis. 2d 172, 796 N.W.2d 837, In reviewing the actions of the County with respect to the Environmental Clean-up Insurance Requirement Conditions, this Court reviews the County's interpretation of its ordinances *de novo,* applying the four part standard of review: (1) whether the 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 make the decision it did. See *Clark,* 186 Wis. 2d at 304 and *Bd. of Regents v. Dane Cnty. Bd. of Adjustment*, 2000 WI App 211, 238 Wis. 2d 810, 818-20, 618 N.W.2d 537, 541-42.; see also *Snyder v. Waukesha Cty. Zoning Bd. of Adjustment,* 74 Wis. 2d 468, 247 N.W.2d 98 (1976).

A. Enbridge Has Not Met a Certiorari Petitioner's Burden of showing that the Dane County Zoning Committee and Dane County Board's Actions Were Incorrect.

A petitioner for a writ of certiorari has the burden of overcoming a presumption of validity of the administrative body's actions. "…Thus, the findings

of the board may not be disturbed if any reasonable view of the evidence sustains them. *State ex rel. Morehouse v. Hunt*, 235 Wis. 358, 367, 291 N.W. 745, 749 (1940). The court may not substitute its discretion for that committed to the board by the legislature." *Snyder*, 74 Wis. 2d 468 at 476, *Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 275-77, 461 N.W.2d 827 (Ct. App. 1990) It is not the Board's duty to convince us that its interpretation of its own ordinance is correct, but rather it is the petitioner's duty to convince us that the Board's interpretation is incorrect. *See State ex rel. Beidler v. Zoning Bd. of Appeals*, 167 Wis. 2d 308, 311, 481 N.W.2d 669 (Ct. App. 1992, *Roberts v. Manitowoc Cty. Bd. of Adjustment*, 2006 WI App 169, ¶16, 295 Wis. 2d 522, 721 N.W.2d 499 However interpretation of a statute is subject to a de novo review. *Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 270, 461 N.W.2d 827 (Ct. App. 1990)

The only meaningful actions taken by Dane County agencies with regard to Enbridge's application for a Conditional Use Permit were the issuance of the Conditional Use Permit with the Environmental Clean-up Insurance Requirement Conditions on April 21, 2015, the refusal of the Zoning Committee to remove the conditions at their meeting September 29, 2015, and the Dane County Board's rejection of Enbridge's appeals of the Zoning Committee's actions on December 3, 2015. Enbridge had earlier claimed in the consolidated proceedings that the Budget Bill retroactively invalidated the insurance conditions in the Conditional Use Permit and removed the County's jurisdiction, R 13:12-15. It claimed that

there was no evidence to support the Conditional Use Permit. It claimed "vested rights" in the Conditional Use Permit. R 12:9

1. The Dane County Zoning Committee and County Board Had Proper Jurisdiction; Their Actions were Reasonable, and Supported by Evidence.

There can be little doubt of Dane County's jurisdiction to issue Conditional Use Permits to applicants proposing to put land to uses that are not expressly permitted by local zoning, in the absence of state law pre-empting regulation. Wis. Stat. §59.69 (1) and (2). In fact, the Zoning Committee has exclusive rights in conjunction with town boards, following prescribed procedures and applying standards under Dane County ordinances, to issue Conditional Use Permits. The County Board can only review, reverse or modify decisions of the zoning committee or town. Dane County Ordinance 10.255(2)(b) and(j).

The jurisdiction of the Zoning Committee is set forth in Section 10.255 of the Zoning Ordinance. It provides in relevant part that the Zoning Committee shall be created and constituted by the county board and have the duties as prescribed by subsection (b) hereof including the duty to grant or deny any application for conditional use after a public hearing. No permit shall be granted when the zoning committee or applicable town board determines that the standards are not met.

Section 10.255(i) authorizes in relevant part the zoning committee prior to the granting of any conditional use to stipulate such conditions and restrictions upon the establishment, location, construction, maintenance and operation of the

conditional use as deemed necessary to promote the public health, safety and general welfare of the community and to secure compliance with the standards and requirements specified in subsection (h). The relevant sections of the Zoning Ordinance are included in the Appendix. See also Wis. Stats. §59.694 and §59.70.

There is no question, after the Zoning Committee held four public hearings, considered the history of accidents involving Enbridge's tar sands pipelines and considered the testimony and recommendations of Mr. Dybdahl that the Environmental Clean-up Insurance Requirement Conditions promoted the public welfare, were supported by sufficient evidence and were neither arbitrary nor unreasonable.

II. Neither the Dane County Board Nor the Zoning Committee Could or Did Find That the New Statute Applied Because There Was No Evidence That Enbridge Had the Insurance Necessary to Make It Apply.

Enbridge can only invoke the preemption of Wis. Stat. §59.70(25) if it has established that it had secured, "Sudden and Accidental Pollution Liability Insurance". That is the plain and unambiguous language of the Budget Bill.

> 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*." (Emphasis added.) Wis. Stat. §59.70(25).

A. Enbridge Refused to Show Its Insurance Policies to the Zoning Committee or their Insurance Consultant, and they were replaced in May, 2015.

In his report to the Dane County Zoning Committee, the expert insurance consultant David Dybdahl started his analysis by stating: "Enbridge declined to provide the actual insurance policies (42 of them in total) to me for review, claiming that the documents contain trade secrets." R. 8:208, but said he found their summary credible. However he went on to note that he didn't think it necessary to read the policies because

> "The current insurance policies will expire on May 1 and new insurance policies will be purchased. Where the current insurance policies are a gauge on what insurance Enbridge may have in the future, there are no guarantees that Enbridge will be able to maintain these high levels of insurance in the future…It served little purpose to review insurance policies that would expire in a few weeks.." R- 8:208-209

The insurance that Enbridge had on July 13, 2015 was not the same insurance they had when the Zoning Committee issued the Conditional Use Permit on April 21, 2015.

B. Dane County's Insurance Consultant Advised That Enbridge Had Insufficient Insurance Coverage and Recommended Additional Environmental Clean-Up Insurance.

Mr. Dybdahl concluded that what Enbridge claimed in March 2015 was "Sudden and Accidental Pollution Liability Insurance" was in fact "Time Element Pollution" coverage. He explained that the insurance coverage Enbridge described was actually limited to pollution events discovered within 30 days and reported within 90 days. In his opinion, County should not rely on it R. 8:211 If the underground pipeline leak was not discovered until the 31st day, Enbridge would have no coverage. He recommended that the County require "$100,000,000 limits in General Liability insurance with a time element

exception to the pollution exclusion (currently in place) and Environmental Impairment Liability insurance with a $25,000,000 limit." R. 8:223

C. Dane County's Zoning Commission Based the Conditional Use Permit Conditions on the Undisputed Assessment and Recommendations of their Insurance Consultant and Required Environmental Clean -Up Insurance and Proof of Coverage.

In Condition #7 of the Conditional Use Permit the Zoning Committee adopted verbatim Mr. Dybdahl's language that Enbridge had something other than "Sudden and Accidental Pollution Liability Insurance". Thus, the County correctly concluded that the new statute, Wis. Stat. §59.70(25) either did not apply; or that Enbridge had failed to produce any evidence to support a decision that it did. Because the Conditional Use Permit was final on April 21, 2015, well before the Budget Bill was adopted, the County was under no obligation to retroactively apply the law. R. 56:50-51

The second condition, #8 of the Conditional Use Permit which Enbridge objected to included technical standards from the Appendix A of Mr. Dybdahl's Report. One of the requirements of Appendix A was "Evidence of Insurance. Upon request by Dane County, Enbridge shall furnish a certificate of insurance to the county which accurately reflects that the procured insurances fulfill these insurance requirements." R. 8:223 Without this provision the County has no way to verify the amount or type of insurance Enbridge carries.

D. There Has Been No Evidence Provided that Enbridge Has the "Sudden and Accidental" Pollution Insurance Required by Wis. Stat. §59.70(25).

The Circuit Court first found in Enbridge's certiorari proceeding (Case 16 CV 008) that the Budget Bill applied because it believed the Dane County Board had concluded that Enbridge had the prerequisite " Sudden and Accidental Pollution Liability Insurance" R. 56:94-95 The Circuit Court proceeded to delete the Environmental Clean-up Insurance Requirement Conditions from the Conditional Use Permit. R. 52:2 Since the affected landowners' complaint for injunctive relief (Case 16 CV 350) sought to enforce the Environmental Clean-up Insurance Requirement Conditions the Circuit Court also granted the Motion to Dismiss that Enbridge filed in that docket. R. 52:1

However, because neither the Dane County Board nor the Zoning Committee ever found Enbridge to have "Sudden and Accidental Pollution Liability Insurance", the Circuit Court erred in striking down the Environmental Clean-up Insurance Requirement Conditions and that decision should be overturned. For the same reason the Circuit Court's decision dismissing Campbells' complaint must be reversed.

Enbridge repeatedly failed to demonstrate that it possesses "Sudden and Accidental Pollution Liability Insurance" Enbridge had the opportunity to produce its insurance policies at the Zoning Committee hearings on its conditional use request and refused to produce them under a claim of "Trade Secret". For the

same reason it declined to offer Mr. Dybdahl the opportunity to review its insurance policies.

Enbridge later had the opportunity to produce evidence that it had secured "Sudden and Accidental Pollution Liability Insurance" in connection with its appeal to the County Board of the Zoning Committee's decision of October 19, 2015 It failed to produce any evidence whatsoever that it satisfied the prerequisite to an exemption from the Environmental Clean-up Insurance Requirement Conditions. The Circuit Court recognized that Enbridge had to meet this burden to apply the Budget Bill.

E. The Dane County Board never made any determination that Enbridge had "Sudden and Accidental Pollution Liability Insurance" Coverage to qualify under the Budget Bill.

> At the County Board meeting to hear Enbridge's appeal on December 3, 2015, the only time the Environmental Clean-up Insurance Requirement Conditions ever came before that body, the only question before the County Board and the only one put to a vote, had nothing to with whether Enbridge had "Sudden and Accidental Pollution Liability Insurance". R. 9:439-442

1. **The Dane County Board's Review of the Zoning Committee's Action Was Limited by Dane County Ordinances and Simply Denied Enbridge's Appeal.**

Rather, in accordance with the legal procedures for processing appeals of Conditional Use Permits, §10.255(2)(j), Dane County Ordinance., the vote was to either approve or deny Enbridge's appeal to overrule the Zoning Committee's decision that refused to remove the Environmental Clean-up Insurance Requirement Conditions from the Conditional Use Permit.

> "Chair Corrigan: And as I said before, a yes vote is to approve the appeal, to agree with Enbridge that the actions of Z[oning and] L[and] R[egulation Committee] should be overturned. And a no vote sustains the actions of the Zoning and Land Regulation Committee.
>
> [Vote Taken]
>
> Chair Corrigan: The vote is two ayes, 27 noes. And the appeal fails."
> R. 9:439-442

Significantly, Enbridge offered no evidence or argument in the course of that appeal that it possessed "Sudden and Accidental Pollution Liability Insurance".

The record simply does not support a finding that the County Board (in the Circuit Court's words) made "a sufficient determination of the applicability of the statute to the insurance that Enbridge does in fact have or did in fact have in the fall". Even if they had determined Enbridge had such coverage in April, by December a different policy should have been in effect.

F. The Zoning Committee also made no determination that Enbridge had "Sudden and Accidental Pollution Liability Insurance" to qualify under the Budget Bill.

When considering the conditions for the Conditional Use Permit, the Zoning Committee adopted Mr. Dybdahl's language that the insurance "currently in place" was general liability insurance with a "time limited exception" to pollution coverage. The Committee never found Enbridge had "Sudden and Accidental Pollution Liability Insurance;" in fact when urged by Enbridge to remove the insurance conditions September 29, 2015, the Zoning Committee voted against finding that the Environmental Clean-up Insurance Requirement

Conditions were no longer enforceable. Instead it simply quoted the new statute verbatim on the face of the previously issued Conditional Use Permit. R 8:591

1. The Zoning Committee Had No Evidence to Find that Enbridge Had Sudden and Accidental Pollution Insurance, Because Enbridge Has Supplied None.

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

To this day, nearly 2 years after legislature granted them a boon, Enbridge has not shown that it has secured the "Sudden and Accidental Pollution Liability Insurance" which is a prerequisite to qualifying under the state exemption.

There is no basis in the record for finding that Enbridge satisfied the prerequisite to the state exemption when it failed and refused to produce the very evidence that would prove one way or the other whether it qualified for the exemption? The Circuit Court's decision is not supported by the record and directly in conflict with that record. Based on Enbridge's failure to produce evidence that it satisfied the prerequisite to the exemption the Writ of Certiorari must be denied.

III. The Budget Bill creates a continuing duty to demonstrate compliance with its conditions.

On its face Wis. Stat. §59.70(25) creates a continuing duty for pipeline companies to maintain "Sudden and Accidental “Insurance Coverage in order to enjoy the exemptions permitted under the Budget Bill. The subsection states that only a pipeline operator who “carries” (in the present tense) “Sudden and Accidental Pollution Liability Insurance” qualifies for the exemption. The language in the statute does not use the word “carried” (in the past tense), which would be the tense that the bill’s drafters would have had to select if they had intended to connote a one-time, instead of a continuing, duty. *State ex rel. Kalal v. Circuit Court for Dane Cnty*., 271 Wis. 2d 633, 634, 681 N.W.2d 110 (2004), see also *Schroeder v. Dane Cty. Bd. of Adjustment, 228 Wis. 2d 324, 333, 596 N.W.2d 472 (Ct. App. 1999)* .

A continuing duty, rather than a one-time obligation, would also be the only logical reading of the statute. Since the amendment includes a minimum insurance requirement before State override may be exercised, it would be irresponsible to assume that Wisconsin legislators would intend that their constituents should have no protection from oil spills. The notion of a continuing legal obligation is long known to our jurisprudence, including insurance, such as auto or health insurance. See (as regards a railroad’s obligation for street crossing maintenance) *Madison v. S. W. R. Co*., 156 Wis. 352, 359, 146 N.W. 492, 495 (1914)

A. Because Insurance Contracts Renew Annually, They Must Be Reviewed Annually to Establish That Enbridge Has the Necessary Insurance.

Mr. Dybdahl's report clearly states that insurance policies are issued annually. Last year's policy cannot be assumed to bear on the terms and content of future policies:

> "The current Enbridge insurance coverage is largely irrelevant in any decision making of Dane County regarding a long term Conditional Use Permit. Almost all insurance policies only insure for 1 year and must be renewed annually. The insurance market place changes over time and can be subject to considerable variation year to year. **Knowing what the insurance coverage is today is not necessarily predictive of what it will be even 2 years from today**." R: 8:211. (Emphasis added.)

Because insurance policies are written annually and change over time, as specifically noted by Mr. Dybdahl R. 8:209, 216 and 217, the insurance coverage that a hazardous liquid pipeline company has today will not be the same insurance it has a year from now. In order for Enbridge to claim an exemption from the Environmental Clean-up Insurance Requirement Conditions for subsequent years the new insurance policy must be submitted and reviewed by the County. The County can then conduct an inquiry as to whether Enbridge has secured "Sudden and Accidental Pollution Liability Insurance". It is a continuing duty on the part of Enbridge to produce evidence satisfactory to the County that it has the required insurance coverage, as the Conditional Use Permit Section 8 established.

B. Failure To Carry the Necessary Insurance Violates the Conditions of the Conditional Use Permit and Would Prompt Revocation of the CUP.

Should Enbridge fail to carry the insurance required by the state statute to qualify for the exemption from the Environmental Clean-up Insurance

Requirement Conditions then the County has the authority to require Enbridge to secure the Environmental Clean-up Insurance. If it fails to do so, the County has the authority to initiate proceedings to revoke the Conditional Use Permit pursuant to Wis. Stat. §59.69(11) and Dane County Ordinance §10.255(2)(m). *Forest Cty. v. Goode*, 219 Wis. 2d 654, 683, 579 N.W.2d 715 (1998), see also *Town of Cedarburg v. Shewczyk*, 2003 WI App 10, 259 Wis. 2d 818, 830, 656 N.W.2d 491

Therefore, it was error for the Circuit Court to eliminate in its entirety the Environmental Clean-up Insurance Requirement Conditions.

IV. Enbridge's Appeal Neither Stayed the Effectiveness of the Conditional Use Permit Nor Rendered it a Non Final Action.

Another independent basis for reversing the grant of the writ of certiorari is that the Conditional Use Permit was final upon action of the Zoning Committee, so the Budget Bill does not apply.

At the 11th hour, Enbridge raised the claim that the appeals it filed with the Dane County Board on May 4, 2015 and October 19, 2015, automatically stayed the Conditional Use Permit from becoming final, and stayed its effectiveness. R 24:3. According to Enbridge, the legal consequence is that the Dane County Board was required to apply the Budget Bill when it acted on by then two separate appeals Enbridge had filed.

Enbridge's position is contrary to the plain words of the Conditional Use Permit. It is inconsistent with the pleadings it has filed in this record. It is contrary to its own development activities pursuant to the authority granted to it

following the issuance of the Conditional Use Permit on April 21, 2015. In order to sustain its position, it is urging a legal construction of the appeal provisions contained in Dane County Ordinance §10.255(2)(j), Dane County Ordinances which requires a court to legislate. In short, Enbridge's legal position is utterly without merit.

The Conditional Use Permit issued to Enbridge April 21, 2015, states on its face that the "EFFECTIVE DATE OF PERMIT" is **April 21, 2015.** R 8:164; A XX. The cover letter from Roger Lane the Zoning Administrator acknowledges the finality of the permit,"…no further action on your part is required to complete this process…" R. 8:162 Enbridge, in its second appeal it filed with the Dane County Board on October 19, 2015 acknowledged the "Effective Date". R. 8:3 As a result there is no basis for claiming that the Conditional Use Permit was not final upon its issuance.

A. Any Reliance By Enbridge on Its Belief that the Environmental Clean-Up Insurance Conditions Were Not in Effect After the Budget Bill's Enactment Was Misplaced, And Contradicts Its Claim that the Conditional Use Permit Was Not Final.

Enbridge has submitted in this record a description of all of the work it allegedly undertook, since July 24, 2015, the date the Zoning Administrator, a ministerial official, unlawfully modified the Conditional Use Permit to remove the Environmental Clean-up Insurance Conditions.

> "As of December 3, 2015 [which is three months after the permit was ostensibly stayed] Enbridge had paid approximately $10 million for construction expenses in reliance on the permits." R. 13:17

It has represented that it "committed" in excess of $10 million as of December 3, 2015 R 658-61. It claims that it acquired vested rights in the Conditional Use Permit. It strangely places its reliance for its vested rights claim upon the unlawful modifications to the Conditional Use Permit on July 24, 2015, not the duly and validly issued Conditional Use Permit issued on April 21, 2015. Of further note, that construction continued even after September 29, 2015, R. 8:651 which was when the Zoning Committee explicitly informed Enbridge that they could not rely upon the mistaken ultra vires letter from the Zoning Administrator. R 8:125 and 133 Thus, from September 29, when the only permit it had included the Environmental Clean-Up Condition, to December 3, 2015, when the County Board voted to not overturn the Conditional Use Permit, Enbridge continued construction, acting as if the permit was effective and not automatically stayed.

1. **The Unlawful Act of The Zoning Administrator Did Not Alter the Terms of the Conditional Use Permit, Or Justify Reliance Thereon.**

Enbridge's reliance upon the unlawful actions of a ministerial officer is completely misplaced. The law is abundantly clear that one can claim no vested rights by virtue of a permit issued in error. The Dane County Ordinances provide that the Zoning Committee is the agency with authority to grant or deny an application for a Conditional Use Permit. Dane County Ordinance §10.255(2)(b). The Zoning Administrator is not empowered to grant a Conditional Use Permit.

In *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963) the Wisconsin Supreme Court clearly set forth the rule of law that a permit issued by a ministerial officer like the Dane County Zoning Enforcement Officer does not give rise to vested rights. The Court cited with authority its similar holding in *Wauwatosa v. Strudell* , 6 Wis. 2d 450, 455, 95 N.W. 2d 257 (1959). Moreover, a Conditional Use Permit does not give rise to property rights, *Rainbow Springs Golf Co. v. Town of Mukwonago*, 2005 WI App 163, 284 Wis. 2d 519, 526, 702 N.W.2d 40, and the unauthorized acts of a ministerial official do not estop the county from enforcing its ordinances. *Snyder v. Waukesha Cty. Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 477, 247 N.W.2d 98 (1976)

As a consequence, there is utterly no basis for Enbridge's claim of vested rights in the unlawful action of the Zoning Enforcement Officer in removing the Environmental Clean-up Insurance conditions.

2. **Enbridge Cannot Argue That the Conditional Use Permit Was Not Final While They Continued Construction.**

Its evidence of all of the work it performed since July 24, 2015 also gives lie to its claim that the Conditional Use Permit issued on April 21, 2015 was not a final action and that its initial appeal stayed the effectiveness of the Conditional Use Permit issued on April 21, 2015. For after all, if Enbridge is correct that the Conditional Use Permit issued on April 21, 2015 was not final and had been

stayed then by what authority did it undertake all of that work in connection with the Conditional Use Permit?

This raises the issue of judicial estoppel.

> "The focus of judicial estoppel is ... intended 'to protect against a litigant playing 'fast and loose' with the courts' by asserting inconsistent positions." Harrison v. Labor Industry Review Commission, 187 Wis. 2d 491, 497; 523 N.W.2d 138 (1994). "Although the doctrine is not reducible to a pat formula, there are certain identifiable boundaries …[t]hey are: first, the later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position--a litigant is not forever bound to a losing argument. *Id.* at 491.

Its arguments on finality and vested rights is just that—talking out of both sides of its mouth-- and maintaining two completely inapposite legal positions. That neither is correct does not avoid the strictures of judicial estoppel.

3. Dane County's Ordinance Clearly Does Not Stay the Effect of A Conditional Use Permit Granted by the Zoning Committee During An Appeal to the County Board.

Nor is there any merit to its tortured construction of §10.255(2)(j), Dane County Ordinances which is the appeal provision that Enbridge availed itself of in its two appeals.

In *State ex rel. Kalal v. Circuit Court for Dane Cty. (In re Criminal Complaint)*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110), the Supreme Court clarified the fundamental principles of statutory construction. The Court cited with approval, "the oft-repeated premise that intention must be determined primarily from the language of the statute itself". *Id*., P. 663.

In *Kalal* the Supreme Court reiterated those essential principles of statutory construction which include and are relevant to the existence or non-existence of a "stay" provision in §10.255(2)(j). Those principles include:

> "…Context is important to meaning. So, too, is the structure of the statute in which the operative language appears… Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." **[citations omitted]** Id., P 663-664.

Applying these principles here, the language contained in the Dane County Zoning Ordinance is clear and unambiguous. More particularly, a close examination of §10.255(2)(j) demonstrates that nowhere in that section does it provide in the expressed words of the ordinance for the automatic stays that Enbridge espouses. Enbridge is essentially requesting the Court to write into the Ordinance a provision that the Dane County Board did not deign to include in §10.255(2)(j).

The Supreme Court also observed that "context is important". Significantly, another section of the County Zoning Ordinance and in its companion in the state law, expressly provide for a "stay". This demonstrates that when either the legislature or the Dane County Board wanted to add a "stay" provision it knew how to include one. See: Wis. Stats. §59.694(5) and §10.26(4) Dane County Ordinances. However, the automatic stay provisions in those laws expressly provide that they are limited to only appeals taken to boards of adjustments.

> **DCO §10.26 BOARD OF ADJUSTMENT …** "(4) *Stays*. An appeal shall stay all proceedings in furtherance of the action appealed from, unless the officer from whom the

> appeal is taken shall certify to the board of adjustment after the notice of appeal shall have been filed with him or her that by reason of facts stated in the certificate a stay would cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by a restraining order, which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown."

Appeals from the Zoning Committee are governed by Dane County Ordinance §10.255(2)(j). That provision on its face does not provide for a stay on appeal of a "final action."

Under the "*Expressio Unius Est Exclusio Ulterius*," doctrine of statutory construction, "the enumeration of specific alternatives in a statute is evidence of legislative intent that any alternative not specifically enumerated is to be excluded." *TA \c 33 \s "Cases" \l "Perra v. Menomonee Mut. Ins. Co.*, 239 Wis. 2d 26, 35, 619 N.W.2d 123, (2000). Clifton Williams, "*Expressio Unius Est Exclusio Ulterius*," 15 MARQ. L. R. 4, 191 (June 1931).

Thus the absence of expressed language in §10.255(2)(j) is fatal to Enbridge's legal argument.

Since the Zoning Committee's grant of the Conditional Use Permit was final, the law to be applied was the law in effect in April 2015, and the Circuit Court erred in holding that the appeal automatically stayed the Conditional Use Permit, requiring application of the Budget Bill. R. 56:51

V. THE PETITION FOR CERTIORARI AND MOTION TO DISMISS SHOULD HAVE BEEN DENIED

In the November 11, 2016 Decision and Order on appeal of the consolidated cases, the Circuit Court granted the Petition for Certiorari and struck

the Environmental Clean-Up Insurance Conditions from the Conditional Use Permit. R 50:1-2 It also granted the motion to dismiss on the grounds that the Conditions the complaint sought to enforce had been voided. R 50:2 For reasons set forth above, Enbridge did not meet the standards for a grant of certiorari.

Despite the Circuit Court's order, The Campbells' complaint states a cause of action. As Campbells' complaint discloses there are significant public interests involved in this matter. The liquid transported over hundreds of miles in this pipeline is hazardous and toxic to the environment if the pipe ruptures. The pumping station increases the risks of a rupture in the pipeline. Enbridge's safety record is of grave concern.

On the bases of these concerns and the recommendations of Mr. Dybdahl, the Zoning Committee in the exercise of its paramount responsibility to protect the public welfare chose to attach the Environmental Clean-up Insurance Conditions on Enbridge's Conditional Use Permit. Such conditions were essential to the Zoning Committee finding that the Conditional Use for the pumping station satisfied the standards for a conditional use. Without the condition, there is no legal basis for the conditional use. (See: Wis. Stats. §§ 10.255(h) (1), (2) and (3).

The rights and security afforded to Campbells and Dane County residents under the Clean-up Insurance Conditions to adequate funds for a clean-up in the event of an accident related to the pumping station and the pipeline is a substantive

right secured to Campbells by virtue of the County's authority under the Zoning Enabling Act, Wis. Stat.§59.69, *et seq.* to protect and promote the public welfare.

§ 59.69 (1) states as its purpose in relevant part:

> It is the purpose of this section to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; …to encourage uses of land and other natural resources which are in accordance with their character and adaptability; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to encourage the protection of groundwater resources; to preserve wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds….

A. Campbells and Other Landowners May Enforce the Conditional Use Permit's Insurance Requirements If They Have Not Been Preempted or Removed from the Conditional Use Permit.

Campbells' Complaint is brought pursuant to Subsection 11 of the Zoning Enabling statute which affords an owner of real estate, in an affected zoning district through a citizen suit to seek "injunctive relief as a remedy for a zoning ordinance violation." *Forest County.* 219 Wis. 2d 654, 657.

In *Forest County.* at 679, n. 13 the Wisconsin Supreme Court held,

> Provisions of this kind recognize not only the fact that landowners have a singular stake in the enforcement of land-use controls, but that the likelihood of vigorous enforcement is not always great. It is common knowledge that when zoning is commenced in many communities no adequate provision is made for enforcement. Frequently, enforcement is committed to a building inspector who is already understaffed for the task of enforcing the building code. When zoning enforcement is committed to his office he is unable to give it more than desultory attention. (**e.s.**) (Brief in Support, at 8-9)

The Circuit Court failed to apply the well accepted standards pursuant to Wis. Stat. § 802.06(2)(a)6, when it dismissed Campbells' complaint.

A motion to dismiss is reviewable by this Court *de novo*. The Circuit Court in reaching its decision that Campbells' Complaint did not state a cause of action under §59.69(11) failed to apply the accepted principles governing such motions including the principle that all properly pleaded facts are taken as admitted. Enbridge never sought to challenge any of these well plead facts and as a result for the purposes of a motion pursuant to Wis. Stat. § 802.06(2)(a)6, they are taken as true.

In *Zinn v. State,* 112 Wis. 2d 417, 423, 334 N.W.2d 67, 70 (1983) the Court laid out the applicable standard of review

> "Thus, the sole issue before the court is whether the plaintiff's complaint states a claim upon which relief can be granted. In determining whether the complaint was properly dismissed by the court of appeals, we apply the familiar test that the pleadings are to be liberally construed to do substantial justice between the parties, and the complaint should be dismissed as legally insufficient only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of her allegations." Citing *Strid v. Converse,* 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983).

B. The Budget Bill Should Not Be Interpreted In Enbridge's Favor to Retroactively Invalidate the Zoning Committee's Action.

Enbridge claimed in their motion to dismiss Campbells' case that the Budget Bill was retroactive. The Circuit Court found that Enbridge had that wrong. Enbridge has not appealed that ruling and as such it is the law of the case. R 57:50.

It hardly seems to be a coincidence that the Legislature entered the fray 2 1/2 months after the Conditional Use permit was approved, and adopted a law that bears directly on the conditions the County included in Enbridge's Conditional Use Permit as part of the Budget Bill.

There are compelling public interests involved in assuring that there are sufficient financial assets available in the event of a rupture or spill. There are equally strong public policy reasons why statutory retroactivity is highly disfavored.

Justice Stevens writing for the US Supreme Court in *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 264-268, 114 S. Ct. 1483, 1501-02 (1994) cited James Madison's treatise in the Federalist Papers as but one example of why retroactive application is disfavored under the law:

> "James Madison argued that retroactive legislation also offered **special opportunities for the powerful to obtain special and improper legislative benefits.** According to Madison, "bills of attainder, ex post facto laws, and laws impairing the obligation of contracts" were "contrary to the first principles of the social compact, and to every principle of sound legislation," in part because **such measures invited the "influential" to "speculate on public measures," to the detriment of the "more industrious and less informed part of the community."** The Federalist No. 44, p. 301 (J. Cooke ed. 1961). See *Hochman*, the Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 693 (1960) (a retroactive statute "may be passed with an exact knowledge of who will benefit from it"). (Emphasis added)
>
> *Landgraf*, 511 U.S. 244, 267 n.20.

From this analysis the Court concluded that, "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf* at 266. See also *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208. Pp. 263-265, 102 L. Ed. 2d 493, 109 S. Ct. 468.

Here, the admonitions of James Madison ring true. Shortly after Dane County attached a condition requiring additional security at the recommendation of

a well-respected insurance consultant the Legislature insinuated itself in the matter at the behest of a powerful interest to tip the scales against protecting the public interest and in favor of the financial benefit of an oil pipeline company.

The Circuit Court in mistakenly applying the Budget Bill provision to the Conditional Use Permit, gave retroactive effect to a statute that does not clearly apply, granted a certiorari petition it should not have granted, and thus erred in dismissing Campbells' Complaint.

VI. REVERSAL OR REMAND TO THE ZONING COMMITTEE IS THE APPROPRIATE RELIEF IF THIS COURT DETERMINES THAT THE ENVIRONMENTAL CLEAN-UP INSURANCE CONDITIONS IN THE CONDITIONAL USE PERMIT SHOULD NOT HAVE BEEN REMOVED BY THE CIRCUIT COURT.

Should this Court choose to reverse the Circuit Court's grant of Enbridge's certiorari action, there are two courses available: reversal and affirmance of the Dane County Board's action in sustaining the Zoning Committee's Conditional Use Permit with all the original conditions, or reversal and remand to the Circuit Court with directions to remand the matter to the Zoning Committee for a determination of 1) whether Enbridge deserves the preemption benefit of Wis. Stat. §59.70(25) because it proves that it has sudden and accidental pollution insurance, and if so 2) whether the Zoning Committee could have satisfied the requirements of the zoning ordinance for granting a Conditional Use Permit without the environmental insurance conditions. The affected landowners support the position and argument by the County calling for the case to be remanded to the

County to reconsider the Conditional Use Permit without the Environmental Clean-up Insurance Conditions in the event the Court of Appeals finds that the Budget Bill applies. Remand can be appropriate if the legal standards have changed during an appeal. *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals*, 2005 WI 117, 284 Wis. 2d 1, 15, 700 N.W.2d 87

CONCLUSION

For the reasons stated, Campbells request this Court to reverse the Circuit Court's grant of a Writ of Certiorari and order the immediate restoration of the Environmental Clean-up Insurance Conditions to the Conditional Use Permit, and reverse the Circuit Court's order dismissing their injunction action.

In the alternative, Campbells request this Court to remand the matter to the Circuit Court with instructions to remand to the Zoning Committee for a determination of whether the Budget Bill statute applies; and if so to reconsider whether to grant the conditional use permit without the Environmental Clean-up Insurance Conditions.

Respectfully submitted:

Plaintiff Appellants ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES and TIM JENSEN

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

I further certify that if 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.

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WISCONSIN COURT OF APPEALS DISTRICT 4

ROBERT and HEIDI CAMPBELLS, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES, and TIM JENSEN,

Plaintiffs-Appellants,

v.

Appeal No. 2017-AP-0013
Circuit Court Case No. 2016 CV 0350

ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY LIMITED PARTNERSHIP WISCONSIN,

Defendants-Respondents.

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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