STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES and TIM JENSEN Plaintiffs, ENBRIDGE ENERGY COMPANY, INC. ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY, LIMITED PARTNERSHIP Defendants.	)	Case No. 16-CV-0350 Case Code: 30704

PLAINTIFFS RESPONSE TO MOTION TO DISMISS

The Plaintiffs, ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES, and TIM JENSEN, ("Plaintiffs") by their Attorneys, Patricia K. Hammel, and Thomas R. Burney as and for their Response to Defendants Motion to Dismiss and in support of their prayer that the Court deny the Motion to Dismiss state as follows:

I. INTRODUCTION

The Insurance Condition which is the subject of this litigation provides as follows:

> *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.

(Compl. at ¶ 28) ("Insurance Condition") For purposes of this Motion, Defendants admit they do not intend to secure the required insurance and otherwise comply with the Insurance Condition. (Compl. at ¶ 65) included in the conditional use permit approved by Dane County (Compl. at ¶¶ 25-30) ("Conditional Use Permit").

Plaintiffs seek an order from this Court finding that Defendants are subject to the Insurance Condition and enjoining it from commencing any operations pursuant to the Conditional Use Permit related to the Project until it has secured a binding letter of commitment from an insurance carrier satisfying the Insurance Condition in the Conditional Use Permit.

Defendants have moved to dismiss the Complaint pursuant to Wis. Stat. § 802.06(2)(a)6, for failure to state a claim upon which relief can be granted. As its sole grounds for dismissal it alleges the Insurance Requirement that the Plaintiffs ask this Court to enforce was invalidated retroactively and is no longer in effect. Defendants rely on two riders added to the State Budget, 2015 Wisconsin Act 55, which were codified as §59.69(2)(bs) and §59.70(25), Stats., and can be found at SECTION 1922am and SECTION 1923e of Act 55, on pages 336, and 337, respectively.[1] They provide in relevant part:

> "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." §59.69(2)(bs), Stats. "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." §59.70(25) Stats.

(Compl. at ¶ 31 and ¶ 32). ("Budget Riders")

The chronology of the Conditional Use Permit, the Insurance Condition and the genesis of the Budget Riders are described in the Complaint. (Compl. at ¶¶ 24-31). The Insurance Condition

[1] The enacted State Budget can be found on-line at: http://docs.legis.wisconsin.gov/document/acts/2015/55.

is the product of considered and deliberate consideration by the Dane County Zoning Committee. The Insurance Condition was the product of an extensive public hearing process, including the retention of a leading risk management expert for advice. (Compl. ¶¶ 9-10; 27-30).

In contrast, there is no evidence that the Budget Riders were subject to the deliberative process employed to enact legislation implicating the public interest prior to enactment including a public hearing. An examination of the two sections of the Wisconsin statutes which were amended demonstrate that prohibitions, preemptions and restrictions on local government authority to impose conditions deemed in the public interest in a land use matter are extraordinary. Moreover, these proscriptions on local government authority are designed to benefit one business or industry.

As Defendants acknowledge, "In considering a motion to dismiss a complaint for failure to state a claim, all properly pleaded facts are taken as admitted." Brief in Support of Motion to Dismiss (Brief in Support, at 4)[2]

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[2] For purposes of this Motion the Defendants admit all of the plead facts in the complaint. That includes: the statement that the Insurance Condition promotes the public welfare and the public health, safety and welfare and that the hazardous material to be transported in the pipeline is subject to *increased risk of oil spills that* bitumen, ~~which is~~ the type of oil transported through the pipeline associated with the pumping station, is similar in its composition and consistency to tar; is as much as 70 times more viscous than conventional oil and is substantially more corrosive to the pipes resulting in increased dangers to affected populations; that these characteristics make it challenging and expensive to clean up; that bitumen is acidic; its constituents include sulfur that chemically causes pipe embrittlement, chlorides that lead to stress corrosion, and quartz sand particles that are physically highly abrasive; that Bitumen is too viscous to flow through a pipe.; therefore, it must be diluted with toxic, explosive and volatile diluents, combined into a product called dilbet, which is ignitable and a health threat when the diluents volatize during pipe ruptures; to reduce viscosity in order to increase flow rates, the bitumen is heated from ambient temperatures to approximately 158F, as every 20 degree increase doubles the rate of corrosion; that industrial pumps are used to increase pressure inside the pipe from low pressures of less than 600 pounds per square inch ("psi") to 1,200 pounds psi, approximately the force of a car power washer, which further amplifies all of the stresses on the pipe; that when there is an oil spill in surface waters, the diluents volatize and the bitumen left behind tends to sink rather than float on the surface, which, unlike conventional oil that can ~~largely~~ be skimmed off, is extraordinarily difficult and costly to clean up; that high volumes of oil are proposed to be transported resulting in increased risks of a huge spill in the event of a pipe rupture; that Line 61 is a 42 inch diameter pipe, ~~which is~~ the largest oil pipeline in the U.S.; that the pumping station will increase internal pipe pressure to 1,200 pounds per square inch (psi); that as a result, a pipe break in Dane County will result in the release of approximately 2 million gallons of hazardous material per hour until the pipe is closed down.; that the Enbridge safety record provides a basis in the public welfare or imposing the Insurance Condition; that in 2010 Enbridge was responsible for the worst inland oil spill in U.S. history; ~~I~~ which continued for 17 hours before the pipeline was finally shut down; that the 2010 spill caused $1.2 billion in damages;~~;~~ that there were numerous warnings of a possible oil spill before the Kalamazoo accident that Enbridge failed to respond to; that beginning in 2008, 329 defects were identified but remained unrepaired in Enbridge's Michigan Line 6 pipeline that later ruptured; that four months before the accident, the Pipeline Safety Hazardous Material Administration cited Enbridge for improper monitoring of corrosion in the pipeline that later ruptured; that the

> The motion to dismiss for failure to state a claim upon which relief can be granted serves basically the same function as the demurrer for failure to state ultimate facts constituting a cause of action under former section 263.06(6), Stats., that is, to test the legal sufficiency of the complaint. Unlike section 263.03(2), Stats.; however, the new rules do not require that the complaint state all the "ultimate facts constituting each cause of action." Thus, the motion to dismiss usually will be granted only when it is quite clear that under no conditions can the plaintiff recover." *Anderson v. Cont'l Ins. Co.*, 85 Wis. 2d 675, 683, 271 N.W.2d 368, 373 (1978).

See also *Zinn v. State,* 112 Wis. 2d 417, 423, 334 N.W.2d 67, 70 (1983):

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

The Defendants expressly recognize the purpose of the County Zoning Enforcement Authority in promoting the public health, safety and welfare of Dane County citizens.

> "The rules and regulations and the districts, setback building lines and regulations authorized by this section, shall be prescribed by ordinances which s*hall be declared to be for the purpose of promoting the public health, safety and general welfare."* **(e.s.)** (Brief in Support, at 5)

Such a purpose is an essential part of the fabric of § 59.69(11), Stats., ("Subsection 11 Enforcement Remedy.")

The Defendants also expressly recognize Plaintiffs' remedy which is afforded under the statute to an owner of real estate,

> 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

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risk management expert retained by the Dane County Zoning and Land Use Committee found that the General Liability insurance policy maintained by Enbridge could not be relied upon to pay for major oil spill cleanups; and that the expert recommended adding an Environmental Impairment Liability insurance policy in amount of $25 million in order to provide adequate assurances that funds will be available in the future to pay for cleanups. (Compl. at ¶¶5-6 39-62).

violation." *Forest County. v. Goode,* 219 Wis. 2d 654, 657, 579 N.W.2d 715 (1998). (Brief in Support, at 6)

Furthermore, Plaintiffs agree with the Wisconsin Supreme Court opinion in *Forest County. v. Goode,* 219 Wis. 2d 654, 657, 579 N.W.2d 715 (1998). 219 Wis. 2d at 679, n. 13 cited by Defendants as to the purpose of this Subsection 11 Enforcement Remedy,

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

Plaintiffs submit that the enforcement authority of private citizens under § 59.69(11), Stats., whose long standing antecedents is unrelated to later citizen suit provisions in federal environmental law, allows them to enforce the Insurance Condition against Defendants with the independent authority to do so established under the statute. (Compl. ¶¶34-35.)

Such enforcement authority is not novel or unique under Wisconsin law: The courts' recognition of the substantive and independent right to enforce compliance with a zoning ordinance date back to the early part of the last century, In *Holzbauer v. Ritter*, 184 Wis. 35, 39-40, 198 N.W. 852, 853-54 (1924) the court recognized the fundamental rights implicated by a property owners proceeding without complying with the necessary land use regulations,

> On the facts alleged in this complaint it is plain that if the defendants Loughlin and Ritter are allowed to proceed in the erection of the store building it might cause special damage to the plaintiffs. Under such circumstances a plaintiff's cause of action does not depend on any right to enforce an ordinance of the city, but on his right to prevent irreparable injury to his property when the injury threatened is special and different from that of the general public.
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> "Similar questions have frequently arisen in other states, and it has generally been held that property rights may be protected by injunction when, in violation of ordinances, those rights are threatened to be invaded, and that it is not necessary in such cases to show

> that the act violating the ordinance is a nuisance per se. Griswold v. Brega, 160 Ill. 490, 43 N.E. 864; First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N.E. 434; Kaufman v. Stein, 138 Ind. 49, 37 N.E. 333; [40] Caskey v. Edwards, 128 Mo. App. 237, 107 S.W. 37; Houlton v. Titcomb, 102 Me. 272, 66 A. 733; Bangs v. Dworak, 75 Neb. 714, 106 N.W. 780.

See also *Bouchard v. Zetley*, 196 Wis. 635, 644-45, 220 N.W. 209, 213 (1928)

The gravamen of Defendants' Motion to Dismiss hinges on whether the Budget Riders have retroactive application. If it does, then Plaintiffs cannot proceed. If the Budget Riders are not retroactive then Defendants' Motion must fail. For these reasons this Response will address the retroactivity issue first and then address Defendants arguments on the alleged limits and scope of the Subsection 11 Enforcement Remedy.

II. THE BUDGET RIDERS ARE NOT RETROACTIVE LAWS

Defendants argue that the budget riders that became effective on July 14, 2015 are retroactive in their effect, and, although the Insurance Condition was legally issued on April 21, 2015 the Insurance Condition was retroactively repealed by action of the Budget Riders and, therefore, is no longer enforceable. (Defendant's Br, at p. 10).

Nothing in either Budget Riders provides for retroactive application nor do the Budget Riders satisfy the limited exceptions to the rule of law severely disfavoring retroactive application of new laws. The Budget Riders are prospective in effect only, and the Insurance Condition continues in effect and is enforceable by affected property owners.

The rule of statutory construction in Wisconsin, and most other jurisdictions, is that "legislation is presumptively prospective." That presumption is only rebutted if:

1. "[T]he statutory language clearly reveals either expressly or by necessary implication an intent that the statute apply retroactively," or
2. The substance of the law is "procedural or remedial," not substantive, and "only go[es] to

> confirm rights already existing and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations [without] impos[ing] an unreasonable burden on a party."

Betthauser v. Wisconsin Physicians Service Insurance, 172 Wis. 2d 141, 493 N.W.2d 40 (1992); *Gutter v. Seamandel*, 103 Wis. 2d 1, 17, 308 N.W.2d 403 (1981). Even a procedural rule change will not be applied retroactively if it impairs existing rights or obligations. *Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, 91, 302 Wis. 2d 299, 735 N.W.2d 1.

Applying the tests and standards addressing retroactivity that the Courts in this state and the United States Supreme Court have applied, there is no basis for Defendants' claim that the Budget Riders have retroactive effect. Accordingly, Defendants' Motion to Dismiss must be denied.

Controlling judicial precedent directs us to first examine the words of the statute at issue. As the Court in *Rock Tenn Co. v. Labor & Indus. Review Comm 'n*, 2011 WI App 93, 334 Wis. 2d 750, 799 N.W.2d 904, at ¶ 9 stated,

> At all times we are mindful of the goal of statutory interpretation, which is to discern and give effect to the intent of the legislature. In determining legislative intent, first resort must be to the language of the statute itself. When a statute is plain and unambiguous, interpretation is unnecessary, and intentions cannot be imputed to the legislature except those to be gathered from the terms of the statute. In short, if the language of the statute is plain and unambiguous, we need not look beyond it to determine the meaning of the statute.

An examination of the Budget Riders on their face disclose no expressed provision for retroactivity upon which the Defendants can rest their claim. The Legislature did not expressly provide or include any statement (clear or otherwise) that the prohibition on the Insurance Condition was retroactive or declarant of existing law.

In examining the excerpts from Senate Bill 21 attached as Exhibit 1 ("Senate Bill 21") it is significant that when the Legislature intended to provide for retroactivity it expressly stated so.

(See for example Section 9337 (2) at page 665; and Section 9427 at page 1565; 9437 (1) at page 659 of Senate Bill 21). The omission of an expressed retroactivity provision in the Budget Riders clearly indicates that the Legislature did not intend to make the Budget Riders retroactive. See Exhibit 1.

Secondly we are directed to examine any legislative history. Significantly, there is no legislative history on the Budget Riders. The Budget Riders were adopted without being subject to the deliberative legislative process of committee hearings and opportunities for interested persons to testify for and against them. There is no legislative history to support a claim that the Legislature intended to make these Budget Riders retroactive.

Nor are the Defendants' characterizations of the Budget Riders as procedural or remedial availing (Brief in Support, at 11-14).

There is no precedent in Wisconsin case law for characterizing as procedural the complete removal of the authority for a county to use its zoning ordinances to condition dangerous new projects upon the purchase of adequate cleanup insurance.

Nor do the Wisconsin cases relied upon by the Defendants support their position that the Budget Riders here are procedural. *Rock Tenn Co. v. Labor & Indus. Review Comm 'n,*2011 WI App 93, 334 Wis. 2d 750, 799 N.W.2d 904 involved the retroactive application of the award of prospective treatment expenses. The Court found that retroactive application of the statute merely changed the payment date of treatment expenses and not the amount of the treatment expenses and therefore did not work a substantive change in existing law.

The Court explained the distinction between a substantive statute and a procedural statute,

> A statute is substantive if it creates, defines or regulates rights or obligations. *Betthauser v. Medical Protective Co.*, 172 Wis. 2d 141, 147-48, 493 N.W.2d 40 (1992). Remedial or

> procedural statutes are "those which afford a remedy, or improve or facilitate remedies already existing for the enforcement of rights and redress of injuries." *Chappy v. LIRC,* 128 Wis. 2d 318, 324, 381 N.W.2d 552 (Ct. App. 1985).
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> See also *Salzman v. Dep't of Nat. Res.,* 168 Wis. 2d 523, 484 N.W.2d 337 (Ct. App. 1992)

where the court reiterated the guiding principles between substantive and procedural laws,

> The distinction between substantive and procedural laws is relatively clear. If a statute simply prescribes the method -- the "legal machinery" -- used in enforcing a right or a remedy, it is procedural. If, however, the law creates, defines or regulates rights or obligations, it is substantive -- a change in the substantive law of the state.
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> In *Ten Mile Invs., LLC v. Sherman* , 2007 WI App 253, 10, 306 Wis. 2d 799, 743 N.W.2d

442 the court addressed an amendment to the frivolous pleading statute (Wis. Stat. § (Rule) 802.05 (2005-06)) and in reliance on the Wisconsin Supreme Court's decision in *Trinity -Petroleum, Inc. v. Scott Oil Co.,* 2007 WI 88, ¶48, 302 Wis. 2d 299, 735 N.W.2d 1 found the amendment was procedural and applied the same retroactively to deny a claim under the sanctions statute for failure to comply with the, "safe-harbor" provision in the statute requiring fair notice of intent to frivolous claims. In *Trinity,* the Wisconsin Supreme Court held that Rule 802.5 is a procedural rule and has retroactive application, 2007 WI 88, ¶7. In reaching that conclusion the Court relied upon the extensive process that preceded the adoption of the Rule and that "the court carefully deliberated whether the new rule was procedural or substantive and determined that the new rule is a procedural rule". 2007 WI 88, ¶7. That careful deliberation and extensive process that the Court conducted is in stark contrast to the absence of any apparent process or deliberation preceding the adoption of the Budget Riders.

Nor does *Salzman v. Dep't of Nat. Res.,* 168 Wis. 2d 523, 484 N.W.2d 337 (Ct. App. 1992) support Defendants' claims. The Salzman court's restatement of the applicable principles for distinguishing substantive and procedural laws resulted in a finding that the statute governing the time for filing an appeal is a "procedural statute" The court observed that, "The establishment of

effective dates does not determine whether a statute will apply retroactively. All statutes have effective dates." *Salzman* at 528-29. Inasmuch as Salzman concerned a procedural law, Defendants reliance upon it for the proposition that a new law passed while the time for an appeal is still pending applies to the pending action is unavailing (Brief in Support, at 13)

The decision in *City of Madison v. Town of Madison*, 127 Wis. 2d 96, 377 N.W.2d 221 (Ct. of App. 1985) is not useful to the court's analysis of whether the Budget Riders are procedural or substantive. The new law requiring a signature on certain documents to establish a City as a

> "First Class City" was deemed to be a procedural not a substantive law, "First, *sec. 990.001(15)*, Stats., makes no reference to *sec. 60.81*, Stats; it speaks only to the procedures a city must follow to move to the next higher classification under *sec. 62.05*, Stats. *Section 60.81* is unchanged by *sec. 990.001(15)*; the criteria for incorporation -- including adjacency to a first class city -- remain exactly the same." *City of Madison*, at 103.

Therefore the court held that no substantive rights were implicated by the retroactive application of the new law.

The Defendants cite to the U.S. Supreme Court decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). In *Landgraf,* the Supreme Court found that Section 102 of the Civil Rights Act did not apply retroactively to preenactment conduct in a sexual harassment claim brought under the Act. Justice Stevens opinion for the 8-1 majority (3 justices joined in a concurring opinion) is a lengthy and dispositive exposition on retroactivity. The cardinal principle is that, "statutory retroactivity is not favored, see *Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208*. Pp. 263-265, *102 L. Ed. 2d 493, 109 S. Ct. 468*." *Landgraf* at 264. The Court illustrates with several examples the ample precedent in our jurisprudence for this axiom (See *Landgraf* at 265-68). For example he cited with authority James Madison's treatise in the Federalist Papers:

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

From this analysis the Court concluded that, "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." (*See Landgraf* at 265-68)

For these and other reasons the Court concluded that statutory retroactivity has long been disfavored but acknowledged that deciding when a statute operates "retroactively" is not always a simple or mechanical task." (*Landgraf* at 266, 268)

The rights afforded under the Insurance Condition to adequate funds for a clean-up in the event of an accident related to the pumping station and the pipeline is a substantive right. The Insurance Condition is a substantive right secured to the Plaintiffs by virtue of the County's authority under the Zoning Enabling Act, §59.69, Stats.,et seq.) to protect and promote the public welfare.

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

> It is the purpose of this section to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; ...to encourage uses of land and other natural resources which are in accordance with their character and adaptability; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to encourage the protection of groundwater resources; to preserve

> wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds....

The Budget Riders are not in the language of either formulation adopted by the courts of this state: one which "afford(s) a remedy, or improve(s) or facilitate(s) remedies already existing for the enforcement of rights and redress of injuries." or "prescribes the method -- the 'legal machinery' -- used in enforcing a right or a remedy".

Contrary to Defendants assertion the county's power to require an Insurance Condition is neither procedural nor remedial. The Insurance Condition is substantive. Each of the named Plaintiffs live within a short distance of the pipeline and the pumping station. (Compl. at para's 12-16). Due to their proximity to the Defendants' facilities, the Plaintiffs, owners of real estate adjoining the Project in the A-1 EX zoning district, are adversely affected by Defendants refusal to secure the necessary insurance to satisfy a condition that the County in the exercise of its discretion deemed to promote the public welfare (Compl. at para's 28 and 66).

Justice Stevens instruction writing for the Supreme Court is particularly apt here,

> However, retroactivity is a matter on which judges tend to have "sound instinct[s]," see *Danforth v. Groton Water Co., 178 Mass. 472, 476, 59 N.E. 1033,1034 (1901)* (Holmes, J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf at 270.

In conclusion for all of reasons set forth above the Budget Riders are substantive and not procedural. By the plain language contained in the Budget Riders they were not given retroactive. Therefore Defendants' Motion to Dismiss fails.

III. THE CONDITIONAL USE AND THE INSURANCE CONDITION ATTACHED TO IT ARE ENFORCEABLE UNDER THE SUBSECTION 11 ENFORCEMENT REMEDY.

Defendants posit two additional arguments against enforceability of the Insurance

Condition—that a Conditional Use and all of the conditions attached to it are either not a zoning ordinance as that term is used in Subsection 11 or Subsection 11 is *not* an appropriate mechanism to enforce a condition in a conditional use permit. (Brief in Support, at 5-10) Neither argument has any merit.

The Defendants rely upon an overly narrow and constrained interpretation of Subsection 11 and ignore the plain language of the statute. Subsection 11 uses the term "ordinances":

> 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 Defendants argument leads to is that none of the County conditions in a conditional use can be enforced through the Subsection 11 Enforcement Remedy because according to the Defendants 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 Defendants 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. The Wisconsin Supreme 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:
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> ..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.

In *Town of Cedarburg v. Shewczyk*, 2003 WI App 10, P15-P16 (Wis. Ct. App. 2002) (a case cited by the Defendants) the court outright rejected the Defendants argument (Brief in Support, at 7-8) that a conditional use is not a zoning ordinance for the purpose of the Subsection 11 Remedy:

> The Shewczyks argue 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 reason 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. We cannot agree.
>
> Municipalities frequently use conditional or special use permits as a device when implementing zoning laws. 8 Eugene McQuillin, The Law of Municipal Corporations § 25.12, at 44 (3d rev. ed. 2000). Moreover, Wis. Stat. § 62.23(7)(a) vests a municipality with the authority to enact ordinances, resolutions or regulations related to the location and use of buildings. The statute easily incorporates the granting or denial of conditional use permits. In fact, in subsec. (7)(e) of this statute, municipalities are empowered to make special exceptions to the terms of a zoning ordinance. The conditional use permit issued to the Shewczyks falls under this statutory provision. This provision gives the Town the general authority to enact its CUP under the Zoning Chapter of its Code of Ordinances. In

> this case, the CUP was a special limited conditional use permit under sec. 10-1-11 of the Town's zoning code...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.

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 §10.123(3) (c), Dane County. Ord., unregulated oil pipelines and associated appurtenances are listed as a conditional use in land zoned as A-1 Exclusive (Compl, at ¶22). §10.255(2) (a), of the Dane County. Ord., 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 Dane County Ord sets forth specific standards governing the issuance of a conditional use permit:

> "*Standards.* No application for a conditional use shall be granted by the town board or zoning committee unless such body shall find that all of the following conditions are present:
> **1.** That the establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare;
> **2.** That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by establishment, maintenance or operation of the conditional use;
> **3.** That the establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district;
> **4.** That adequate utilities, access roads, drainage and other necessary site improvements have been or are being made;

5. That adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets; and

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

Thus, the Dane County Zoning Ordinance, which the plaintiffs seek to enforce under §59.69(11) specifically provides for and authorizes the conditions (including the Insurance Condition) in the conditional use permit issued to the Defendants 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,

> 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.

Contrary to Defendants' assertions, there is nothing "absurd" about allowing private citizens to enforce conditions a county has included in a conditional use permit. The example offered by the Defendants in support of its absurdity argument (Brief in Support, at 9-10) equating a condition allowing discrimination in public accommodations to a condition affording adequate funds for a clean-up in the event of an accident related to a very dangerous business prone to accident is not only offensive but also carelessly inaccurate. Unconstitutional enactments by legislatures or administrative agencies are void and have no legal effect: as they cannot be enforced

by anyone. A law or regulation created under authority of law which violates the constitution is invalid. As the Wisconsin Supreme Court has explained in *G. Heileman Brewing Co. v. City of LaCrosse*, 105 Wis. 2d 152, 312 N.W.2d 875, 879 (Ct. App. 1981), "An unconstitutional act of the legislature is not a law. It confers no rights. It poses no penalty, affords no protection, and in legal contemplation has no existence."

If there is any situation that deserves the characterization of "absurd" it is the Legislature's intervention in this matter to aid Enbridge when a local unit of government has sought to protect its citizenry and its property owners.

Fundamentally Defendants' arguments fail because they place an over-reliance on what they deem to be legislative intent without any support for their claims. They have reserved for themselves the judicial function of divining the "true intent of Subsection 11". For example with respect to the Subsection11 Enforcement Remedy, they assert without any authority that, "This indeed is the true intent of Subsection 11...seeing the standards for that district enforced." (Brief in Support, at 6). We 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 Defendants claims that the Subsection 11 Enforcement Remedy is not available to the Plaintiffs herein.

IV. CONCLUSION

WHEREFORE, Plaintiffs respectfully pray that this Court deny the Motions to Dismiss, find that the Complaint states a cause of action, order the Defendants to answer the Complaint and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

Plaintiffs Robert and Heidi Campbell Keith and Trisha Reopelle, James and Jan Holmes, and Tim Jensen

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PLAINTIFF'S EXHIBIT 1

for Plaintiff's Brief in Opposition to

Motion to Dismiss

par. (c) shall declare that they are serving on the board, or appoint their designees, not later than the first day of the 4th month beginning after a board is created.

SECTION 1922am. 59.69 (2) (bs) of the statutes is created to read:

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.

SECTION 1922b. 59.692 (1) (bn) of the statutes is amended to read:

59.692 **(1)** (bn) "Shoreland setback area" means an area in a shoreland that is within a certain distance of the ordinary high–water mark in which the construction or placement of ~~buildings or~~ structures has been limited or prohibited under an ordinance enacted under this section.

SECTION 1922c. 59.692 (1) (e) of the statutes is created to read:

59.692 **(1)** (e) "Structure" means a principal structure or any accessory structure including a garage, shed, boathouse, sidewalk, stairway, walkway, patio, deck, retaining wall, porch, or fire pit.

SECTION 1922d. 59.692 (1d) of the statutes is created to read:

59.692 **(1d)** (a) An ordinance enacted under this section may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard.

(b) Paragraph (a) does not prohibit a county from enacting a shoreland zoning ordinance that regulates a matter that is not regulated by a shoreland zoning standard.

SECTION 1922e. 59.692 (1f) of the statutes is created to read:

59.692 **(1f)** (a) A county shoreland zoning ordinance may not require a person to do any of the following:

1. Establish a vegetative buffer zone on previously developed land.

2. Expand an existing vegetative buffer zone.

(b) A county shoreland zoning ordinance may require a person to maintain a vegetative buffer zone that exists on the effective date of this paragraph .... [LRB inserts date], if the ordinance also does all of the following:

1. Allows the buffer zone to contain a viewing corridor that is at least 35 feet wide for every 100 feet of shoreline frontage.

2. Allows a viewing corridor to run contiguously for the entire maximum width established under subd. 1.

SECTION 1922f. 59.692 (1k) of the statutes is created to read:

59.692 **(1k)** (a) 1. The department may not impair the interest of a landowner in shoreland property by establishing a shoreland zoning standard, and a county may not impair the interest of a landowner in shoreland property by enacting or enforcing a shoreland zoning ordinance, that does any of the following:

a. Requires any approval to install or maintain outdoor lighting in shorelands, imposes any fee or mitigation requirement to install or maintain outdoor lighting in shorelands, or otherwise prohibits or regulates outdoor lighting in shorelands if the lighting is designed or intended for residential use.

b. Except as provided in subd. 2., requires any approval or imposes any fee or mitigation requirement for, or otherwise prohibits or regulates, the maintenance, repair, replacement, restoration, rebuilding, or remodeling of all or any part of a nonconforming structure if the activity does not expand the footprint of the nonconforming structure.

c. Requires any inspection or upgrade of a structure before the sale or other transfer of the structure may be made.

d. Requires any approval or imposes any fee or mitigation requirement for, or otherwise prohibits or regulates, the vertical expansion of a nonconforming structure unless the vertical expansion would extend more than 35 feet above grade level.

e. Establishes standards for impervious surfaces unless the standards provide that a surface is considered pervious if the runoff from the surface is treated by a device or system, or is discharged to an internally drained pervious area, that retains the runoff on or off the parcel to allow infiltration into the soil.

2. A county shoreland zoning ordinance shall allow an activity specified under subd. 1. b. to expand the footprint of a nonconforming structure if the expansion is necessary for the structure to comply with applicable state or federal requirements.

3. a. Nothing in this section prohibits the department from establishing a shoreland zoning standard that allows the vertical or lateral expansion of a nonconforming structure.

b. Nothing in this section prohibits a county from enacting a shoreland zoning ordinance that allows the vertical or lateral expansion of a nonconforming structure if the ordinance does not conflict with shoreland zoning standards established by the department.

SECTION 1922g. 59.692 (1m) of the statutes is renumbered 59.692 (1c).

SECTION 1922h. 59.692 (1s) of the statutes is repealed.

SECTION 1922i. 59.692 (2m) (a) and (b) (intro.) and 1. of the statutes are repealed.

SECTION 1922j. 59.692 (2m) (b) 2. of the statutes is renumbered 59.692 (2m) and amended to read:

59.692 **(2m)** ~~Regulates~~ A county shoreland zoning ordinance may not regulate the construction of a structure ~~or building~~ on a substandard lot ~~if~~ in a manner that ~~provision~~ is more restrictive than the shoreland zoning standards for substandard lots ~~promulgated by the department under this section~~.

SECTION 1922k. 59.692 (4) (b) of the statutes is amended to read:

59.692 **(4)** (b) Variances and appeals regarding shorelands within a county are for the board of adjustment for that county under s. 59.694, and the procedures of that section apply. Notwithstanding s. 59.694 (4), the department may not appeal a decision of the county to grant or deny a variance under this section but may, upon the request of a county board of adjustment, issue an opinion on whether a variance should be granted or denied.

SECTION 1922L. 59.692 (5m) of the statutes is created to read:

59.692 **(5m)** If a county has in effect on or after the effective date of this subsection .... [LRB inserts date], a provision in an ordinance that is inconsistent with sub. (1d), (1f), (1k), or (2m), the provision does not apply and may not be enforced.

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 that includes coverage for sudden and accidental pollution liability.

SECTION 1923k. 59.796 of the statutes is created to read:

59.796 Milwaukee County; opportunity schools and partnership program. Notwithstanding s. 59.81, the board of any county with a population of 750,000 or more may not have access to or exercise oversight of any private gifts and grants received by the county executive under s. 59.17 (2) (b) 7.

SECTION 1923p. 59.88 of the statutes is created to read:

59.88 Employee retirement system of populous counties; duty disability benefits for a mental injury. **(1)** In this section, "county" means any county having a population of 500,000 or more.

(2) If an employee retirement system of a county offers a duty disability benefit, the employee retirement system may only provide the duty disability benefit for a mental injury if all of the following apply:

(a) The mental injury resulted from a situation of greater dimensions than the day−to−day mental stresses and tensions and post−traumatic stress that all similarly situated employees must experience as part of the employment.

(b) The employer certifies that the mental injury is a duty−related injury.

(3) If an employee retirement system of a county determines that an applicant is not eligible for duty disability benefits for a mental injury, the applicant may appeal the employee retirement system's determination to the department of workforce development. In hearing an appeal under this subsection, the department of workforce development shall follow the procedures under ss. 102.16 to 102.26.

(4) This section applies to participants in an employee retirement system of a county who first apply for duty disability benefits for a mental injury on or after the effective date of this subsection .... [LRB inserts date].

SECTION 1924. 60.05 (4) of the statutes is amended to read:

60.05 **(4)** COURT ORDER. If, after the hearing under sub. (3), the court finds that the area of the proposed town meets the requirements of sub. (1), the court shall enter an order establishing a new town under the name proposed in the petition and shall designate the location of the first town meeting of the new town. The clerk of court shall immediately file certified copies of the order with the secretary of ~~state~~ administration and the county clerk.

SECTION 1925. 60.065 of the statutes is amended to read:

60.065 Change of town name. The name of a town shall be changed if a petition designating the new name is signed and filed with the town clerk under the procedures in s. 9.20 (1), certified by the town clerk under the procedure in s. 9.20 (3), approved by the electors in an election held under the procedures in s. 9.20 (4) and the result of the election is published in the town's official paper, or posted in the town, and the new name is filed ~~in the office of~~ with the secretary of ~~state~~ administration.

SECTION 1936u. 60.61 (4) (g) of the statutes is created to read:

60.61 **(4)** (g) As part of its approval process for granting a conditional use permit under this section, a town may not impose on a permit applicant a requirement that is expressly preempted by federal or state law.

SECTION 1937m. 60.62 (3) (c) of the statutes is created to read:

60.62 **(3)** (c) As part of its approval process for granting a conditional use permit under this section or s. 61.35, a town may not impose on a permit applicant a requirement that is expressly preempted by federal or state law.

SECTION 1938e. 60.635 of the statutes is created to read:

60.635 Environmental protection; interstate hazardous liquid pipelines. A town 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.

SECTION 1940. 61.187 (2) (d) of the statutes is amended to read:

61.187 **(2)** (d) If, in accordance with par. (a), the results of the election under sub. (1) provide for dissolution, the village clerk shall, within 10 days after the election, record the petition and determination of the village

SECTION 9429. Effective dates; Local Government.

(1u) METROPOLITAN SEWERAGE DISTRICTS. The renumbering and amendment of section 200.09 (1) of the statutes, the creation of section 200.09 (1) (b) of the statutes, and SECTION 9129 (3u) of this act take effect on the 90th day after publication.

SECTION 9432. Effective dates; Natural Resources.

(1c) SOUTHEASTERN WISCONSIN FOX RIVER COMMISSION. The repeal and recreation of section 20.370 (5) (cq) of the statutes takes effect on July 1, 2016.

(1d) AIDS IN LIEU OF TAXES. The amendment of section 20.370 (5) (dr) (by SECTION 636e) of the statutes takes effect on July 1, 2016.

(2f) STATE PARK AND TRAIL FEES. The treatment of section 27.01 (7) (f) 1., 2., and 3., (g) 1., 2., and 3., and (gm) 1. and 3. of the statutes, the renumbering and amendment of section 27.01 (8) (c) of the statutes, and the creation of section 27.01 (8) (c) 2. and 3. of the statutes take effect on January 1, 2016.

SECTION 9434. Effective dates; Public Instruction.

(1) CHARTER SCHOOL GOVERNING BOARD. The treatment of section 118.40 (4) (ag) of the statutes takes effect on September 1, 2015.

SECTION 9437. Effective dates; Revenue.

(1) MANUFACTURING AND AGRICULTURE CREDIT. The treatment of sections 71.07 (5n) (a) 3., 4., and 5. d. and 71.28 (5n) (a) 3., 4., and 5. d. of the statutes takes effect retroactively to January 1, 2013.

Vetoed In Part

(2c) CONSTRUCTION MATERIALS. The treatment of section 77.54 (9a) (k) of the statutes takes effect on January 1, 2016.

(2d) ALTERNATIVE MINIMUM TAX. The treatment of section 71.08 (1) (d) of the statutes takes effect on January 1, 2017.

(2j) FARM-RAISED DEER. The treatment of section 77.54 (62) of the statutes takes effect on January 1, 2016.

(2L) PRIVATE LABEL CREDIT CARD BAD DEBT. The treatment of 2013 Wisconsin Act 229, Section 6 (1) takes effect retroactively to June 30, 2015.

Vetoed In Part

(2s) ADMISSION OFFSET. The renumbering of section 77.51 (1ba) of the statutes, the amendment of section 77.52 (2) (a) 2. a. of the statutes, and the creation of sections 77.51 (1bd) and 77.52 (2) (a) 2. d. of the statutes take effect on January 1, 2016.

(3f) PREMIER RESORT AREA TAX, RHINELANDER. The treatment of section 66.1113 (2) (b) of the statutes takes effect on the first day of the calendar quarter beginning at least 120 days after publication.

(5j) CIDER. The treatment of section 139.01 (2m) of the statutes takes effect on January 1, 2016.

(5k) RENTED PERSONAL PROPERTY. The treatment of section 70.111 (22) of the statutes takes effect retroactively to January 1, 2014.

SECTION 9444. Effective dates; Tourism.

(1j) TOURISM MARKETING EXPENDITURES. The treatment of section 41.11 (6) of the statutes takes effect on July 1, 2017.

SECTION 9445. Effective dates; Transportation.

(1) OPERATOR'S LICENSES AND IDENTIFICATION CARDS. The treatment of sections 343.15 (1) (a), 343.16 (2) (b) and (3) (a) and (am), 343.20 (1) (a) and (e) and (1m), 343.21 (1) (a), (ag), and (am) and (1m), and 343.50 (5) (b) and (d) of the statutes and SECTION 9345 (1) of this act take effect on the first day of the 7th month beginning after publication.

(2u) MOTOR VEHICLES ACQUIRED FOR SCRAP OR JUNKING. The treatment of sections 218.20 (1r) and (1t) and 218.23 (title), (1d), (1g), (1r), and (3) (a) and (b) of the statutes takes effect on the first day of the 4th month beginning after publication.

SECTION 9448. Effective dates; University of Wisconsin System.

(1c) ENVIRONMENTAL EDUCATION. The repeal of sections 15.915 (6), 20.285 (1) (r) and (rc), 36.25 (29) and (29m) (a) and 36.54 of the statutes, the amendment of sections 36.25 (29m) (b), 118.40 (2r) (e) 2p. a. (by SECTION 3284m) and 321.62 (9) and (22) (d) 1. (intro.) of the statutes, and the creation of section 321.62 (1) (bm) of the statutes take effect on July 1, 2017.

(1d) SYSTEM ADMINISTRATION. The repeal of section 20.285 (3) of the statutes takes effect on July 1, 2016.

(1db) SOLID WASTE, RECYCLING, AND BIOENERGY. The repeal of sections 20.285 (1) (s), (fb), and (tm) and 36.25 (3m) of the statutes takes effect on July 1, 2016.

(2d) PROCUREMENT POLICIES. The treatment of sections 16.70 (1e), 16.705 (1r) (d) and (e), 16.71 (1m) (by SECTION 327d) and (4), 16.72 (8), 16.73 (5), 16.75 (3t) (c) 1. and 6., 16.78 (1) (by SECTION 355s), and 36.11 (56m) (a) of the statutes takes effect on the date stated in the notice published in the Wisconsin Administrative Register under SECTION 9148 (2d) of this act. **Vetoed In Part**

(5j) AQUACULTURE SPECIALIST FUNDING. The repeal of section 20.505 (8) (hm) 11c. of the statutes takes effect on July 1, 2017. **Vetoed In Part**

(5k) FORESTRY GRANTS. The amendment of section 20.285 (1) (qm) (by SECTION 596r) of the statutes takes effect on July 1, 2017. **Vetoed In Part**

SECTION 9449. Effective dates; Veterans Affairs.

(1q) GRANTS TO LOCAL GOVERNMENTS PROVIDING ASSISTANCE TO VETERANS HOMES. The treatment of sections 20.485 (1) (gk) (by SECTION 768kb) and (kj) (by SECTION 768pb) and 45.58 (by SECTION 1458rb) of the statutes takes effect on July 1, 2017.

SECTION 9450. Effective dates; Wisconsin Economic Development Corporation.

(2b) BUSINESS DEVELOPMENT TAX CREDIT. The amendment of section 238.15 (3) (d) (intro.) (by SECTION 3991c) of the statutes and the creation of section 238.308 of the statutes take effect on January 1, 2016.