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March 2, 2016

VIA HAND DELIVERY

The Honorable Richard G. Niess
Circuit Court Judge, Branch 9
215 S Hamilton St, Rm 5109
Madison, WI 53703

Re: *Robert Campbell, et al. v. Enbridge Energy Company, et al.*
Case No. 16 CV 0350

Dear Judge Niess:

Enclosed please find the original and one copy of Defendants' Notice of Motion and Motion to Dismiss and Defendants' Brief in Support of Motion to Dismiss in the above-referenced matter.

Please have the copies file stamped and returned to the waiting messenger. By copy of this letter, all counsel of record will be served as indicated below.

Very truly yours,

Thomas M. Pyper

TMP
Enclosures

cc: Patricia K. Hammel, Esq. (w/encs.) (via Email and U.S. Mail)
Thomas R. Burney, Esq. (w/encs.) (via U.S. Mail)

WHD/12409913.1

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

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

Plaintiffs,

v.

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

Defendants.

Case No. 16-CV-0350

Case Code: 30704

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS

TO: Patricia K. Hammel
Herrick & Kasdorf LLP
16 North Carroll Street, Suite 500
Madison, Wisconsin 53703

Thomas R. Burney
Law Office of Thomas R. Burney
40 Brink Street
Crystal Lake, Illinois 60014

PLEASE TAKE NOTICE that Defendants, Enbridge Energy Company, Inc., Enbridge Energy, Limited Partnership and Enbridge Energy, Limited Partnership Wisconsin (*sic*) (collectively "Enbridge"),[1] by their attorneys, Thomas M. Pyper and Jeffrey L. Vercauteren of Whyte Hirschboeck Dudek S.C., pursuant to Wis. Stat. § 802.06(2)6., hereby move the Court for an order of dismissal of the Plaintiffs' Complaint, with prejudice. The grounds for this motion are that the Complaint fails to state a claim upon which relief can be granted. Further grounds

[1] There is no entity entitled Enbridge Energy, Limited Partnership Wisconsin.

are set forth in Enbridge's Brief in Support of Motion to Dismiss, filed contemporaneously herewith.

PLEASE TAKE FURTHER NOTICE that this motion will be heard before the Honorable Richard G. Niess at the Dane County Circuit Court, located at 215 South Hamilton Street, Madison, Wisconsin, at a date and time established by the Court.

Dated this 2nd day of March, 2016.

WHYTE HIRSCHBOECK DUDEK S.C.
Attorneys for Defendants, Enbridge Energy Company, Inc., Enbridge Energy, Limited Partnership and Enbridge Energy, Limited Partnership-Wisconsin

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

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

Plaintiffs,

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Defendants.

Case No. 16-CV-0350

Case Code: 30704

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendants, Enbridge Energy Company, Inc., Enbridge Energy, Limited Partnership and Enbridge Energy, Limited Partnership Wisconsin (*sic*) (collectively "Enbridge"),[1] by their attorneys, Thomas M. Pyper and Jeffrey L. Vercauteren of Whyte Hirschboeck Dudek S.C., hereby file this Brief in Support of Motion Dismiss. For the reasons stated herein, the Court should dismiss Plaintiffs' Complaint, pursuant to Wis. Stat. § 802.06(2)(a)6., for failure to state a claim upon which relief can be granted.

Plaintiffs are attempting to utilize the citizen suit provision under Wis. Stat. § 59.69(11) to enforce a Dane County Zoning Ordinance through injunctive relief. Plaintiffs, however, fail to state a claim upon which relief can be granted by the Court because they attempt to enforce Condition No. 7 of Enbridge's conditional use permit ("CUP") (Complaint, ¶ 3) that Dane County itself is prohibited under state law from imposing and enforcing. Just as state law

[1] There is no entity entitled Enbridge Energy, Limited Partnership Wisconsin.

prohibits Dane County from enforcing the Condition, so too does state law prohibit Plaintiffs from enforcing that same Condition through a citizen suit. Accordingly, the Court should dismiss Plaintiffs' Complaint.

FACTS

Enbridge applied for a zoning permit for purposes of constructing a pump station and related appurtenances and improvements at the Waterloo Pump Station location. (Complaint, ¶¶ 5, 7 and 21.) The Zoning Administrator issued Dane County Zoning Permit No. DCPZP-2014-00199 for construction at the Waterloo Pump Station. On April 30, 2014, Enbridge signed the Dane County Zoning Permit agreeing to comply with all Dane County ordinances. (Complaint, ¶ 21.) However, on June 12, 2014, the Zoning Administrator issued a letter to Enbridge revoking the zoning permit and contending that the Waterloo Pump Station expansion and improvement was not a permitted land use but rather that it required a CUP. (Complaint, ¶ 24.)

In August 2014, in accordance with the Zoning Administrator's decision, Enbridge filed a CUP application with the Dane County Zoning and Land Regulation Committee ("ZLR Committee") to seek authorization to conduct the work at the Waterloo Pump Station. (Complaint, ¶ 25.) The ZLR Committee held public hearings on Enbridge's CUP permit application. (Complaint, ¶ 27.) On April 14, 2015, the ZLR Committee decided to grant Enbridge a CUP for the expansion and improvements at the Waterloo Pump Station. Condition No. 7 of that CUP required Enbridge to purchase and maintain for the life of the Waterloo Pump Station an additional Environmental Impairment Liability ("EIL") insurance policy with coverage limits of $25,000,000 (the "Insurance Requirement"). (Complaint, ¶ 28.)

The ZLR Committee submitted the CUP to the Town for its approval or rejection. The Town approved the CUP with the Insurance Requirement on April 20, 2015, and the CUP

became effective on April 21, 2015. (Complaint, ¶¶ 29-30.) On May 4, 2015, Enbridge appealed the ZLR decision, requesting that the Insurance Requirement be removed from the CUP.

While Enbridge's appeal to the Dane County Board was pending, the Wisconsin State Legislature passed 2015 Wisconsin Act 55, which created Wis. Stat. § 59.70(25) that provides:

> 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.

The Act also created 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.

(Complaint, ¶ 31.) Act 55 was signed into law on July 12, 2015 and published on July 13, 2015 with an effective date of July 14, 2015. As a result of the enactment of Wis. Stat. §§ 59.69(2)(bs) and 59.70(25), Dane County is prohibited from enforcing the Insurance Requirement against Enbridge. (Complaint, ¶ 33.)

On October 19, 2015, Enbridge once again filed an appeal with the Dane County Board to have the Insurance Requirement removed from the CUP. On December 3, 2015, the Dane County Board voted to deny Enbridge's appeal. (Complaint, ¶ 37.) On January 4, 2016, Enbridge filed a Petition for Certiorari Review challenging the imposition of the unenforceable Insurance Requirement in Dane County Circuit Court Case No. 16-CV-0008, which is currently pending.

ARGUMENT

A motion to dismiss for failure to state a claim pursuant to Wis. Stat. § 802.06(2) tests the legal sufficiency of the complaint. *See Weber v. City of Cedarburg*, 129 Wis. 2d 57, 64, 384

N.W.2d 333 (1986); *Wausau Tile, Inc. v. Cnty. Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). A complaint will be dismissed where "it is quite clear that under no conditions can the plaintiff recover." *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985) (citation omitted). In considering a motion to dismiss a complaint for failure to state a claim, all properly pleaded facts are taken as admitted. *Id.*

In the instant case, even accepting all of Plaintiffs' allegations as true for the purposes of this motion, the claims alleged should be dismissed because Plaintiffs' claims fail under state law, as explained below. *See, e.g., Wilson v. Cont'l Ins. Cos.*, 87 Wis. 2d 310, 317, 274 N.W.2d 679 (1979) ("While the complaint must be liberally construed it must still state a cause of action.") (quoting *Wulf v. Rebbun*, 25 Wis. 2d 499, 502, 131 N.W.2d 303 (1964)).

I. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR INJUNCTIVE RELIEF UNDER WIS. STAT. § 59.69(11).

Plaintiffs' sole claim in their Complaint is that Plaintiffs have authority under Wis. Stat. § 59.69(11) to enforce the Insurance Requirement contained in the CUP, which they allege to be a "violation[ ] of the zoning code." (Complaint, ¶ 1-2.) Plaintiffs acknowledge, as they must, that Wis. Stat. §§ 59.69(2)(bs)[2] and 59.70(25)[3] prohibit Dane County from imposing the Insurance Requirement on Enbridge or requiring Enbridge to comply with the Insurance Requirement. (Complaint, ¶ 31.) However, Plaintiffs argue that the enforcement authority of private citizens under Wis. Stat. § 59.69(11) allows them – but not Dane County – to somehow enforce the Insurance Requirement against Enbridge. (Complaint, ¶¶ 34-35.)

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[2] Wis. Stat. § 59.69(2)(bs) 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."

[3] Wis. Stat. § 59.70(25) provides: "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."

Plaintiffs' argument is without merit. They have failed to state a claim for two reasons. First, private citizens only have authority to enforce violations of *county zoning ordinances*, and not conditions included in permits that are not rooted under and/or required by a county zoning ordinance. Here, because: (i) the Insurance Requirement is contained in Enbridge's CUP and not under any Dane County zoning ordinance; and (ii) the Insurance Requirement is unenforceable under state law, Plaintiffs cannot demonstrate any violation of a zoning ordinance to allow them to sustain a citizen suit against Enbridge.

Second, even if the citizen suit provision allowed Plaintiffs to enforce the Insurance Requirement contained in Enbridge's CUP as a zoning ordinance, they are still not entitled to enforce the Insurance Requirement because the citizen suit provision on which they base their Complaint only allows citizens to supplement, and not supplant, a county's authority to enforce zoning ordinances. Because Dane County has no authority to enforce the Insurance Requirement, Plaintiffs also have no authority to enforce the Insurance Requirement, as addressed below.

A. Plaintiffs Cannot Establish Any Violation Of The Dane County Zoning Ordinance By Enbridge.

The county zoning ordinance enforcement provisions in Wis. Stat. §59.69(11) ("Subsection 11")[4] and predecessor provisions have been in effect for nearly a century.

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[4] Wis. Stat. § 59.69(11) provides:

> PROCEDURE FOR ENFORCEMENT OF COUNTY ZONING ORDINANCE. The board shall prescribe rules, regulations and administrative procedures, and provide such administrative personnel as it considers necessary for the enforcement of this section, and all ordinances enacted in pursuance thereof. 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. (Emphasis added.)

Subsection 11 authorizes a county or an owner of real estate in an affected zoning district through a citizen suit to seek "injunctive relief as a remedy for a zoning ordinance violation." *Forest Cnty. v. Goode*, 219 Wis. 2d 654, 657, 579 N.W.2d 715 (1998).

Court decisions interpreting Subsection 11 make clear that, in order for injunctive relief to be granted, a "proven zoning ordinance violation" must first be demonstrated. *Id.* at 657, 662 ("Compliance with such ordinance *may also be enforced* by injunctional order instituted at the suit of the county or an owner of real estate within the district affected by the regulation."); *Town of Delafield v. Winkelman*, 2004 WI 17, ¶ 28, 269 Wis. 2d 109, 675 N.W.2d 470. Thus, while Subsection 11 provides counties and citizens with an enforcement mechanism, that mechanism is inextricably tied to the enforcement of a violation of a county zoning ordinance, and *not* any other type of violation. *Columbia Cnty. v. Bylewski*, 94 Wis. 2d 153, 288 N.W.2d 129 (1980).

Accordingly, in the typical case, Subsection 11, like its predecessor provisions dating back nearly a century, has been utilized where a property owner is constructing a structure or commenced a use that does not comply with the express terms of a zoning ordinance. For example, in one of the earliest reported cases of a citizen enforcement action of a zoning ordinance violation in Wisconsin, the plaintiffs sought an injunction to stop the construction of a nonresidential building in a residential zoning district. *Holzbauer v. Ritter*, 184 Wis. 35, 198 N.W. 852 (1924) (concluding that construction was a "violation of the zoning ordinance").

This indeed is the true intent of Subsection 11 – the provision recognizes that residents of a particular zoning district have an interest in seeing the standards for that district enforced. If the county refuses to enforce those standards, Subsection 11 provides residents living in that district with an avenue to protect their interests. For example, if an applicant was proposing to construct a structure that was prohibited under the zoning ordinance and the county issued a

permit for its construction, the residents of the district could seek an injunction to prevent construction. Alternatively, Subsection 11 is *not* an appropriate mechanism to enforce a condition in a conditional use permit that is not prohibited under any zoning ordinance.

Here, Plaintiffs have failed to allege that Enbridge has violated the Dane County Zoning Ordinance. Instead, Plaintiffs' sole allegation is that Enbridge has not complied with the Insurance Requirement contained in Enbridge's CUP. However, a CUP is not a zoning ordinance.

While, in limited circumstances, courts have allowed citizens to enforce permit violations under Subsection 11, those permit violations are limited to enforcing permit conditions that are expressly rooted in a zoning ordinance. *See, e.g., Town of Cedarburg v. Shewczyk*, 2003 WI App 10, 259 Wis. 2d 818, 656 N.W.2d 491 (a provision of a conditional use permit can be enforced under Subsection 11 only when the provision is issued pursuant to and consistent with the zoning ordinance). Unlike those cases, Plaintiffs here are attempting to enforce an Insurance Requirement that is unique to Enbridge's CUP which is unenforceable under state law.

Nor can Plaintiffs demonstrate that Enbridge is in violation of any zoning ordinance. Indeed, there can be no dispute that Enbridge is in compliance with the Dane County zoning ordinance because it is constructing the pump station as allowed under the CUP and consistent with the standards in the zoning ordinance. Plaintiffs' Complaint contains no allegations to the contrary.

Further, Subsection 11 only allows a citizen suit to enforce an ordinance that has adopted "regulations authorized by" Wis. Stat. § 59.69. Yet, Wis. Stat. § 59.69(2)(bs) prohibits enforcement of a CUP condition that is preempted by state law and Wis. Stat. § 59.70(25) preempts the Insurance Requirement Plaintiffs are seeking to enforce. Thus, the Insurance

Requirement is not authorized by Wis. Stat. § 59.69 and, according to the express provisions of Subsection 11, it cannot be enforced by Plaintiffs under Subsection 11.

In sum, absent an allegation that Enbridge has failed to comply with a Dane County zoning ordinance, Plaintiffs cannot establish a claim under Subsection 11. *See Sohns v. Jensen*, 11 Wis. 2d 449, 456, 105 N.W.2d 818 (1960) ("It is clear from the record that *this permit was issued in violation of the ordinance*.") (emphasis added); *Citizens for Pres. of St. Croix, Inc. v. Riviera Airport, Inc.*, 212 Wis. 2d 644, 570 N.W.2d 64 (Ct. App. 1997) (unpublished) ("We conclude that the airstrip operation *violated the applicable zoning ordinance*.") (emphasis added); *Jelinski v. Eggers*, 34 Wis. 2d 85, 91, 148 N.W.2d 750 (1967) ("Such property right can be protected by injunction when threatened by *violation of a zoning ordinance*.") (emphasis added).

B. Plaintiffs Can Not Supplant The County's Zoning Ordinance Enforcement Authority.

Plaintiffs' claim also fails because they have no authority to enforce the Insurance Requirement, which state law prohibits Dane County from enforcing. This is because the citizen suit provision only supplements, and does not supplant, a county's ability to enforce a zoning ordinance violation.

Specifically, the purpose of the citizen suit provision in Subsection 11 is to allow a private citizen to enforce a county zoning ordinance where the county has failed to act, not when the county is prohibited from acting.

> While zoning regulations, like other regulations enacted pursuant to the police power, are enacted with the expectation that the burden of enforcement will rest with the municipality, the enabling acts of a substantial number of states authorize a taxpayer or other private person to institute an action to enjoin a violation of the zoning regulations. Provisions of this kind recognize not only the fact that landowners have a singular stake in the enforcement of land-use controls, but that the likelihood of vigorous enforcement is not always great. It is common knowledge that when zoning is commenced in many communities no adequate

> provision is made for enforcement. Frequently, enforcement is committed to a building inspector who is already understaffed for the task of enforcing the building code. When zoning enforcement is committed to his office he is unable to give it more than desultory attention.

Goode, 219 Wis. 2d at 679, n. 13 (quoting Kenneth H. Young, *Anderson's American Law of Zoning*, § 29.01, 683 (4th ed. 1997). The citizen suit provision thus does not establish unlimited and unfettered authority for private citizens to enforce a zoning ordinance, and it extends only so far as expressly permitted by express statutory law. *See Avondale Federal Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 694 (7th Cir. 1999) (denying remedy not expressly provided in citizen suit statute); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (a citizen suit "is meant to supplement rather than to supplant governmental action.").

In a case such as this where the State Legislature has made clear that the public interest in the enforcement of county zoning ordinances is limited as provided in Wis. Stat. §§ 59.69(2)(bs) and 59.70(25), the citizen suit provision in Subsection 11 does not provide an avenue for private citizens to trump that interest. Indeed, here, as in *Gwaltney*, allowing Plaintiffs to file a citizen suit where the State Legislature has clearly prohibited the imposition or enforcement of the Insurance Requirement "would *change the nature of the citizens' role from interstitial to potentially intrusive*." *See Gwaltney*, 484 U.S. at 61 (emphasis added). Plaintiffs have no authority to bring a citizen suit to enforce the Insurance Requirement where the State Legislature has eliminated the County's authority to do so. Because Plaintiffs citizen suit is a "private attorneys general" action, their authority to act is limited to the enforcement authority of the County. In the absence of County enforcement authority, there is no citizen enforcement authority.

Allowing private citizens to enforce conditions a county has included in a conditional use permit even where the county is prohibited from enforcing those conditions would lead to absurd

results. A county could thus include conditions with full knowledge that the conditions are unenforceable by the county, and a private citizen could enforce those conditions even though the county could not. For example, a county could include a condition in a conditional use permit that prohibited a restaurant from serving individuals of a particular classification. Clearly, the county could not enforce that discriminatory condition because doing so would be a clear constitutional violation. Plaintiffs would fair no better than the county in attempting to enforce that unconstitutional condition.

However, under Plaintiffs' view, a private citizen could enforce that condition and seek an injunction preventing the restaurant from serving individuals of the subject classification. There can be no reasonable argument that such a result is intended or allowed under Subsection 11. In short, because Dane County has no authority to impose or enforce the Insurance Requirement, Plaintiffs have no independent authority to enforce Condition No. 7 to the CUP.

II. THE INSURANCE REQUIREMENT WAS INVALIDATED RETROACTIVELY AND IS NO LONGER IN EFFECT.

Plaintiffs also allege that the statutes prohibiting Dane County from imposing or enforcing the Insurance Requirement were not retroactive and, therefore, the Insurance Requirement remains in effect. (Complaint, ¶ 33.) However, the prohibition on Dane County's ability to impose or enforce the Insurance Requirement under Wis. Stat. §§ 59.69(2)(bs) and 59.70(25) applies retroactively. Therefore, even under an argument that Plaintiffs have some enforcement authority under the CUP itself, there is nothing remaining in the CUP related to the Insurance Requirement that Plaintiffs could enforce.[5]

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[5] On January 4, 2016, Enbridge filed a Petition for Certiorari Review challenging the imposition of the unenforceable Insurance Requirement, Dane County Circuit Court Case No. 16-CV-0008, which is currently pending, seeking to remove the unenforceable Insurance Requirement from the conditional use permit.

In general, a statute is applied retroactively if: (1) the statute expressly or by necessary implication evidences a legislative intent that it apply retroactively; or (2) if the statute is remedial or procedural rather than substantive. A statute is considered "substantive" if it creates, defines or regulates rights or obligations; a statute is deemed "remedial" or "procedural" if it affords a remedy or facilitates remedies already existing for the enforcement of rights or redress of injuries. *Rock Tenn Co. v. Labor & Indus. Review Comm'n*, 2011 WI App 93, 334 Wis. 2d 750, 799 N.W.2d 904. Retroactive application need not be expressly stated in the statute; instead, it can be implied by the purpose of the law. For example, in *Overlook Farms Home Ass'n, Inc. v. Alternative Living Servs.*, 143 Wis. 2d 485, 422 N.W.2d 131 (Ct. App. 1988), the court concluded that the "necessary implication of the statute reveals the legislative intent to make the statute retroactive." *Id.* at 494. The purpose of the statute was to invalidate private covenants restricting group homes, and without retroactive application that purpose would have been thwarted.

In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the court stated that notwithstanding the general presumption against retroactivity, "in many situations, a court should apply the law in effect at the time it renders its decision." *Id.* at 273 (citation omitted). "We have regularly applied intervening statutes *conferring or ousting jurisdiction*, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274 (emphasis added) (citing a case where the elimination of the amount-in-controversy requirement during the pendency of the case gave the court jurisdiction over the case where it otherwise would not have had jurisdiction). A jurisdictional rule "takes away no substantive rights" and such rules "speak to the power of the court rather than to the rights or obligations of the parties." *Id.* (citation omitted). The prohibition on retroactive application

considers whether the retroactive application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.

In *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999), the court restated the general rule that a court should generally not apply a new statutory provision retroactively where it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 825 (quoting *Landgraf*, 511 U.S. at 280). However, "intervening procedural and jurisdictional provisions are regularly applied to pending cases" because "application of a new jurisdictional rule usually takes away no substantive rights" and instead speaks to "the power of the court rather than the rights or obligations of the parties." *Id.* at 826 (concluding that a new law was "jurisdictional" because it divested a government authority of power to take action with respect to a class of individuals).

Given that Dane County's authority to impose the Insurance Requirement is a jurisdictional issue, the new state law applies retroactively and makes the County's imposition of the Insurance Requirement unlawful when it was added to the CUP even though the new laws limiting the County's jurisdiction had not yet been enacted. The new state laws are jurisdictional in that they divested the County of the power to impose insurance requirements on hazardous liquid pipeline companies.

The Insurance Requirement is also a continuing obligation that regulates Enbridge's conduct long after the passage of the new state law, and therefore even if the application of the law to the period prior to its passage is prohibited, that would not speak to its application to the Insurance Requirement going forward. *See Ten Mile Invs., LLC v. Sherman*, 2007 WI App 253,

¶ 10, 306 Wis. 2d 799, 743 N.W.2d 442 (concluding that although the activity at issue was commenced before the effective date of the new statute, it was maintained after that date). When the CUP was approved is irrelevant. The Insurance Requirement was rendered unenforceable prospectively by the language of Wis. Stat. §§ 59.69(2)(bs) and 59.70(25).

Notably, a new law passed while the time for an appeal is still pending applies to the pending action. In *Salzman v. Dep't of Nat. Res.*, 168 Wis. 2d 523, 484 N.W.2d 337 (Ct. App. 1992), a new law was passed during the 45-day period the petitioner had to appeal a circuit court decision that extended the appeal deadline when a motion for reconsideration is filed. The court held that the new law applied and extended the appeal deadline in that case. The court concluded: "The state has no vested right to its judgment until the time for appeal has expired. In this case, the forty-five-day appeal time limit had not expired at the time [the new law] became effective. Therefore, at the time the statute became effective, the state had no vested right to the judgment." *Id.* at 530. *See also Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶ 48, 302 Wis. 2d 299, 735 N.W.2d 1 (concluding that a new law applied where the court had not yet issued a final decision, stating that "[n]o litigant has a vested right in a particular remedy, so he can have none in rules of procedure which relate to the remedy.").

This case is similar to *City of Madison v. Town of Madison*, 127 Wis. 2d 96, 377 N.W.2d 221 (Ct. App. 1985), in which the court held that a statute passed after the Town of Madison had commenced incorporation proceedings prevented the town from incorporating under that procedure. The court concluded that a town has no "right" to incorporate, and instead incorporation is a matter of legislative grace, not a matter of right. *Id.* at 105. The town therefore had no vested rights that could be affected by the change in law, and the new law was a "procedural" statute. Similarly, here Dane County has no "right" to impose the Insurance

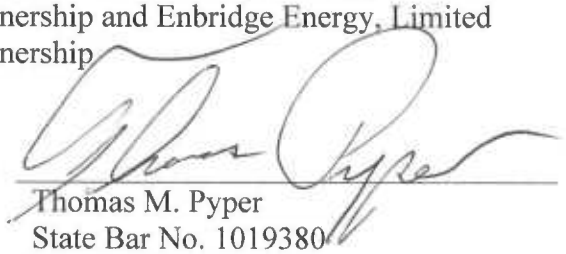
Requirement. Dane County's authority to regulate land use activities is created by the state legislature and is subject to changes in law. The legislature's decision to change the procedure by which counties can regulate land uses is a procedural statute with retroactive effect. Moreover, under *Trinity Petroleum*, the County had no vested rights in the Insurance Requirement until Enbridge had exhausted its appeal and, because the new law came into effect during the appeal, it eliminated the County's right to impose the Insurance Requirement at the time it was added to the CUP. Therefore, the Insurance Requirement was invalidated retroactively by the new state law and is no longer in effect. Accordingly, even if the Plaintiffs could enforce a condition attached to a CUP (as opposed to a zoning ordinance when the ordinance has been violated), there is no legal condition to be enforced.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint, with prejudice, and with costs.

Dated this 2nd day of March, 2016.

WHYTE HIRSCHBOECK DUDEK S.C.
Attorneys for Defendants, Enbridge Energy Company, Inc., Enbridge Energy, Limited Partnership and Enbridge Energy, Limited Partnership

By: 

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