SUPREME COURT OF WISCONSIN

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

Petitioners-Respondents-Petitioners,

v.

DANE COUNTY,

Respondent-Appellant

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

Respondents.

Appeal No. 17AP0013

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

Plaintiffs-Appellants,

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

Defendants-Respondents-Petitioners.

Appeal No. 16AP2503

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

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Appeal from a Judgment Dated November 11, 2016,
Entered in the Dane County Circuit Court, Branch 17,
The Honorable Peter Anderson, Presiding
Case Nos. 16CV8 and 16CV350

BRIEF OF PETITIONERS

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INTRODUCTION

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

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

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

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

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

STATEMENT OF THE ISSUES

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

During this process, Enbridge notified ZLR that it carried $700 million of comprehensive general liability ("CGL") insurance that included coverage for sudden and accidental pollution liability.[2] (P-App.114/R.2 ¶ 32; P-App.101/R.7 ¶ 13.) In addition, Enbridge informed ZLR that up to $4 billion in funds were available through the Oil Spill Liability Trust Fund administered by the U.S. Coast Guard. (P-App.114–15/R.2 ¶ 33; P-App.101/R.7 ¶ 13; R.8:218–19.) *See* 33 U.S.C. §§ 2701–61. Enbridge also agreed to provide funds to hire a consultant, David Dybdahl, to advise ZLR on insurance issues. (P-App.115/R.2 ¶ 34; P-App.101/R.7 ¶ 14.). Enbridge met with the consultant and provided a briefing on the scope and terms of its insurance coverage.

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

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

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

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

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

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

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

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

- Wis. Stat. § 59.69(2)(bs): "As part of its approval process for granting a conditional use permit under this section, a county may not impose on a permit applicant a requirement that is expressly preempted by federal or state law."
- Wis. Stat. § 59.70(25): "A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability."

These provisions took effect on July 14, 2015.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

This consolidated appeal involves two cases and three issues.

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

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

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

The second issue involves a question of appropriate remedy. A circuit court's decision on whether to grant a particular remedy based on equitable or factual considerations is reviewed by this Court under the "highly deferential" erroneous exercise of discretion standard. *Prince Corp. v. Vandenberg*, 2016 WI 49, ¶ 16, 369 Wis. 2d 387, 882 N.W.2d 371; *see also Duhame by Corrigal v. Duhame*, 154 Wis. 2d 258, 262–63, 453 N.W.2d 149 (Ct. App. 1989).

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

ARGUMENT

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

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

A. Wisconsin state statutes preempt the Insurance Requirements.

Wisconsin Statutes section 59.69(2)(bs) prohibits counties from "impos[ing] on a permit applicant" any CUP conditions that are "expressly preempted by federal or state law." Enacted at the same time as section 59.69(2)(bs) as part of Act 55, section 59.70(25) provides that "[a] county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general

liability insurance coverage that includes coverage for sudden and accidental pollution liability." Read together, these statutes both preempt the Insurance Requirements and prohibit Dane County from including them in the CUP. Dane County required Enbridge to obtain two types of insurance other than the CGL insurance that it already maintained. (P-App.115/R.2 ¶ 35; P-App.102/R.7 ¶ 15.). This is the rare case where both the permit applicant and Dane County agree that those Insurance Requirements were invalid. Dane County does not dispute that Enbridge is an interstate hazardous liquid pipeline operator. And, more importantly, Dane County does not dispute that Enbridge carries the necessary insurance required to trigger section 59.70(25)'s preemption.

In fact, throughout this litigation, Dane County has consistently admitted that Enbridge "carries" the "comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." Wis. Stat. § 59.70(25). Dane County admitted in pleadings[3] that Enbridge had notified ZLR that it was carrying insurance with sudden and accidental pollution liability coverage and, as a result, that "[s]ection 59.70(25) prohibits the County from enforcing the [Insurance Requirements] that are the subject of this action." (P-App.114/R.2 ¶ 32; P-App.101/R.7 ¶ 13; P-App.104/R.7 ¶ 35.) In

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

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

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

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

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

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

Even the language of the Insurance Requirements in the CUP confirms that Enbridge carries sudden and accidental pollution liability coverage through "a time element exception to the pollution exclusion." Condition No. 7 of the CUP provides: "Enbridge shall procure and maintain liability insurance as follows: $100,000,000 limits in General Liability insurance with a time element exception to the pollution exclusion *(currently in place)*." (P-App.400/R.8:177 (emphasis added).) Thus, the note added to the CUP "identifies that the County's ability to enforce [the Insurance Requirements] are affected by [Act 55]." (R.8:125; R.9:253–54.)

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

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

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

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

This erroneous interpretation resulted from the court's reading of section 59.70(25) in isolation. But doing so violates a basic canon of statutory construction. As this Court has long observed, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; [and] in relation to the language of surrounding or closely-related statutes . . . ." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110; *accord CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶ 24, 380 Wis. 2d 399, 909 N.W.2d 136 ("[L]aws addressing the same subject should be interpreted harmoniously, if possible.")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> In short, conditional use permits *are governed by* ordinances within the Town's Zoning Chapter of the Code of Ordinances. *Thus*, noncompliance with the terms of a CUP is tantamount to noncompliance with a Town ordinance.

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

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

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

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

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

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

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

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

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

In the end, the legislature made a policy determination to limit a county's ability to impose certain insurance requirements, Wis. Stat. §§ 59.69(2)(bs), 59.70(25), and by extension has precluded the enforcement of those requirements. The Citizens have no authority under section 59.69(11) to sidestep the legislature's policy determination. Indeed, when the legislature eliminated Dane County's authority to enforce the Insurance Requirements, the Citizens' authority, being parallel, also ended. Leaving the court of appeals' decision in place and allowing the Citizens to enforce the unlawful Insurance Requirements "would change the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987).

* * * *

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

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

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

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

CONCLUSION

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

Dated this 4th day of October, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,995 words.

Dated this 4th day of October, 2018.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wisconsin Statutes section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court and the court of appeals; and (3) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

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ELECTRONIC FILING CERTIFICATION

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

Dated this 4th day of October, 2018.

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HAND DELIVERY CERTIFICATION

I hereby certify that on October 4, 2018, this brief and appendix were hand-delivered to the Clerk of the Supreme Court. I further certify that the brief and appendix were correctly addressed.

Dated this 4th day of October, 2018.

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

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

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

DANE COUNTY,
Respondent-Appellant,

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

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

COURT OF APPEALS DECISION DATED MAY 24, 2018

DANE COUNTY'S RESPONSE BRIEF AND APPENDIX

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

ENBRIDGE ENERGY COMPANY, INC. AND ENBRIDGE ENERGY, LIMITED PARTNERSHIP,
Petitioners,
v. **Case No. 17 AP 0013**

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

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

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

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF CASE

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

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

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

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

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

> environmental study be conducted after clean-up.

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

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

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

[3] Enbridge never satisfied this request.

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

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

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

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

(R.8, p.183.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

liability." Act 55 also created Wis. Stat. § 59.69(2)(bs), which states: "As part of its approval process for granting a conditional use permit under this section, a county may not impose on a permit applicant a requirement that is expressly preempted by federal or state law." It is also important to note that at the time Mr. Dybdahl reviewed Enbridge's insurance and when ZLR imposed the insurance conditions the Legislature had not yet adopted Act 55.

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

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

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

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

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

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

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

(R.8, p. 125)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

ARGUMENT

I. THE APPROPRIATE REMEDY WAS REMAND TO ZLR.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. n.29 (emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> That is, what is expressly preempted is quite specific. The phrase "may not require an operator of an interstate hazardous liquid pipeline *to obtain insurance"* creates only one limitation on a county once it gets triggered, namely, preventing the county from requiring the operator *to obtain insurance*. This says nothing about *other conditions related to insurance*, including any reasonable requirements that counties might use *related to* insurance, whether or not the operator makes the required showing to trigger the Act. This is significant in part because the Act does not restrict counties in their ability to include conditions requiring proof of insurance at any time, at specified intervals, or any such.

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

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

CONCLUSION

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

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

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

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

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

Dated this _____ day of October, 2018.

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

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

Dated this ____ day of October, 2018.

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CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(12)

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

Dated this ____ day of October, 2018.

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CERTIFICATION

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

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

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

Dated this ____ day of October, 2018.

_____
David R. Gault
Assistant Corporation Counsel

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2016 AP 2503
2017 AP 0013

DANE COUNTY BOARD OF SUPERVISORS,
DANE COUNTY ZONING AND LAND
REGULATION COMMITTEE and ROGER LANE
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AND ENBRIDGE ENERGY LIMITED
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DANE COUNTY, DANE COUNTY BOARD
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AND LAND REGULATION COMMITTEE AND
ROGER LANE DANE COUNTY ZONING
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Appeal No.
2017 AP 0013
2016 AP 2503

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 ENGRIDGE ENERGY LIMITED
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On Petition for Review of the Decision of the Court of Appeals,
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Appeal from a Judgment dated November 11, 2016,
Entered in the Dane County Circuit Court, Branch 17,
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BRIEF OF PLAINTIFFS-APPELLANTS ROBERT CAMPBELL, HEIDI CAMPBELL, KEITH REOPELLE, TRISHA REOPELLE, JAMES HOLMES, JAN HOLMES and TIM JENSEN

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In the consolidated case before the circuit court, the court found that Enbridge had the necessary insurance and that the county could not require additional insurance or proof of the insurance Enbridge had. The Court of Appeals reversed, found no evidence that limited the County from requiring proof of insurance or imposing other conditions related to insurance.

II. Are the Campbells, Reopelles, Holmes' and Mr. Jensen (Landowners) as consolidated parties in the trial court allowed to question the factual basis for application of the limiting statute, and as property owners of real estate in the district affected by Enbridge's tar sands pipeline expansion able to enforce the conditional use permit?

The circuit court ruled that the landowners were not allowed to raise the issue of the adequacy of Enbridge's insurance unless the County also challenged it, and dismissed their claim for injunction. The Court of

Appeals reversed, found that the consolidation order made the landowners full parties to the consolidated case, and nothing prevented them from raising the issue of whether Enbridge had met the insurance requirement of the statute.

III. When as in this case, the law is changed during a zoning proceeding to consider an appeal of a conditional use permit, and the conditions of the permit may have been affected by subsequent legislation, should the matter be remanded to the zoning authority or is the court free to rewrite the conditions integral to the permit?

Following its finding that the County was unable to require additional insurance from Enbridge, the circuit court removed that condition and another condition related to providing proof of coverage from the conditional use permit and refused to remand the matter to the zoning committee. The Court of Appeals reversed and found that the circuit court had impermissibly interfered in the committee's legislative function, and remanded the case to the circuit court and committee to find whether the limiting statute applied based on proof of Enbridge's insurance.

INTRODUCTION

Robert and Heidi Campbell, Keith and Trisha Reopelle, James and Jan Holmes and Tim Jensen ("Landowners") the Plaintiffs Appellees in

this proceeding all own and reside on property in close proximity to the pumping station and Enbridge Energy's Line 61, a 42 inch pipeline carrying Canadian tar sands oil from Alberta to a refinery south of the Illinois state line. In 2014 Enbridge sought to double the volume of tar sands oil through the pipeline and applied for a conditional use permit from Dane County to build a new pumping station near Marshall, in northeastern Dane County. ("CUP") This pumping station is expected to operate for decades.

The County Zoning and Land Regulation Committee ("ZLR") conditioned its approval of the CUP on Enbridge securing supplemental pollution insurance and providing proof of coverage. The insurance conditions were based on the recommendations of David Dybdahl, a nationally recognized expert in risk management. The insurance requirements were included in the CUP to assure the availability of funds to cover clean up and emergency response costs and to cover damages to natural resources in case of an accident in the County.

Enbridge refused to provide evidence of their insurance and sued the County challenging the insurance conditions included in the CUP. The Landowners seek protection of their health and property from the

devastating consequences of a pipeline leak or spill through such insurance. The outcome of this case revolves solely on the narrow *legal* questions of:

1) Whether the statute enacted after the CUP was granted necessitates that a hazardous liquid pipeline operator continually carries "comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability"
2) Whether Enbridge must provide proof to the County on an on-going basis of such insurance?
3) In the absence of proof that Enbridge carries insurance coverage specified by the legislature does Dane County has the authority to enforce its insurance conditions?

The plain words of Wis. Stat. §59.70 (25),[1] require a hazardous liquid pipeline company like Enbridge to demonstrate that it perpetually carries the necessary insurance in order to restrict the County's insurance requirements. The statute is clear and precise. It specifies "comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." ("Sudden and Accidental Insurance") The statute also clearly and precisely requires that the pipeline company

"carries" certain insurance that "includes" coverage for sudden and accidental pollution liability.

There can be no doubt that the legislature's choice of the word "carries" in the statute imposes an ongoing obligation on Enbridge to carry such insurance in order to avoid the application of the County's own insurance conditions. Enbridge has **never** produced its policy to demonstrate that it has the required insurance. The Landowners are entitled under the law for the County to review and confirm that Enbridge's has the required insurance. ("Where's the beef?") Otherwise their property rights will not be protected.

Contrary to Enbridge's and WMC's incendiary briefs, this case has absolutely nothing to do with "an invitation to lawlessness" or "dodging legislation" Enbridge brief. p. 25, nor the collapse and ruin of the nation's essential energy infrastructure. It simply has to do with providing sufficient insurance coverage mandated by either the legislature or the insurance coverage that the CUP was conditioned upon.

Such a requirement is no different than verifying and enforcing the legislative mandate to carry adequate insurance as a condition to operating a motor vehicle.

Insurance is our economy's hallowed, free market-based mechanism to mitigate risk. Buying commercial insurance is part of the cost of doing business. By insuring against life's perils, all of the affected players, including innocent third parties, can at least be financially protected from the inevitable dangers inherent in living in an industrial society. When an officer stops a vehicle and asks to see proof of insurance, the driver must produce proof of insurance, not claim that it is a "trade secret," or misrepresent its coverage, at the risk of prosecution and forfeiture[1].

The overriding public interest demands interstate hazardous liquid pipeline operators verify that their facilities are adequately insured to

[1] 344.62 Motor vehicle liability insurance required.

(1) Except as provided in s. 344.63, no person may operate a motor vehicle upon a highway in this state unless the owner or operator of the vehicle has in effect a motor vehicle liability policy with respect to the vehicle being operated. 344.62(2) Except as provided in s. 344.63, no person may operate a motor vehicle upon a highway in this state unless the person, while operating the vehicle, has in his or her immediate possession proof that he or she is in compliance with sub. (1). The operator of the motor vehicle shall display the proof required under this subsection upon demand from any traffic officer. 344.64 Fraudulent, false, or invalid proof of insurance. No person may do any of the following for purposes of creating the appearance of satisfying the requirements under s. 344.62 (2):

(2) Represent that any printed or electronic proof of insurance, policy of insurance, or other insurance document or electronic image is valid and in effect, knowing or having reason to believe that the proof of insurance, policy of insurance, or other insurance document or electronic image is not valid or not in effect.

protect the health and property of neighbors. There was a good reason for the legislature and the County to be concerned. Enbridge caused the worst inland oil spill in U.S. history, which cost $1.2 billion to clean up. The need for insurance arises from the nature of Enbridge's pipeline operations: transporting, under high pressures, highly hazardous, combustible and corrosive liquid in pipes, which all too frequently rupture, and often are located in close proximity to family homesteads.

Shorn of Enbridge's rhetoric, this Court should examine the record to determine whether Enbridge has supplied the evidence necessary to invoke the budget amendment's limiting provision. Enbridge has failed to establish that it has the requisite insurance coverage. As a consequence, the Landowners are legally authorized to maintain this lawsuit to enforce the County's insurance conditions.

The Landowners respectfully request this Court to affirm the Court of Appeals in sustaining the Landowners cause of action and remand this matter to the ZLR.

STATEMENT OF THE CASE

Because Enbridge caused a catastrophic oil spill from a similar pipeline in Michigan in 2010, which cost $1.2 billion to partially remediate

and caused protracted litigation with Enbridge's insurer, the ZLR required Enbridge to purchase a $25 million environmental clean-up insurance policy to cover gaps in the policies Enbridge said it had.

As Enbridge described its existing insurance (having declined to provide the policies claiming that they contained "trade secrets"), R 8:207 it would not cover cleanup or emergency response costs and would not cover any leaks or spills unless they are discovered and reported within certain time limits. R 8:211-12.

Enbridge opposed the environmental clean-up insurance requirements and appealed the ZLR's decision to the Dane County Board. While the administrative appeal was pending, the state legislature adopted a statute in the 2015-16 Budget Bill limiting the circumstances when counties can impose insurance conditions on 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 Landowners' case. The

court refused to remand the permit to the County and instead removed two of the conditions from the permit. The County and the Landowners separately appealed from that same Circuit Court decision, and the original two lawsuits remain consolidated on appeal.

On appeal, the Court of Appeals reversed the Circuit Court, finding that 1) the Landowners are parties with authority to insist on proof of insurance in order to enforce those conditions; 2) Enbridge failed to show the ZLR that it carries any particular coverage, much less the type required by Wis. Stat.§ 59.70(25); and 3) that the appropriate remedy was remand to the Circuit Court to direct the ZLR to make the finding necessary to limit or uphold its insurance conditions (P-App. 17).

Enbridge filed a Petition for Review in this Court, which was granted.

STATEMENT OF FACTS

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.

Enbridge is transporting a dangerous product in the pipeline through Dane County. Enbridge's pipeline is carrying heavy crude oil through Dane County which is both hazardous and corrosive. As a 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. 9:102-6

Bitumen or tar sands oil, like tar, is too viscous to flow through pipelines without substantial modifications. It has to be mixed with a diluent, which is toxic, volatile and explosive, and heated to approximately 140°F. Heating the tar sands increases the rate of corrosion. Then it must be accelerated with pumps under high pressure reaching 1200 pounds per square inch (psi), increasing the incidence of stress fractures in the pipeline. All of these modifications increase the probability of a break in the pipeline. R. 8:22, 9:103-104

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. 8:22

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. Both because of the unusual characteristics of tar sands, which sinks instead of floating in water, and the volume of oil spilled over many hours before the leak was detected, 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 R.9-120, 126-27.

In the aftermath, Enbridge was severely criticized by the National Transportation Safety Board ("NTSA") 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 in the pipeline for more than 17 hours. NTSA pointed out that 10 days earlier Enbridge had testified to Congress that it could quickly detect and stop even the smallest leaks; and found a complete breakdown of Enbridge's culture of safety. R. 9:91-2,103

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. 9:91

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. 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, Phase 2 will increase 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

located upon is zoned "A-1 Exclusive".(See: §10.123(3)(c), Dane Co. Ordinance "DCO".)

Dane County ZLR Proceedings. ZLR considered Enbridge's application for a CUP pursuant to the applicable requirements and standards set forth in Section 10.255 of the DCO . R. 8:50-126 and 8:164-169 The ZLR held four public hearings on the application, R. 8:50-126, and also commissioned an independent expert risk analyst, David Dybdahl[2] to review the Project. R. 8:198-227 (See L-App. 49-78) Mr. Dybdahl provided the only expert testimony to the ZLR on the environmental clean-up insurance. Enbridge presented no other expert to contradict or refute any of the opinions offered by Mr. Dybdahl. In addition the ZLR considered the testimony of many county residents and others about increased risks and unacceptable threats to the physical environment posed by the project.

On April 8, 2015, Mr. Dybdahl submitted his report to the ZLR. David Dybdahl started his analysis by stating: "Enbridge declined to provide the actual insurance policies (42 of them in total) to me for review,

[2] 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. 8:193-194

claiming that the documents contain trade secrets." R. 8:207. The policies were also about to expire May 1, 2015. R.8-207. However, based on the summaries provided to him, for purposes of making a recommendation to the ZLR (three (3) months before the Act 55 Insurance Limitations were enacted. 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 "time limited" pollution exclusion that did not cover clean-up costs, emergency response 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 Enbridge's insurance policy, and led to $103 million in unrecovered insurance costs because Enbridge had inadequate 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 "readily available" environmental impairment secondary insurance coverage. 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. R.8-220-223

Pursuant to its authority under Section 10.255(h) of the DCO, the ZLR 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 DCO could not be satisfied unless certain conditions were included in the approval of this risky project. The ZLR 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 CUP #2291 as Conditions No. 7 and 8. (See L-App. 79-84). Conditions No. 7 and 8 read as follows:

> 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.

("Conditions No. 7 and 8")

Under the Zoning Ordinance and the stated terms of the permit, the CUP 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 DCO at §10.255 (2) (j). Enbridge filed an appeal to the Dane County Board on May 4 pursuant to §10.255(2)(j). It argued that the insurance conditions were preempted by federal law, an argument it subsequently abandoned (R.8-310-313; *Enbridge Energy Co. v. Dane Cty.*, 2018 WI App 39, 382 Wis. 2d 830 . ¶ 21). (See L-App. 1-48)

Legislative intervention. On July 2, 2015, the State Legislature interceded through an anonymously authored amendment to the Budget

Bill. 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 limiting counties from requiring additional insurance for hazardous liquid pipeline companies, provided that the company has certain insurance coverage. Joint Finance Committee, Motion 999, p. 18, ¶55, dated July 2, 2015. This amendment, adopted without any debate or public hearing, contained terms directly related 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.

Dane County ZLR Proceedings –Post Budget Bill. On September 29, 2015 the ZLR met and reversed the Zoning Administrator's unauthorized action on July 24, 2015 in removing Conditions No. 7 and 8 from the CUP. It also voted to deny Enbridge's request to delete Conditions No. 7 and 8. R. 9:247-254. The ZLR was never presented 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 ZLR's

refusal to remove Conditions No. 7 and 8 from the CUP, R. 8:3-18. On December 3, 2015, the Board heard the appeal. It voted 27 to 2 to uphold the decision of the ZLR. R. 9:439-443

Circuit Court proceedings. On January 2, 2016, Enbridge petitioned the Circuit Court for certiorari review under Wis. Stat. §59.694(10) of Dane County's actions. Separately, on February 8, 2016, the Landowners sought injunctive relief under Wis. Stats. §59.69(11), to have the conditions enforced. Judge Anderson ruled on July 11 that the newly-enacted law applied, granted Enbridge's certiorari petition, excised the Conditions No. 7 and 8 from the CUP and granted Enbridge's Motion to Dismiss the Landowners' complaint for an injunction.

Court of Appeals proceedings. After both Dane County and the Landowners in the consolidated cases appealed the circuit court's orders, the Court of Appeals held oral arguments in the case. The Court of Appeals reversed the circuit court's decision. It held that the Landowners could raise the issue of the sufficiency of Enbridge's insurance coverage and contest Enbridge's unsubstantiated claims; that it had the insurance required by the statute. It further held that remand of the case to the ZLR was the appropriate remedy in this case, because even if the statute applied,

the ZLR never considered issuing the CUP without those insurance conditions.

Following the Court of Appeals' decision May 24, 2018, Enbridge filed a petition for review, which this Court granted September 4, 2018.

STANDARD OF REVIEW

While Campbells et. al. agree with the standards for review in a certiorari action and interpretation of statutes, the standard for review of a court's remedy order in a certiorari review is far less deferential than the review in partition or divorce cases cited in Enbridge's brief. Judges cannot grant conditional use permits; a "highly deferential" abuse of discretion standard is inappropriate when review focuses on the action of the local government's legislative role. "The role of courts in zoning matters, is limited because zoning is a legislative function." *Buhler v. Racine County*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966), cited by *Town of Rhine v. Bizzell*, 2008 WI 76, ¶26, 311 Wis. 2d 1, 751 N.W.2d 780

ARGUMENT

I. THE ACT 55 INSURANCE LIMITATIONS DO NOT NOW APPLY BECAUSE ENBRIDGE HAS NOT SHOWN THAT IT CARRIES THE INSURANCE COVERAGE REQUIRED BY THE LEGISLATURE.

Enbridge's reliance on the statutes included in the Act 55 Insurance Limitations is unsupported by the clear language of the statutes themselves. Its complaint is based on a total disregard for elementary principles of statutory construction, and is doomed by its own refusal to produce evidence required by the very law that it exclusively relies upon.

The construction of the expressed statutory language used by the legislature in the Act 55 Insurance Limitations is the central legal issue in this appeal. Issues of statutory construction are reviewed by this Court de novo. *See Crown Castle USA, Inc., v. Orion Constr. Grp., LLC*, 2012 WI 29, ¶12, 339 Wis. 2d 252, 811 N.W.2d 332. Statutory interpretation must always begin with the text of the statute,

> "Well established principles of statutory construction grounded in precedent long established and consistently followed by this Court and the courts of this state over the last three centuries guide and control the decision of this case. We discover a statute's meaning in its **text**, context, and structure. "[S]tatutory interpretation begins with the language of the statute," and we give that language its "common, ordinary, and accepted meaning." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶45-46, [**572] 271 Wis. 2d 633, 681 N.W.2d 110 (internal mark and quoted source omitted) …If we determine the statute's plain meaning through this methodology, we go no further. *Id.*, ¶¶45-46 ("If the meaning of the statute is plain, we ordinarily stop the inquiry." (internal mark and quoted source omitted)). *See generally* Daniel R. Suhr, *Interpreting Wisconsin Statutes*, 100 Marq. L. Rev. 969(2017). Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 2018 WI 75, ¶96, 382 Wis. 2d 496, 914 N.W.2d 21

"[W]e assume that the legislature's intent is expressed in the

statutory language." *State ex rel. Kalal* 2004 WI 58, ¶44,

If the statutory language is clear, courts are bound to apply that language as it reads because the words used by the legislature are the best evidence of its intent. *Id.*, ¶¶45-46.

A. The Language in the Act 55 Insurance Limitations Allows Counties to Verify Insurance Coverage Include Other Conditions, and Require Liquid Hazardous Pipeline Companies to Obtain Insurance Mandated by the County In the Absence of Proof of the Insurance Specified By the Legislature.

Initially, the statute only limits a county's ability to require a hazardous liquid pipeline company to *obtain* insurance if the company *carries* the insurance prescribed by the legislature. If the company does not have that insurance, the limitation on county insurance requirements does not apply. Both terms ("carries" and "includes") are expressed in the present tense supporting the construction of the statute that the legislature imposed a continuing duty to maintain the specified insurance coverage.

Applying these well settled rules of statutory construction to the statutory provisions at issue in this matter, read in proper context, demonstrates that the rules that Dane County and Enbridge are subject to are those announced by the Court of Appeals:

> "The plain language of the Act 55 insurance limitations defines a strikingly narrow limitation on county action. That is, what is expressly preempted is quite specific. The phrase "may not require an operator of an interstate hazardous liquid pipeline *to obtain insurance*" creates only one limitation on a county once it is triggered, namely, preventing the county from requiring the operator *to obtain insurance*. *Enbridge Energy Co.*, 2018 WI App 39, ¶66

1) The Act 55 Insurance Limitations imposes no *other conditions related to insurance*, including any reasonable requirements that counties might use *related to* insurance, consistent with the nature of conditional use permits allowing conditional uses "only in a controlled manner," See *Town of Rhine*, 2008 WI 76, ¶¶20-21, whether or not the operator makes the required showing to trigger the Act.

2) The Act 55 Insurance Limitations do not restrict counties in their ability to include conditions requiring proof of insurance at any time, at specified intervals. The closely related provision, WIS. STAT. §59.69(2)(bs) which provides: "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." County action in this area is not limited unless the requirement at issue involves express preemption. *Enbridge Energy Co.*, 2018 WI App 39, ¶65

3) It is not sufficient to show that the operator has carried this insurance in the past or might obtain it in the future. *Enbridge Energy Co.*, 2018 WI App 39 ¶71

4) Recognition of the ability of local officials to verify insurance requirements is inherent in the Act 55 Insurance Limitations.

To rule as Enbridge requests would necessarily implicate the judicial branch in engaging in the practice of rewriting legislation. The judicial principle of strict construction of legislation condemns such a practice. Enbridge is inviting this Court to breach these inviolate principles—the holy grail of conservative jurisprudence.

Even though Enbridge would like a rewrite of the hastily drawn Act 55 Insurance Limitations (See supra pp. 17-18) it does not get a "do over" in this Court unless this Court is prepared to overrule "...well-established principles of statutory construction grounded in precedent long established and consistently followed by this Court and the courts of this state over the last three centuries.." *Tetra Tech EC, Inc.* 2018 WI 75 ¶96. The result will be to invite the courts in this state now and in the foreseeable future to engage in judicial legislating.

B. There Has Been No Evidence Provided that Enbridge Has Had and Will Continue To Have the "Sudden and

Accidental Pollution Liability Insurance" Required by Wis. Stat. §59.70(25).

The record shows that the ZLR had no evidence to support a determination that Enbridge had secured Sudden and Accidental Insurance" in April or September 2015. Enbridge claimed a "trade secret" privilege and refused to share or disclose its insurance policies to either the ZLR or Mr. Dybdahl in April. The policies in effect in April were not the same policies Enbridge had in September.2015 (Supra p.14)

To this day, over three years after the legislature without public hearings approved the Act 55 Insurance Limitations, Enbridge has not produced its policies demonstrating that it has secured the Sudden and Accidental Insurance, a prerequisite to qualifying for the exemption.

There is no basis in the record for finding that Enbridge satisfied the prerequisite to the state exemption when it refused to produce the very evidence that would prove one way or the other whether it qualified for the exemption. Nor has Enbridge demonstrated that it will maintain that insurance on an on-going basis. In fact, Enbridge insists that it need not demonstrate compliance on an on-going basis and insists that it has no duty to maintain such insurance.

Enbridge's position is completely at odds with the plain language

of the Act 55 Insurance Limitations. The Court of Appeals observed, "… we see no starting point in the record for an argument that Enbridge demonstrated to the zoning committee that it "carries" the insurance delineated in the Act 55 Insurance Limitations that it now alleges. Nor do we see an attempt by Enbridge to make any credible argument." *Enbridge Energy Co.*, 2018 WI App 39 ¶¶75-76 During the zoning permit proceedings before the Circuit Court, and now on appeal, Enbridge has relied on the April 2015 insurance consultant's report, and the fictional "agreement" or "concession" [3] by the County that Enbridge has the insurance prescribed by Wis. Stat. §59.70(25) to establish what insurance it carried at any time.

The Dybdahl report, based as it was on a summary from Enbridge of policies due to expire May 1, 2015, contradicts Enbridge's position. He

[3] The County's "concession" lies at the feet of David Gault, an assistant corporation counsel. Gault is merely an employee, a ministerial officer of the County. He is nothing more. He is not the County Board which is the entity that makes binding determinations like these. He can no more bind the County than a building permit official can when he or she issues a building permit in error. A petitioner like Enbridge is held to constructive knowledge of the limits of a ministerial official's authority. Furthermore Gault's prescience, his ability to divine compliance of Enbridge's insurance policy with the Act 55 Insurance Limitations defies belief. First, because Enbridge never showed it to anyone—not to Dybdal, the County's consultant, not to the County Zoning Committee, not to the Circuit Court and certainly not to Gault. Gault has failed to offer any basis for the opinion Enbridge places so much reliance upon.

wrote “the words "sudden and accidental" carry no weight in the current pollution exclusion. A more accurate term to describe the limited coverage for pollution events within the current General liability insurance policy is "Time Element Pollution" coverage.” (R.8-209) The pollution had to be discovered in 30 days and reported within 90 days or there would be no insurance coverage, leaving “an obvious gap” in Enbridge’s coverage (R.8-211).

. As the Court of Appeals noticed, that report makes consistent references to time-limited insurance policies of Enbridge. Dybdahl’s report speaks in terms of the “current” Enbridge policy, what insurance “Enbridge is already purchasing,” the “financial resources available in 2015,” and explicitly notes that Enbridge’s purported “current insurance policies will expire on May 1st” 2015. Indeed, Dybdahl stated that, ‘[i]t served little purpose [for Dybdahl, on behalf of the ZLR] to closely review insurance policies that would expire in a few weeks.’” R.8-207

In sum, the “carries” and “includes” elements of the Act 55 Insurance Limitations have not been met, and therefore the insurance limitations have not been triggered. This conclusion is dispositive in establishing that the Act 55 Insurance Limitations do not apply based upon

the facts established in the current record. As Enbridge acknowledges, the Act 55 Insurance Limitations requires that Enbridge meet the "threshold question of whether Enbridge carries CGL insurance coverage that includes coverage for Sudden and Accidental liability." *Enbridge Energy Co*., 2018 WI App 39, ¶77

C. Wis. Stat. §59.70(25) Does Not Affect Enbridge's Conditional Use Permit Condition No. 8

The second condition Enbridge seeks to cut out of its CUP does not require it to obtain insurance; it only prescribes the quality of the insurer (A.M. Best rating), the named insureds, and that Enbridge must provide proof on demand of coverage it claims it already has[1]. Enbridge has offered no legally cognizable argument supporting the elimination of Condition No. 8.

D. "Sudden and Accidental" Pollution Liability Insurance Means What this Court Held it Means in *Just v. Land Reclamation*

WIS. STAT. § 59.70(25) expressly refers to a "comprehensive general liability insurance" policy with "coverage for sudden and accidental pollution liability". Comprehensive general liability insurance policies contain exclusions for damages resulting from pollution. This Court has defined the term "sudden and accidental pollution liability" in

its decision *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 742-57, 456 N.W.2d 570 (1990).” we conclude that the phrase "sudden and accidental," contained in the pollution exclusion clause, means unexpected and unintended damages.” *Just* 166 Wis. 2d at 760 (following a discussion of a broad range of authority addressing pollution exclusions in comprehensive general liability insurance policies). The Court rejected the landfill owner’s insurance company’s claims that “sudden and accidental” had a strictly time limited meaning, and found that it had to defend against claims for damage to neighboring landowners’ health and property even though the harm continued for some time. By contrast, the insurance Enbridge claims to have had in March 2015 limited coverage to pollution discovered within 30 days and reported within 90 days. R. 8-209, what Dybdahl called “time element” coverage. Of course only Enbridge and its insurer know what insurance it had then, or has now.

Just is squarely on point as to the meaning ascribed to the legislature’s choice of the term “sudden and accidental pollution liability”. The legislature intended to mandate a pollution insurance policy that offers coverage for both “abrupt or immediate” and “unexpected and unintended.” casualty events *See Just,* 155 Wis. 2d at 741-42, 745-46 for a company to

avoid a requirement in a conditional use permit to obtain other insurance.

"The legislature is presumed to act with full knowledge of existing case law when it enacts a statute." *Strenke v. Hogner*, 2005 WI 25, ¶28, 279 Wis. 2d 52, 694 N.W.2d 296 (citing *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶22, 236 Wis. 2d 316, 613 N.W.2d 120, in turn citing *Ziulkowski v. Nierengarten,* 210 Wis. 2d 98, 104, 565 N.W.2d 164 (Ct. App. 1997)).See also *Linda L. v. Collis (In re Guardianship & Protective Placement of Catherine P*., 2006 WI App 105, ¶57, 294 Wis. 2d 637, 718 N.W.2d 205

When interpreting a statute, we look first to its language. *Vill. of Lannon*, 2003 WI 150, 267 Wis. 2d 158, P13, 672 N.W.2d,275, Strenke, 2005 WI 25, ¶20. Therefore, despite the nearly nonexistent legislative history of the statute, we must conclude that the legislature intended to provide a reasonable assurance to communities before they could be limited from making a pipeline operator obtain more, so it did not use "time element pollution insurance" in the statute.

Certainly, neither Enbridge nor the County have identified either any legislative enactment or opinion of this Court since *Just* that could alter or contradict the meaning of this phrase In rejecting the "… argument that the

phrase "sudden and accidental" …has only a temporal meaning within the exclusionary clause…" *Just,* 155 Wis. 2d 737, 746, this Court has made clear that "time element" and "sudden and accidental" pollution insurance are not the same. We must presume the legislature knew that.

Enbridge's counsel conceded at oral argument that the interpretation it urges this Court to adopt would be better for Enbridge if the legislature had used the term "time element exception" in the Act 55 Insurance Limitations and not "sudden and accidental liability coverage." However, the legislature did not chose to use the phrase "time element insurance" and it is not this Court's function to rewrite the Act 55 Insurance Limitations to accommodate Enbridge. The legislature used a phrase that this Court has defined in crafting a narrow exception to the ability of counties to impose a conditional use permit insurance condition.

Enbridge attempts to avoid the definition of the term "sudden and accidental," adopted in *Just* on the basis that *Just* involved an insurance coverage dispute. That *Just* arose in the context of the interpretation of an insurance contract does not diminish its precedential value in this matter involving the adequacy of Enbridge's insurance and a county's ability to impose conditions and verify coverage pursuant to a conditional use

permit. *Just* remains good law interpreting the language the statute employs in the insurance coverage context. Enbridge had to go to Texas, Louisiana and Oklahoma to find other authority interpreting that term, because Wisconsin case law did not support its position. (Enbridge brief pp. 24-25).

E. Neither the Insurance Consultant's Report, Nor the Unsupported Opinions of the Assistant Corporation Counsel, Nor Statements of Enbridge's Attorneys Can Serve as Evidence of Enbridge's Insurance Coverage at Any Time during the Last Three Years.

Enbridge tries to finesse the distinction between "time element" and "sudden and accidental" pollution liability insurance by claiming for the first time in its Supreme Court brief that there is no difference between these two types of coverage, or if there is, Enbridge has both kinds of insurance, or incredibly despite everything the insurance consultant and this Court have opined, that "time element" is even better (Enbridge brief pp 22-24) with no basis in fact or law. As Enbridge will not disclose its policies, it relies on false representations of the statements contained in the Dybdahl report and statements taken out of context made by Asst. Corporation Counsel Gault. It cannot claim that ZLR or the County Board made any finding that its insurance met the specifications of Wis. Stat.

§59.70(25), for that question was never addressed by any fact finding legislative or quasi-judicial body.

Dybdahl questioned Enbridge's use of the term "sudden and accidental" pollution insurance in the portion of his report titled "Sudden and Accidental Pollution Insurance?" Mr. Dybdahl asks "..why does Enbridge represent that it has Sudden and Accidental Insurance when its only liability insurance on Line 61 is a General Liability insurance policy which contains a pollution exclusion?" R.8-211 and proceeds to explain the confusion around the term, and the evolution of pollution insurance. He never saw Enbridge's policies, but what he saw in its summary was "time element" pollution insurance, at least in March 2015. The pollution exclusion would apply to prevent coverage, if a pollution release were not discovered within 30 days or if Enbridge failed to report the loss to the insurer within 90 days of discovery. R. 8-211

As for the statements of Mr. Gault, those are not the result of any fact finding that either the ZLR, the County Board or he conducted as to whether Enbridge's insurance meets the requirements of Act 55 Insurance Limitations. He is in the dark on Enbridge's insurance coverage like

everyone else. The misbegotten action of the zoning administrator[4], lacking authority to issue or modify conditional use permits under DCO 10.255(b) removed the insurance conditions from the CUP in July 2015, was overruled by the ZLR after they were informed about it in September 2015.R.8-125.

The absence of evidence on the nature of Enbridge's insurance coverage and the County's inability to ascertain whether that it meets the statutory requirements is entirely Enbridge's fault. Having refused to disclose its policies for over three years based on a claim of "trade secret," it cannot now invent the evidence it has concealed all this time. Enbridge has never demonstrated that it has the insurance necessary to limit the County from making it comply with Conditions No. 7 and 8 and the Act 55 Insurance Limitations do not expressly preempt the County from verifying that Enbridge has adequate insurance.

II. The Conditional Use Permit and the Insurance Conditions Attached to It Are Enforceable by Property Owners under Wis. Stat. § 59.69(11)'s Enforcement Remedy.

[4] Roger Lane, the zoning administrator admitted he has no authority to do what he did, and sent Enbridge the conditional use permit with the insurance conditions restored October 9, 2015. R.8-133

In persistent attempts to cut the Campbells and other landowners out of this litigation (continually referring to them as "Citizens," though only property owners in the district have enforcement power under the statute, and claiming that they are not real parties to the case despite the language of the court order consolidating the circuit court cases), Enbridge argues against enforceability of the Insurance Condition—that a Conditional Use and all of the conditions attached to it are not a zoning ordinance as that term is used in Subsection 11 § 59.69(11) (E.Br at 35) Its argument is frivolous.

A. Conditional Use Permits May Be Enforced Like Any Other Zoning Ordinance.

Enbridge relies upon an overly narrow and constrained interpretation of Subsection 11 and ignores the plain language of the statute. Subsection 11 uses the term "ordinances":

> **59.69 (11)** PROCEDURE FOR ENFORCEMENT OF COUNTY ZONING ORDINANCE. The rules and regulations and the districts, setback building lines and regulations authorized by this section, shall be prescribed by ordinances which shall be declared to be for the purpose of promoting the public health, safety and general welfare. The ordinances shall be enforced by appropriate forfeitures. Compliance with such *ordinances* may also be enforced by injunctional order at the suit of the county or an owner of real estate within the district affected by the regulation.(**e.s.**)

The Subsection 11 Enforcement Remedy, is equally applicable to counties and owners of real estate. The absurd result that the Enbridge's

argument leads to is that none of the County conditions in a conditional use can be enforced, because according to Enbridge's construction of Subsection 11 neither a conditional use nor a condition in a conditional use is a zoning ordinance. Even though the Legislature authorized counties to impose conditions in a CUP for the purpose of *promoting the public health, safety and general welfare,* to have it Enbridge's way, neither the conditional use nor the conditions fall within the purview of subsection 11 and therefore none are enforceable.

The Supreme Court's decision in *Forest County. v. Goode,* 219 Wis. 2d 654, 657, 579 N.W.2d 715 (1998), makes it abundantly clear that Subsection 11 applies to enforcement of all land use controls. "Provisions of this kind recognize not only the fact that landowners have a singular stake in *the enforcement of land-use controls…"* (**e.s.**)

There can be no dispute that a conditional use is a land use control. This Court in *State ex rel. Skelly Oil Co. v. Common Council, Delafield*, 58 Wis. 2d 695, 700-701 (Wis. 1973) expressly recognized conditional uses as a land use control:

> Conditional uses or as they are sometimes referred to, special exception uses, enjoy acceptance as a valid and successful tool of municipal planning on virtually a universal scale. Conditional uses have been used in zoning ordinances as flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use classification of a particular

> zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone. The Supreme Court of Minnesota in the case of *Zylka v. Crystal* (1969), 283 Minn. 192, 195, 167 N. W. 2d 45, most aptly described this flexibility:
>
> ..By this device, certain uses (e.g., gasoline service stations, electric substations, hospitals, schools, churches, country clubs, and the like) which may be considered essentially desirable to the community, but which should not be authorized generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site depending upon the facts and circumstances of the particular case." 16 N. W. 2d at page 49.

Enbridge's argument that a conditional use is not a zoning ordinance for the purpose of the Subsection 11 Remedy (E Br. at 39-41) offers no legally cognizable basis for disturbing established precedent premised on the plain words of subsection 11.

Town of Cedarburg v. Shewczyk, 2003 WI App 10, P15-P16 (Wis. Ct. App. 2002) further defeats Enbridge's argument. There the Shewczyks argued that the Town cannot maintain an action for an injunction and forfeitures because a violation of a CUP does not constitute a violation of an ordinance. They reasoned that the CUP constitutes a contract and that therefore the Town's remedy for the Shewczyks' noncompliance is limited to damages for breach of that contract. The Court of Appeals disagreed. It found that municipalities frequently use conditional or special use permits as a device when implementing zoning laws. 8 Eugene McQuillin, *The Law*, concluding "In short, conditional use permits are governed by

ordinances within the Town's Zoning Chapter of the Code of Ordinances. Thus, noncompliance with the terms of a CUP is tantamount to noncompliance with a Town ordinance." *Town of Cedarburg*, 2003 WI App 10, ¶16.

Similarly, Dane County's Zoning Ordinance also establishes that the conditions that the County zoning authority establishes in connection with a conditional use are grounded in the standards found in the zoning ordinance. Thus, in DCO §10.123(3) (c), unregulated oil pipelines and associated appurtenances are listed as a conditional use in land zoned as A-1 Exclusive (§10.255(2) (a), of the DCO, describes the conditional use process),

> However, there are certain uses which, because of their unique characteristics, cannot be properly classified as unrestricted permitted uses in any particular district or districts, without consideration, in each case, of the impact of those uses upon neighboring land or public facilities, and of the public need for the particular use at a particular location. Such uses, nevertheless, may be necessary or desirable to be allowed in a particular district provided that due consideration is given to location, development and operation of such uses. Such uses are classified as conditional uses and are of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities. The following provisions are then established to regulate those conditional uses which require special consideration.

§10.255(2)(h) of the DCO sets forth specific standards governing the issuance of a CUP (incidentally the same six (6) standards cited by

Enbridge for its proposition of what constitutes a "Zoning Ordinance" (Enbridge brief p. 39[1]).

Thus, the Dane County Zoning Ordinance, which the Landowners seek to enforce under §59.69(11) specifically provides for and authorizes the conditions (including the Insurance Conditions) in the CUP issued to Enbridge herein. Those conditions reflect the County's careful balancing of interests acting in its legislative capacity, *Forest County v. Goode*, 219 Wis. 2d 654, 657, 579 N.W.2d 715 (1998). *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 701 (1973).

The State Zoning Enabling Act specifically recognizes and authorizes conditional uses along with planned unit developments and rezonings,

> **59.69 Planning and zoning authority. (bm)** The head of the county zoning agency appointed under sub. (10) (b) 2. shall have the administrative powers and duties specified for the county zoning agency under this section, and the county zoning agency shall be only a policy-making body determining the broad outlines and principles governing such administrative powers and duties and shall be a quasi-judicial body with decision-making power that includes but is not limited to conditional use, planned unit development and rezoning. The building inspector shall enforce *all laws, ordinances, rules and regulations under this section.* Emphasis added.

Contrary to Enbridge's assertions, there is nothing "absurd" about allowing landowners to enforce conditions a county has included in a CUP. The Court of Appeals found *Town of Cedarburg*, 2003 WI App 10,¶15-16

persuasive: "…noncompliance with the terms of a CUP is tantamount to noncompliance with a Town Ordinance." *Enbridge Energy Co*., 2018 WI App 39 ¶53

Enbridge's arguments fail because it places an over-reliance on what it deems to be legislative intent without any support for its claims. (E Br. at 43). It has reserved for itself the judicial function of divining the "true intent of Subsection 11". For example with respect to the Subsection11 Enforcement Remedy, it asserts without any authority that, "[t]he legislature made a policy determination to limit a county's ability to impose certain insurance requirements, Wis. Stat. §§ 59.69(2)(bs), 59.70(25), and by extension has precluded the enforcement of those requirements. The Citizens have no authority under section 59" (Enbridge brief p. 44). As with its many other assertions there is nothing in the plain words of the Act 55 Insurance Limitations or in the record to support such a preposterous assertion.

With respect to Enbridge's remaining arguments they hinge on its false claim that it has the insurance necessary to trigger Wis. Stat. §59.70(25)'s Insurance Limitations and Landowners lack any conditions to enforce. As an apparent after-thought Enbridge asserted that the

landowners were not "full parties" in the consolidated case, without citing any authority. The consolidation order (See L-App. 85-86) itself disproves that allegation, R.12-1-2, and no legal argument was presented to support Enbridge's claim that the landowners were barred from raising an issue the County failed to bring up. (*Enbridge Energy Co*., 2018 WI App 39 ¶¶ 43-50)

The Landowners submit that the *Goode* case represents the clearest expression of intent on the Subsection 11 Enforcement Remedy and that neither Subsection 11 nor *Goode* support Enbridge's claims that the Subsection 11 Enforcement Remedy is not available to the Landowners herein.

III. REMAND TO THE ZLR IS THE APPROPRIATE REMEDY

This matter should be remanded to the Circuit Court, with directions that the Circuit Court return it to the ZLR. The ZLR is the body ordained by the legislature to evaluate the facts and weigh appropriate conditions. As this Court has noted with respect to towns, "…municipalities still have ample authority to regulate land use--and they should. Such regulation is an appropriate legislative function; it can serve to protect the health, safety and welfare of the public, and it encourages well-reasoned

growth." *Town of Rhine,* 2008 WI 76, ¶62

> "In general, we are hesitant to overrule administrative decisions. *Snyder,* 74 Wis. 2d at 476. A board's decision is presumed to be correct and valid. Id. The board's findings may not be disturbed if any reasonable view of the evidence sustains such findings. Id. Moreover, we may not substitute our discretion for that of the board's, as committed to it by the legislature." Id. *State v. Waushara Cty. Bd. of Adjustment,* 2004 WI 56, ¶13, 271 Wis. 2d 547, 679 N.W.2d 514

As the ZLR never had the opportunity to determine whether Enbridge has Sudden and Accidental Insurance and if not, whether they would approve the CUP without the insurance conditions set forth in Conditions No 7 and 8 remand will allow the ZLR to exercise its discretion applying a correct interpretation of the Act 55 Insurance Limitations.

As Asst. Corporation Counsel Gault pointed out in the Circuit Court, there are six standards that the ZLR had to satisfy to grant Enbridge a CUP under DCO 10.255(2)(h), and the ZLR never considered granting the CUP without the insurance conditions R.55-98

A. The Insurance Conditions Are Integral to The Conditional Use Permit and Should Not be Removed by the Court.

Enbridge utterly fails to address the County's argument on the integral-to-the-permit concept. The ZLR heard substantial testimony about

the hazards of Enbridge's pipelines, R.9-84-146, 184-200, and Enbridge was involved in litigation with its insurer over clean-up costs for its 2010 spill into the Kalamazoo River while its application was under consideration R.8-196, 215-16., Sufficient insurance coverage is integral to the approval of the CUP-the ZLR conducted months of fact finding and would not have issued the permit without being assured of sufficient insurance coverage. Had the ZLR believed they could not require Enbridge to obtain sufficient insurance, and could not verify Enbridge's insurance coverage it may have imposed other conditions or denied the permit as there is no "right" to a CUP.

> "A conditional use, however, is different than a permitted use. See S. Mark White, Classifying and Defining Uses and Building Forms: Land-Use Coding for Zoning Regulations, American Planning Association Zoning Practice, Sept. 2005, at 8. While a permitted use is as of right, a conditional use does not provide that certainty with respect to land use. See id. Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner. *State ex rel. Skelly Oil Co. v. Common Council, City of Delafield,* 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973); 3 Young, supra, § 21.06 (discussing uses commonly subject to special permit requirements).*Town of Rhine* , 2008 WI 76, ¶20.

Moreover, a CUP 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.

The standards the ZLR is obligated to consider include risks to "the public health, safety, comfort or general welfare"; substantial impairment or diminishment of already permitted uses of other property in the neighborhood; and impediments to "normal and orderly development and improvement of the surrounding property for uses permitted in the district." Section 10.255(2)(h)(1)(2)(3) of the DCO.

The ZLR in insisting on Conditions No. 7 and 8 put Enbridge on notice of its obligation to carry adequate insurance to satisfy the three standards above. The Act 55 Insurance Limitations were clearly not anticipated. Given the significant public welfare issues involved in adequate insurance coverage the remedy of returning this CUP to the ZLR to review Enbridge's alleged Sudden and Accidental Insurance is the appropriate remedy.

Enbridge's only response to the "integral to permit" principle is its statement that "Dane County already approved Enbridge's CUP sans the Insurance Requirements" (Enbridge brief p. 33) is farcical. The record does not support such an outlandish statement; it in fact repudiates such an assertion. Why has Enbridge carried on this legal challenge if Dane County approved its permit without the insurance

conditions?

As the Court of Appeals held:

> , "…the appropriate judicial remedy, when a court holds permit conditions invalid and the conditions were integral to approval of the permit, is to reverse permit approval and not to sever the invalid conditions. *See, e.g.,* Patricia E. Salkin, 2 Am. Law Zoning § 14:17 (5th ed.) (May 2018 Update) (ch. 14, "Special and Conditional Use Permits") (citing authority from Connecticut, the District of Columbia, and Hawaii). *Enbridge Energy Co*., 2018 WI App 39 ¶103

Enbridge relies on *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404, a case which did not involve a certiorari review action. The facts of *Adams* demonstrate a complete disconnect between the context in that case and this one. *Adams* was a livestock siting case involving a complete statutory scheme with an agency (the State Livestock Siting Board) and rule making authority created to supplant the authority of local governments in granting permits for livestock facilities. In *Adams* this Court was reviewing the action of an administrative agency (the State Livestock Siting Board) granted specific authority to rewrite the Town of Magnolia's CUP, which under the Siting Law the town was required to issue *unless* the town could make certain findings. Under the expressed terms of the Siting Law the town lacked authority to include certain conditions in the permit absent the required findings. Adams is an unconditional withdrawal of authority from political

subdivisions to regulate livestock facility siting. Here the Act 55 Insurance Limitations are extremely limited and they cannot be read to support a conclusion that the legislature has withdrawn a county's authority to regulate hazardous liquid pipeline facilities.

Conversely, here the ZLR cannot grant a permit to Enbridge *unless* it finds that the six standards in DCO § 10.255(2)(h) are met, and the ZLR has never made that determination when taking into account potential insurance conditions integral to the permit with a proper understanding of the Act 55 Insurance Limitations. Although the legislature put some limits on counties' ability to require additional insurance from a hazardous liquid pipeline company, it failed to create an alternate permitting scheme as it did in the Livestock Siting Board Thus the *Adams* decision is irrelevant to this certiorari petition.

Dane County cannot be mandated to grant a CUP on specific terms an applicant demands. It is legally bound to find that the health, property and environment of the neighboring communities will not be compromised. *Town of Rhine* 2008 WI 76 ¶20, see also *AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm.*, 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368

It was the Circuit Court which usurped the legislative function entrusted to the ZLR by the legislature Wis. Stat. §59.69 and DCO §10.255. It was the Circuit Court which committed error in striking Conditions No. 7 and 8 which the record demonstrates were integral to the decision to grant the permit. The ZLR is the only entity allowed under Wisconsin law to determine which parts of the permit are insignificant enough that they may be stricken from the permit.

The circumstance of whether a CUP is granted or denied does not change the criteria necessary to issuing the CUP. If conditions can be judicially removed, the entire foundation of controlled uses is destroyed, and communities will either be forced to allow such uses, or prohibit them entirely.

The Landowners agree with the County that the proper remedy is for this case to be remanded to the ZLR to: 1) Initially review Enbridge's insurance policies to determine whether Enbridge has the necessary insurance coverage for "abrupt or immediate" or "unexpected and unintended damages."[5] *See Just*, 155 Wis. 2d at 760[1]

[5] Enbridge does not dispute that its insurance policies must meet this threshold set forth in the Court of Appeals decision. (See Enbridge Brief at pp. 23)

to satisfy Wis. Stat. §59.70(25); 2) Confirm that such coverage will be maintained on an on-going basis sufficient to protect the County and its residents in the event of a catastrophic oil spill, and 3) If the County cannot require Enbridge to obtain pollution insurance, then to craft additional conditions necessary to satisfy the findings they require for granting a conditional use permit.

Remand is particularly appropriate when the legal standards have changed during an appeal. This Court in *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals*, 2005 WI 117, ¶40, 284 Wis. 2d 1, 700 N.W.2d 87 found remand the appropriate remedy (a certiorari case involving a city variance) :

> "On remand, the Board should reconsider and, if necessary, rehear and decide this matter in conformance with the new legal standards governing area variances… We express no opinion on whether Lamar's application should be granted under Ziervogel and Waushara County. The Board is the body best suited to make such factual determinations, and we remand this cause to allow it to do so. *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals*, 2005 WI 117, ¶40, 284 Wis. 2d 1, 700 N.W.2d 87

Enbridge's effort to distinguish *Lamar* on the basis that it involves a permit denial (Enbridge brief fn 30-31) is the epitome of a distinction without a difference. In both circumstances the police power the local unit

of government is at issue. It is as nonsensical as claiming *Lamar* is inapposite because the case does not involve Enbridge.

With respect to Enbridge's argument that remand "would be inequitable" E Br. at 28 Enbridge has not (as it cannot) assert that remand would interfere with the continued operation of the pumping station as it has been operational for several months.

CONCLUSION[6]

This court should interpret the statutes based on their plain language, and affirm the Court of Appeals' remand of this matter to the circuit court and ZLR committee to find facts necessary to properly apply the law.

[6] In addition to its repeated claims that it has "sudden and accidental pollution insurance coverage" required by Wis. Stat. §59.70(25) with no evidence, Enbridge makes new and unsupported claims in the brief filed in this Court: specifically that "time element" insurance is the same as, or includes "sudden and accidental" coverage (E.Br. at 20, 23 24), that if required to obtain environmental pollution insurance by Dane County their entire system of pipeline insurance would be jeopardized (E.Br. at 26-27), and that the county's insurance conditions violate federal law (E.Br. at 25, 27-28).

For support of the misstatements about the nature of the two kinds of pollution insurance, Enbridge cites to the actions and statements of the county zoning administrator and assistant corporation counsel, neither of whom ever considered the issue or reviewed any documents to come to a reasoned opinion on the matter; and to oral testimony of the insurance consultant (not to his actual report which they chose not to include in their Appendix and which they only cite to once), omitting his quotation marks around his reference to the term "sudden and accidental" and to a portion of the zoning committee minutes cited (R.9-253-54) which defeat its claim that the two terms are "interchangeable" or indicate that one is subsumed under the other (E.Br. at 9), citing to R.9-811-12, which has only 490 pages). There is definitely nothing even remotely in the record to support its claim that its insurance coverage is "even broader than "sudden and accidental" coverage (E.Br. at 23). All that Enbridge cites are its prior self serving claims made by its insurance agent and attorneys in 2015.

There are no record citations to the lengthy statements (E.Br. at 26-27) about the consequences of complying with the conditions in the CUP, because no such record exists.

Respectfully submitted:

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Dated: October 24, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,210 words.

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CERTIFICATE OF SERVICE

The undersigned states, under oath, that she/he served the foregoing Brief of the Plaintiffs/Appellants, Robert and Heidi Campbell, Keith and Trisha Reopelle, James and Jan Holmes and Tim Jensen, by placing three (3) copies in an envelope addressed as indicated below, and depositing the same in the U.S. Mail at Madison, Wisconsin, proper postage prepaid, at approximately 5:00 p.m. on the 24th day of October 2018, to the following persons:

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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 which complies with the requirements of Wisconsin Statute Section 809.19(12) and (13). 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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HAND DELIVERY CERTIFICATION

I hereby certify that on October 24, 2018, this Brief was hand-delivered to the Clerk of the Supreme Court. I further certify that the Brief were correctly addressed.

Dated this 24th day of October, 2018.

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SUPREME COURT OF WISCONSIN

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

Petitioners-Respondents-Petitioners,

v.

DANE COUNTY,

Respondent-Appellant

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

Respondents.

Appeal No. 17AP0013

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

Plaintiffs-Appellants,

v.

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

Defendants-Respondents-Petitioners.

Appeal No. 16AP2503

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

*****

Appeal from a Judgment Dated November 11, 2016,
Entered in the Dane County Circuit Court, Branch 17,
The Honorable Peter Anderson, Presiding
Case Nos. 16CV8 and 16CV350

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ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Dated this 8th day of November, 2018.

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FORM AND LENGTH CERTIFICATION

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

Dated this 8th day of November, 2018.

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ELECTRONIC FILING CERTIFICATION

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

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HAND DELIVERY CERTIFICATION

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Nos. 17AP13, 16AP2503

In the Supreme Court of Wisconsin

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

v.

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

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

v.

ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP AND ENBRIDGE ENERGY LIMITED PARTNERSHIP WISCONSIN,
DEFENDANTS-RESPONDENTS-PETITIONERS

On Appeal From The Dane County Circuit Court,
The Honorable Peter Anderson, Presiding,
Case Nos. 16CV8, 16CV350

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INTRODUCTION

The Legislature has the authority to displace any county action through "uniform[ ]" legislation on matters of "statewide concern," Wis. Stat. § 59.03(1), such as beneficial development projects that create jobs and economic prosperity for the people of Wisconsin. In 2015 Wis. Act 55, the Legislature enacted the Pipeline-Insurance Statute, which provides that a county cannot require the operator of an "interstate" pipeline to "obtain insurance" if the operator's comprehensive general liability policy covers pollution that is both "sudden and accidental." Wis. Stat. § 59.70(25). Act 55 also prevents counties from imposing requirements for conditional-use permits that are preempted by federal or state law. Wis. Stat. § 59.69(2)(bs). Taken together, these provisions prevent counties from interfering with statewide projects by imposing non-uniform insurance requirements on pipeline operators.

Here, Dane County required Petitioners (hereinafter "Enbridge") to obtain "and maintain" millions of dollars' worth of liability insurance, among other requirements, in order to procure a conditional-use permit for its "interstate" pipeline, which cuts diagonally across the State from near Superior to Pontiac, Illinois. Enbridge Br.6; P-App.5–9. The circuit court concluded that Act 55 voided these conditions because Enbridge qualified for the Pipeline-Insurance Statute's protections, but the Court of Appeals reversed that decision. P.-App.15, 47. The Court of Appeals narrowed Act

55's limitation on county action by concluding, as relevant to the arguments in this brief, that the Legislature intended for the Pipeline-Insurance Statute's exclusion to apply only if the operator's policy covered all "accidental" pollution, including gradual pollution. P.-App.33–39. This interpretation rewrites the statute, contrary to the plain statutory text, and undermines Act 55's goal by giving each county in Wisconsin the ability to undermine projects of statewide importance.[1]

STATEMENT OF INTEREST

This case implicates the ability of the State to govern county actions, an issue in which the State has a core interest. *See* Wis. Stat. §§ 59.03, 59.69(2)(bs). The Department of Justice shall "appear" in actions in the Supreme Court "in which the state is interested." *Id.* § 165.25(1). In Wisconsin, "legislative power . . . is lodged in the Legislature." *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25, 28 (1936). Counties, which have statutory—not constitutional—home-

[1] In this brief, the State focuses on the proper interpretation of "sudden and accidental" in the Pipeline-Insurance Statute, an issue of statewide importance. The State does not opine on the more case-specific questions of whether the circuit court properly allowed the landowners to intervene in the certiorari action, whether this Court should strike the two permit conditions at issue if it concludes that they are invalid under Act 55, whether Enbridge showed that it has coverage for "sudden and accidental" pollution, and whether Dane County can impose insurance-related requirements that do not require Enbridge to obtain insurance, including a "continuous duty" to demonstrate compliant insurance "on demand." The State agrees with Enbridge that the plain language of Wis. Stat. § 59.69(11) does not allow landowners to enforce conditional-use-permit conditions, Enbridge Br.35–41, but will not repeat those arguments here.

rule authority, "have no inherent right of self-government beyond the powers expressly granted to them." *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 89, 358 Wis. 2d 1, 851 N.W.2d 337; *compare* Wis. Stat. § 59.03(1), *with* Wis. Const. art. XI, § 3(1). Thus, any "enactment of the legislature . . . of statewide concern" that "uniformly affects every county" trumps county action. Wis. Stat. § 59.03(1).

One such "enactment" is the Pipeline-Insurance Statute, Wis. Stat. § 59.70(25), which prevents counties from requiring operators of "interstate" pipelines to obtain additional insurance as long as the operators' insurance policies cover "sudden and accidental" pollution. The Legislature enacted the statute in 2015 along with another provision restricting counties in issuing conditional-use permits, *id.* § 59.69(2)(bs); 2015 Wis. Act 55. The contextually and textually "manifest [] purpose" of these provisions restricting localities is to ensure that individual counties cannot stop a statewide project. *See State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 49, 271 Wis. 2d 633, 681 N.W.2d 110. Thus, the State has an interest in a correct interpretation of the Pipeline-Insurance Statute consistent with its express purpose.

ARGUMENT

I. Under The Pipeline-Insurance Statute, If A Pipeline Operator Has Insurance For Liability From "Sudden And Unexpected" Pollution, A County May Not Require The Operator To Obtain Additional Insurance

A. This Court looks to the "language of the statute" to discern the statute's meaning. *Kalal*, 2004 WI 58, ¶ 44. "Statutory language is given its common, ordinary, and accepted meaning," usually by "reference to the dictionary definition." *Id.* ¶¶ 45, 53; *see* Wis. Stat. § 990.01(1); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69, 418 (2012). The words are "interpreted in [ ] context." *Kalal*, 2004 WI 58, ¶¶ 46, 49. This Court "give[s] reasonable effect to every word," and aims "to avoid absurd or unreasonable results." *Id.* ¶ 46. This Court also examines the statute "as a coherent whole" and in relation to "surrounding . . . statutes" to identify the "textually or contextually manifest statutory purpose." *Id.* ¶ 49. "[A] statute's construction will stand unless the legislature explicitly changes the law." *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶ 22, 236 Wis. 2d 316, 613 N.W.2d 120. If this examination of language, "[c]ontext," and "purpose" results in a "plain, clear statutory meaning," then the Court applies the statute accordingly. *Kalal*, 2004 WI 58, ¶¶ 46, 49 (citation omitted).

B. Under the Pipeline-Insurance Statute, a county cannot require an "interstate . . . pipeline" "operator" to

"obtain insurance" if the operator's "general liability insurance" covers liability for pollution that is "sudden and accidental," such as from a burst pipeline or an explosion. Wis. Stat. § 59.70(25). Most comprehensive general liability insurance policies issued today do not cover damages from pollution, whether sudden or gradual. Penny R. Warren, *"Sudden and Accidental" Pollution Exclusions: The Battle Between Insurance Carriers and Insureds Continues*, 12 J. Nat. Resources & Envtl. L. 243, 249 (1997); *Exclusion*, Black's Law Dictionary (10th ed. 2014). Some policies, however, include coverage if the release of pollutants is "sudden and accidental," e.g., from an explosion as opposed to a gradual leak. Warren, *supra*, at 249. In the Pipeline-Insurance Statute, the Legislature wanted to ensure that individual counties cannot force pipeline operators to cover non–"sudden and accidental" events.

The statutory text makes clear the type of insurance that a pipeline operator must have in order to benefit from the Pipeline-Insurance Statute's protections. The word "sudden" in the Statute limits the type of accidental pollution that the policy needs to cover to that which happens *quickly or abruptly*. The "common, ordinary, and accepted meaning" of the word "sudden" has a temporal component. *See Kalal*, 2004 WI 58, ¶ 45. The Oxford English Dictionary, an "authoritative" "contemporaneous-usage" dictionary "for the English language," *see* Scalia & Garner, *supra*, at 419, 423–24; *Kalal*, 2004 WI 58, ¶ 53, defines "sudden" as "taking place

or appearing *all at once*." 17 Oxford English Dictionary 115 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). The dictionary then notes, in smaller print and set off from the main definitions, that sudden "impli[es]" "[u]nexpected" "[i]n some contexts." *Id.*

"Context" indicates that "sudden," as used in the Pipeline-Insurance Statute, means "taking place or appearing all at once," not "unexpected." *Kalal*, 2004 WI 58, ¶¶ 46, 49; Scalia & Garner, *supra*, at 31–33. Specifically, the Statute requires coverage for pollution that is "sudden *and accidental*." Wis. Stat. § 59.70(25) (emphasis added). "Accidental" means "[h]appening . . . unexpectedly." 1 Oxford English Dictionary, *supra*, at 75. If "sudden" also meant "unexpected," that would render the words "and accidental" mere surplusage. *Kalal*, 2004 WI 58, ¶ 46; *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 152 (7th Cir. 1994).

Again, the Pipeline-Insurance Statute means that if an operator has insurance that will cover damages from abrupt, unexpected pollution (e.g., resulting from an explosion, fire, or burst pipeline), a county cannot require it to purchase more. Reading the statute to require coverage for gradual pollution would so narrow the application of the statute as to render it meaningless, allowing counties to interfere with beneficial interstate projects.

II. The Court Of Appeals' Interpretation Of The Pipeline-Insurance Statute Is Contrary To The Statutory Text And Would Undermine The Statute's Fundamental Purpose

The Court of Appeals held—and the Landowners argue, Landowners' Br.27–31[2]—that the Pipeline-Insurance Statute's insurance limitation "is not triggered" unless an operator shows that it carries coverage for gradual pollution. P-App.33–38. The Court of Appeals did not engage in a textual analysis of the Pipeline-Insurance Statute. Instead, it relied entirely on a 25-year-old contract case which held that "sudden" could mean "unexpected." P-App.33–38 (citing *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990)). The Court of Appeals concluded that the Legislature intended to import that meaning of "sudden" when it passed 2015 Act 55, so an operator needs coverage for *all* unexpected pollution, including gradual pollution, to qualify. P-App.33–38. This interpretation greatly narrows the applicability of the Pipeline-Insurance Statute and undermines the statute's express purpose: to prevent county interference with beneficial statewide and interstate projects.

The *Just* Court interpreted the word "sudden" in an insurance contract between a landfill operator and its insurer. *Just*, 155 Wis. 2d 737. Property owners sued the landfill operator for gradual pollution. *Id.* at 741–42. The property

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[2] Dane County does not argue for the Court of Appeals' and Landowners' interpretation of the statute. *See* Enbridge Br.43.

owners, who wanted the pollution covered, argued that "sudden" is "ambiguous" and could reasonably mean "unexpected"; the insurer argued that "sudden" unambiguously means "abrupt or immediate." *Id.* at 741. The *Just* Court noted that one dictionary first defined "sudden" as abrupt or immediate, but another dictionary defined it first as "unexpected[ ]" and "[o]nly later" as "immediate." *Id.* at 745 (citation omitted). Thus, the Court held, the word was "ambiguous." *Id.* at 746. It then applied a principle *specific to* "insurance contract[s]": it must construe any "ambiguity in favor of the insured and against the insurance company *that drafted the ambiguous language*." *Id.* (emphasis added). As a result, the *Just* Court chose to define "sudden" in that contract to mean "unexpected and unintended" so that the policy covered the gradual pollution at issue. *Id.* at 742–43, 746.

There is no basis to hold that *Just*'s interpretation of "sudden" controls its meaning in the Pipeline-Insurance Statute. *Just* did not interpret a prior version of the statute, a related statute, or a well-established common-law term of art.

The presumption that the Legislature acts with "knowledge of the existing case law," *Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 694 N.W.2d 296, applies to decisions construing *that very statute*, *see Czapinski*, 2000 WI 80, ¶ 22; *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015), and "with less force[ ] to interpretations of the same

wording [even] in *related statutes*," Scalia & Garner, *supra*, at 322 (emphasis added). Under a textualist analysis, "context is as important as sentence-level text"; "[t]he entire document must be considered." As a result, rarely does a true "prior construction" ever exist. *Id.* at 323; *compare Superior Steel Prod. Corp. v. Zbytoniewski*, 270 Wis. 245, 247, 70 N.W.2d 671 (1955) ("adjacent" in Wis. Stat. § 85.06(5) would not require contiguity), *with City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 355, 382 N.W.2d 52 (1986) ("adjacent" required "contigu[ity]" in Wis. Stat. § 60.81).

Nor does *Just* establish or imply that "sudden" is a common-law term of art that this Court would expect the Legislature to be aware of. *See Carter v. United States*, 530 U.S. 255, 264 (2000). A term of art is one "in which are *accumulated* the legal tradition and meaning of *centuries* of practice." *Id.* (emphases added and citation omitted); *see also State v. McKellips*, 2016 WI 51, ¶ 32, 369 Wis. 2d 437, 881 N.W.2d 258; *Bilski v. Kappos*, 561 U.S. 593, 602–03 (2010). A single 25-year-old contract case, *Just*, does not constitute a legal tradition; rather, that case dealt with a particular insurance contract between two private parties and relied on the principle that ambiguous contractual language is construed against the drafter, the insurer. This Court's construction of a single word in one case does not control that word's meaning indefinitely no matter where it appears.

To the extent that the phrase "sudden and accidental" was used in the commercial-insurance industry, its meaning

is far from settled and any widespread discussion about it ended decades before Act 55. Many federal and state courts disagreed about its meaning, and by 1997, "a majority of state and federal courts" contravened the *Just* Court's interpretation of "sudden and accidental." *See* Warren, *supra*, at 245, 249–56; *see also Flanders*, 40 F.3d at 152. In addition, industry discussion and publicity about this issue reached its apex in the mid-1980s, thirty years before the Legislature passed Act 55. *See* Warren, *supra*, at 245. By 2015, most comprehensive general liability policies issued did not use any "sudden and accidental" language. *See id.* at 249.

At the very least, this Court should hold that "the application of other sound rules of interpretation overcome[ ]" any presumption about *Just* in order to avoid enshrining *Just*'s interpretive mistake in the Pipeline-Insurance Statute. Scalia & Garner, *supra*, at 324. "No canon of interpretation is absolute," and this Court must assess the appropriate weight to give to each. *Id.* at 59; *see State v. Popenhagen*, 2008 WI 55, ¶ 42, 309 Wis. 2d 601, 749 N.W.2d 611. *Just* deserves little weight in the context of interpreting the Pipeline-Insurance Statute. The *Just* Court erroneously concluded that the ordinary meaning of "sudden" was "ambiguous" simply because two dictionaries had different "primary definition[s]" of the term. 155 Wis. 2d at 745 (majority op.);

id. at 761 (Steinmetz, J., dissenting).[3] But "multiple" dictionary definitions do not, by themselves, create ambiguity. *Kalal*, 2004 WI 58, ¶ 49. Courts must look to textual context, which the *Just* Court did not do. *Id.* ¶¶ 46, 49; Scalia & Garner, *supra*, at 31–33. As discussed *supra* p. 6, the presence of "and accidental" next to "sudden" indicates that "sudden" "add[s] the element of brevity, the temporal element." *Just*, 155 Wis. 2d at 762 (Steinmetz, J., dissenting). Thus, "sudden," in that context, obviously means abrupt and immediate. *Id.*

Adopting the Court of Appeals' narrow interpretation of the Pipeline-Insurance Statute would undermine the Statute's purposes by disqualifying innumerable operators from its protection and permitting a single county to stall, control, or effectively veto a project of statewide importance, contrary to the Legislature's clear intent in passing Act 55: preventing county interference in beneficial statewide and interstate projects. For example, a county could require an operator to obtain a prohibitively expensive amount of liability insurance, even if all of the other affected counties

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[3] The *Just* majority also misinterpreted the dictionary that created the alleged ambiguity, Webster's Third New International Dictionary. Webster's first listed definition for "sudden" was about unexpectedness, and only later did it define "sudden" as happening quickly. 155 Wis. 2d at 745. But Webster's ordered its definitions by "earliest ascertainable meaning," not common contemporaneous usage. *Id.* at 761 (Steinmetz, J., dissenting). Random House Dictionary, which organized definitions by "most frequently used meaning," defined "sudden" first as "happening . . . or done quickly." *Id.* at 761–62 (citation omitted); *id.* at 745 (majority op.).

want the project to proceed as-is. In addition, county-specific insurance requirements could result in unfair recovery across the State at the expense of other counties and Wisconsin citizens. At minimum, a complicated patchwork of local requirements will make Wisconsin less attractive to interstate business investors and developers to the detriment of statewide economic growth.

III. The Statute Does Not Require Unlimited Coverage For "Sudden And Accidental" Pollution

Operators do not need unlimited coverage to qualify for the Pipeline-Insurance Statute's protections. The statute indicates that the Legislature clearly contemplated that the policy would not cover *all* damages from pollution. *See Kalal*, 2004 WI 58, ¶¶ 46, 49 (statutory context). For example, the statute does not require any minimum dollar amount of coverage. *Compare* Wis. Stat. § 59.70(25), *with id.* § 632.32(4) (requiring minimum coverage). In addition, the statute undisputedly does not require coverage for intentional or expected pollution. And nowhere does the statute require the operator's insurer to omit notice or reporting deadlines, a typical feature of comprehensive general liability policies. Lisa S. Keyes & Steven P. Means, *Comprehensive General Liability Policies: Insurance Coverage for Environmental Cleanup*, 66 Wis. Law. 14, 17 (Apr. 1993); *see also* Wis. Stat. § 632.26 (discussing insurers' notice provisions). Indeed, notice deadlines are common in all types of insurance. *See, e.g., id.* § 632.26(6)(c) (motor vehicle). The Legislature merely

wanted to ensure that the interstate-pipeline operator had some form of coverage for the type of pollution it deemed most important: "sudden and accidental." Then it could proceed with its interstate project free from county-imposed insurance requirements.

The Court of Appeals and Landowners argue that a policy with a "time-element exception" does not trigger the Pipeline-Insurance Statute's protection because it has reporting deadlines. P-App.39; Landowners' Br.26. A time-element exception means that an operator must discover and report a polluting incident within a certain timeframe to obtain coverage. *See, e.g.*, Enbridge Br.9, 13, 17, 19–20; Fall 2018 Survey, 3 Envtl. Ins. Litig.: L. & Prac. Appendix E, Part I, No. 16. But, as discussed above, reporting and notice deadlines are a typical feature of insurance policies. There is no reason to think that the Legislature required an exception here.

CONCLUSION

This Court should reject the Court of Appeals' interpretation of the Pipeline-Insurance Statute.

Dated: November 7, 2018.

Respectfully submitted,

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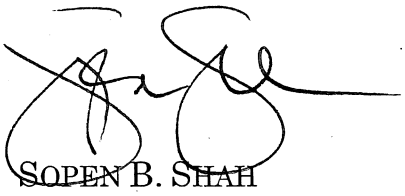

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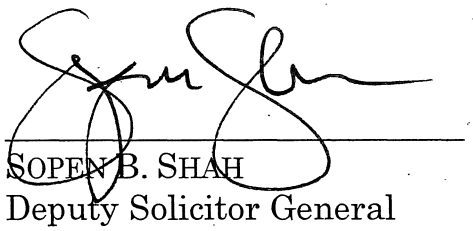
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,965 words.

Dated: November 7, 2018.



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I hereby certify that:

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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.

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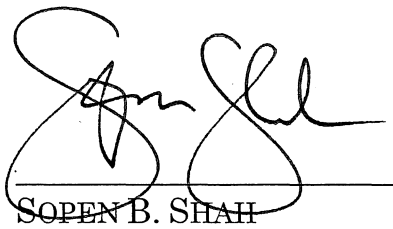

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SUPREME COURT OF WISCONSIN

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

Petitioners-Respondents-Petitioners,

v.

DANE COUNTY,

Respondent-Appellant,

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

Respondents.

Appeal No. 17AP0013

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

Plaintiffs-Appellants,

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

Appeal No. 16AP2503

ENBRIDGE ENERGY LIMITED
PARTNERSHIP WISCONSIN

Defendants-Respondents-Petitioners.

On appeal from District IV of the Court of Appeals' May 24, 2018 decision reversing the November 11, 2016 Order of Dane County Circuit Court, The Honorable Peter C. Anderson, Presiding

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NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Wisconsin Manufacturers and Commerce (WMC) is Wisconsin's chamber of commerce and manufacturers association. With approximately 3,800 members statewide, WMC is the largest general business trade association in Wisconsin. WMC members represent all sizes of business and every sector of Wisconsin's economy. Since our founding in 1911, WMC has been dedicated to making Wisconsin the most competitive state in the nation in which to conduct business.

As an organization, WMC advocates on behalf of its members before the Legislature, administrative agencies and in the courts. One area WMC has long advocated for is ensuring Wisconsin's regulatory climate is predictable, clear, and even-handed. Our members have a substantial interest in ensuring that when the Legislature acts to provide regulatory predictability by creating statewide standards, the state's political subdivisions faithfully follow the law, not retaliate against businesses by creating unnecessary litigation over permit conditions that the subdivision itself has admitted are unlawful and unenforceable.

ARGUMENT

I. Local governments do not have the authority to supersede the will of the people, as enacted by the Legislature, and must not be allowed to ignore legislative directives.

A system of laws that is applied predictably and evenly throughout the state creates one less impediment to maintaining and

growing Wisconsin's economy. A strong rule of law creates a climate where employers want to create or grow their businesses because they have a guarantee of being treated fairly. Upholding the supremacy of duly enacted laws on policy areas of statewide concern in the face of actions taken by political subdivisions created by the Legislature is key to maintaining the rule of law in Wisconsin. *See Cty. of Fond du Lac v. Muche*, 2016 WI App 84, 372 Wis. 2d 403, 888 N.W.2d 12. When local governments flout these laws it weakens the rule of law and creates uncertainty in our economy, business climate, and legal system.

A. Allowing Dane County to enforce permit conditions that the Legislature has expressly preempted undermines the rule of law.

In this case, Enbridge was waiting for the Dane County Board of Supervisors to rule on their first appeal of two provisions (the "Insurance Requirements") in its conditional use permit ("CUP") when the state Legislature passed and governor enacted 2015 Wisconsin Act 55, which (among other things) created two new provisions of state law:

> 59.70(25) Interstate hazardous liquid pipelines. A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability.
>
> 59.69(2)(bs) As part of its approval process for granting a conditional use permit under this section, a county may not impose on a permit applicant a requirement that is expressly preempted by federal or state law.

In other words, Act 55 expressly preempted Dane County from imposing the Insurance Requirements that Enbridge had appealed to the Dane County Board.

Dane County's initial reaction to Act 55 was to follow the plain language of the law. The Dane County Zoning Administrator issued a revised CUP removing the unenforceable Insurance Requirements at the suggestion of the Dane County Corporation Counsel's office. (P-App.10–11.) Enbridge also reacted to Act 55, by making a $10 million investment into the pipeline. (P-App.12.) It was not until a local environmental interest group became involved that the Dane County Zoning and Land Use Regulation Committee chose to reconsider the permit, reinserted the unlawful Insurance Requirements and noted that they could not be enforced at this time because of Act 55. (P-App.10–11.) When Enbridge appealed this reinsertion, the Dane County Board decided to keep the unlawful requirements in place in case state law changed to allow them to be enforced and because they thought a citizen's suit may be able to enforce the provisions where they could not. (P-App.12–13; Enbridge's Opening Br. 13.) At the hearing on their appeal, Enbridge demonstrated that they carried the requisite insurance to trigger state preemption of the County's Insurance Requirements. *Id.*

In *Anchor Savings & Loan Ass'n v. Madison EOC*, this Court laid out four tests for state preemption of local regulation: "(1) the legislature

has expressly withdrawn the power of municipalities to act; (2) the local regulation logically conflicts with state legislation; (3) the local regulation defeats the purpose of state legislation; or (4) the local regulation violates the spirit of state legislation." 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). At various times throughout this litigation, Dane County has admitted the Legislature has expressly withdrawn their authority to enforce the Insurance Requirements. (Enbridge's Opening Br. 13, 18-19.) Dane County decided to keep these unenforceable conditions in the permit anyway and may attempt to enforce them in the future, keeping Enbridge in a regulatory limbo where they do not know if or when Dane County may try to enforce the conditions.

Allowing Dane County to circumvent the law by imposing unlawful conditions on Enbridge at the behest of a special interest group creates significant uncertainty and a disincentive to invest in Wisconsin's economy. Enbridge operates in the vital energy industry, and the pipeline at issue here runs from Superior, through Dane County, into Illinois. Wisconsin has over 3,200 miles of petroleum pipelines traveling through more than half of its counties. These pipelines could not properly function if local governments decided to act in a manner similar to Dane County, jeopardizing Wisconsin's energy supply. Balancing the need for predictability with the need to ensure that a company operating interstate pipelines has adequate insurance coverage to deal with any accidental

pollution is a strong rationale for the Legislature's creation of Wis. Stat. §§ 59.69(2)(bs) and 59.70(25). Allowing Dane County's Insurance Requirements to trump the Legislature's clear preemption would lead to more challenges against state preemption and undermine the rule of law.

B. To create predictability and uniformity in the law, the state often preempts political subdivisions from enacting local regulatory standards in key industry sectors.

The conflict in this case—a local government overstepping its authority to attempt to regulate areas where the state has prohibited it from doing so—is not new. It is reminiscent of debates over ride-share services, auxiliary containers, concentrated animal feeding operations, and wind turbines. In each of these instances the state Legislature determined that in order to protect the functionality of important business sectors, like transportation, communications, energy, and agriculture, there needed to be uniform statewide standards in place.

In 2015, the Legislature preempted political subdivisions from regulating transportation network companies such as Lyft and Uber. 2015 Wis. Act 16. This legislation prohibits political subdivisions from licensing transportation network companies or their individual drivers, in contrast to how they can for taxicab companies and drivers. Wis. Stat. § 440.465. One co-author of the legislation, then-Representative Cory Mason, stated in written testimony that the purpose of the legislation was

to "ensure rideshare services can operate throughout Wisconsin" and that "a patchwork of potentially conflicting and contradictory municipal regulations will make it difficult for rideshare services to pick up a rider in one municipality and drive them to another."[1] The Legislature preempted local governments in Act 16 to help an emerging sector of the economy operate statewide, similar to what they did for pipeline operators in Act 55.

Also in 2015, the Legislature passed Act 302, which preempted local bans on auxiliary containers. Wis. Stat. § 66.0419(2). Influenced by environmental interest groups, local governments nationwide began to impose user fees or bans on the use of single-use paper and plastic bags and other disposable containers. These bans significantly constrained restaurants, retail stores, and manufacturers of paper and plastic products. Representative Mike Rohrkaste, the lead author of the bill, stated in his written testimony that "the intent of this legislation is to maintain uniform regulations regarding auxiliary containers" and that a "patchwork of bans" does more harm than good and creates disruptive obstacles for businesses.[2] Similar to this example, the patchwork of

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[1] Representative Cory Mason, Testimony to the Assembly Committee on State Affairs and Government Operations, page 1, April 2, 2015, https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2015/ab143/ab0143_2015_04_02.pdf.

[2] Representative Mike Rohrkaste, Testimony to the Senate Committee on Elections and Local Government, Feb. 3, 2016, page 1,

insurance conditions Dane County attempted to apply here would create a disruptive burden on Enbridge and other pipeline operators, exactly what the standardization of regulatory requirements is meant to prevent.

In 2009 the Legislature overwhelmingly passed 2009 Act 40, which strictly limited local governments' ability to impose restrictions on the installation or use of wind turbines, created a standard procedure of review for permitting, and created an appeals process through the Public Service Commission. Wis. Stat. §§ 66.0401(1m), (4)-(5). The chief author of the legislation, then-Senator Jeff Plale, explained the rationale of the legislation, stating "too many wind projects are victims of delay tactics and other obstructions."[3] Then-Representative Phil Montgomery, another author, stated in a press release announcing the introduction of the legislation that the purpose of the bill is to provide "clear, predictable regulations."[4] The same spirit behind the Legislature's preemption of the wind turbine siting law, to encourage

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https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2015/sb601/sb0601_2016_02_03.pdf.

[3] Paul Snyder, The Daily Reporter, "Wind farm bill would govern state," Feb. 24, 2009, http://docs.legis.wisconsin.gov/2009/related/public_hearing_records/sc_commerce_utilities_energy_and_rail/bills_resolutions/09hr_sc_cuer_sb0185_pt17.pdf; Wisconsin Ag Connection, "Legislators Introduce 'Wind Siting' Bill," May 1, 2009, http://docs.legis.wisconsin.gov/2009/related/public_hearing_records/sc_commerce_utilities_energy_and_rail/bills_resolutions/09hr_sc_cuer_sb0185_pt17.pdf.

[4] "Bipartisan Group of Legislators Introduce Wind Siting Bill" April 30, 2009, http://docs.legis.wisconsin.gov/2009/related/public_hearing_records/sc_commerce_utilities_energy_and_rail/bills_resolutions/09hr_sc_cuer_sb0185_pt18.pdf.

investment and provide predictability, applies to Wis. Stat. §§ 59.70(25) and 59.69(2)(bs).

In 2004 the Legislature introduced and passed the bipartisan livestock facility siting law, creating consistent standards local governments must follow if they wish to regulate the construction of such facilities. The law strictly limits when a local government can deny a facility siting or expansion, creates a standard procedure and timeline for the application process, and creates a standardized appeals process. Wis. Stat. §§ 93.90(3)-(4), 15.135. This Court found that the Legislature expressly preempted local governments from regulating livestock facility siting. *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 36, 342 Wis. 2d 444, 820 N.W.2d 404. Providing predictability in permitting to farmers who take the risk to expand their farms was a key concern of the policy makers in Governor Doyle's administration who drafted the legislation.[5] Another goal of the legislation was to help keep Wisconsin's milk supply at a level sufficient for Wisconsin's dairy-related industries to function appropriately.[6] The Legislature's actions in Act 55 to provide certainty to pipeline operators are similar to its actions

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[5] Secretary Rod Nilsetuen, Testimony to the Senate Committee on Agriculture, Financial Institutions, and Insurance and the Assembly Committee on Agriculture, Feb. 23, 2004, pages 23-27, http://docs.legis.wisconsin.gov/2003/related/public_hearing_records/ac_agriculture/bills_resolutions/03hr_ac_ag_ab0868_pt02.pdf.

[6] *Id.*

to protect the dairy industry under the livestock facility siting law. This Court should treat the two laws similarly and reinforce its ruling in *Adams*, that local governments must yield when preempted by the state. *Adams*, 2015 WI 85, ¶¶ 2, 39.

The above examples show that the purpose and spirit of preemption legislation in various business sectors share common threads. The Legislature preempts local governments from creating patchworks of regulation to ensure that key economic sectors are not so disrupted that they cannot function. This is often done to entice new business sectors like renewable energy or to create stability for current sectors like dairy. The same purpose and spirit surrounds the state's preemption of local insurance requirements in this case.

C. Wisconsin courts have a history of rejecting local government attempts to regulate in areas where the Legislature has prohibited them from doing so.

Not only does the Legislature have a long history of preempting local governments in order to create more predictability in the law, Wisconsin courts also have a long history of upholding these legislative acts. Indeed, Wisconsin courts have not resorted to tortured statutory interpretations, as the court of appeals did in this case, to find that there was not any preemption. To that end, while Wisconsin courts have recognized the importance of local governments, they have also made

clear that when the state enacts a law of statewide concern, local regulation on the subject must yield. *Anchor*, 120 Wis. 2d at 397.

One such case where a local government attempted to subvert a state law was *Golden Sands Dairy v. Town of Saratoga*. 2018 WI 61, 381 Wis. 2d 704, 913 N.W.2d 118. In *Golden Sands Dairy*, the town attempted to stop the construction of a business by changing a zoning ordinance after the business had filed their building permits, in contravention of Wisconsin's "building permit rule." *Id.* ¶¶ 1-2. This Court ruled in favor of the business, stating that the purpose of the state law, predictability and judicial economy, would be circumvented if local governments could separate the structures from the land surrounding it. *Id.* ¶¶ 26, 33.

Separately, the Wisconsin Court of Appeals ruled against the Village of Richfield when it attempted to force a business to comply with regulations that the Legislature had expressly preempted. *Scenic Pit LLC v. Village of Richfield*, 2017 WI App 49. The Village attempted to force a property owner who wanted to reclaim a former quarry with clean fill to comply with local approvals. *Id.* ¶¶ 3-4. The court held the Legislature had expressly preempted the Village's authority to do so in Wis. Stat. § 289.43. *Id.* ¶ 30.

Golden Sands Dairy and *Scenic Pit* are just two of the most recent examples of local governments flouting state law and requiring

businesses to spend considerable time and resources to clarify the issue. Wisconsin courts have been a bulwark against a distressing trend of local governments attempting to supersede the Legislature. This Court should reinforce that where the state Legislature enacts a law of statewide concern that expressly preempts a local unit of government from taking an action, the local government must yield.

II. The Legislature did not give private citizens a greater right to enforce zoning ordinances than counties.

WMC joins and adopts Enbridge's argument that the plain language of Wis. Stat. § 59.69(11) does not authorize citizen suits to enforce conditions in a CUP. Section 59.69(11) provides, in relevant part, "[c]ompliance with such *ordinances* may also be enforced by injunctional order at the suit of the county or an owner of real estate within the district affected by the regulation." Wis. Stat. § 59.69(11) (emphasis added). Under the statute, property owners have the right to enforce ordinances, not individual permit conditions.

In addition to being an incorrect statutory interpretation, giving citizens more power to enforce permit conditions than the counties attempting to impose the condition itself would create more litigation and would damage Wisconsin's business climate. After the passage of Act 55, Dane County admitted on multiple occasions that it did not have authority to enforce the Insurance Requirements under current law.

Allowing a property owner to sue to enforce a permit condition the County itself conceded was unenforceable would hand a formidable tool over to special interests to delay or derail all manner of projects. It would incentivize local governments to insert unlawful conditions that they could not enforce with the hopes that private citizens could, which is what at least one supervisor stated was the purpose of reinserting the invalid provisions. (Enbridge's Opening Br. at 13.) Allowing private citizens to sue to enforce individual conditions in a CUP would result in more litigation, significant monetary costs, and time delays for CUP holders.

III. The appropriate remedy in this case is for the Court to strip unlawful provisions from the CUP.

WMC joins and adopts Enbridge's argument that the appropriate remedy when a party challenges certain conditions to an otherwise approved CUP is to modify the CUP by striking those conditions that are preempted by state law. This Court has the statutory authority to do so under Wis. Stat. § 59.694(10), which provides that on certiorari review a court "may modify, the decision brought up for review." In a similar circumstance, this Court upheld the Livestock Facility Siting Review Board's decision to remove unlawful conditions from a CUP that had been approved. *See Adams*, 2012 WI 85. In *Adams*, the Livestock Facilities Siting Review Board struck several conditions that it

determined were preempted by state law, but did not remand the CUP to the local government for reconsideration. *Adams*, 2012 WI 85, ¶¶ 16, 60-61. The Court subsequently upheld that determination stating, "We agree with the court of appeals that the Board acted properly." *Id.* ¶ 60.

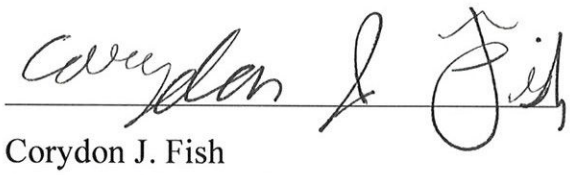
This Court should confirm that the remedy provided in *Adams* can and should be used in situations like this case. If this Court finds that the Insurance Requirements are unlawful but remands the decision back to Dane County, it would reward knowingly prohibited behavior by a political subdivision. Such a remedy would effectively allow political subdivisions to stymie projects indefinitely by including unlawful permit conditions. A local government could simply include unlawful permit conditions knowing they would have a second chance to deny the permit if the conditions were successfully challenged. In practice, a business would either have to agree to abide by the unlawful conditions or go through a costly court challenge only to have their permit denied upon remand. This kind of remedy would give local governments significant political leverage to enact the very policies the Legislature has prohibited them from enacting. Instead, this Court should affirm the circuit court's decision to strike the unlawful permit conditions without remanding the permit back to Dane County and setting Enbridge back to where they started, with a local government that is knowingly flouting the law.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals and remand to the circuit court with instructions to strike the Insurance Requirements from the CUP and enter judgment in favor of Enbridge in both consolidated cases.

Dated this 27th day of November, 2018.

Respectfully Submitted,

By: 

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FORM AND LENGTH CERTIFICATION

I hereby certify that his brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and (c) for a brief and a brief produced with a proportional serif font. The length of this brief is 2,992 words.

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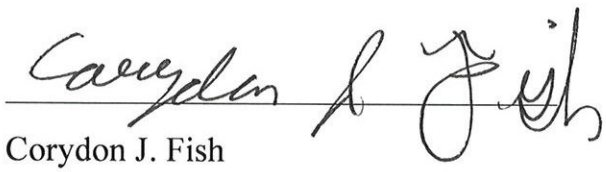
By: 

Corydon J. Fish

ELECTRONIC FILING CERTIFICATION

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

Dated this 27th day of November, 2018.

By: 

Corydon J. Fish

HAND DELIVERY CERTIFICATION

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

Dated this 27th day of November, 2018.

By: 

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