STATE OF WISCONSIN DANE COUNTY CIRCUIT COURT BRANCH 17

ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY, LIMITED PARTNERSHIP,	)	
Petitioners,	)	**Case No. 16-CV-0008**
v.	)	**Case Code: 30955**
DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE, and ROGER LANE, in his official capacity as the Dane County Zoning Administrator,	)	
Respondents,	)	
ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES, and TIM JENSEN,	)	
Plaintiffs,	)	**Case No. 16-CV-0350**
v.	)	**Case Code: 30704**
ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY, LIMITED PARTNERSHIP WISCONSIN,	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF AFFIRMING ACTION OF DANE COUNTY ZONING AND LAND REGULATION COMMITTEE OR REMANDING TO DANE COUNTY ZONING AND LAND REGULATION COMMITTEE IN CASE NO. 16-CV-0008

Plaintiffs adopt the arguments of Dane County regarding the insurance condition being an

integral and material part of the CUP[1] issued by the ZLR, and adopt its arguments that the appropriate remedy is to invalidate the CUP and remand the matter to the ZLR for reevaluation on issuance or not of the CUP without the insurance condition and to evaluate whether a replacement form of financial insurance is warranted. Plaintiffs also agree with the County's position that Enbridge's assertion is in error that the record supports issuing the CUP without the insurance condition.

I.

STRIKING THE INSURANCE CONDITION NECESSITATES REMANDING THE MATTER TO THE ZLR

The County has correctly shown that this appeal is a common law, not a statutory, certiorari proceeding. The cases that Enbridge mistakenly rely upon are limited upon their facts to statutory certiorari proceedings and therefore do not support their assertion that remand is inappropriate.

The County has also correctly demonstrated that the Insurance Condition was integral to the ZLR's original decision to grant the CUP, without which the permit could have been denied.

Finally, the County has explained the reasons why it never waived remand, in that it never

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[1] As the County documents, in consideration of Enbridge's application to expand its pumping station and flow of tar sands through its existing pipeline, the ZLR held several hearings, considered the nature of the hazardous pipeline and the safety record of the applicant as well as significant public opposition to the project, and commissioned an insurance report. The committee then created conditions to protect the public health and welfare and the property interests of surrounding properties by requiring environmental liability insurance in addition to the insurance Enbridge said it had. Conditions 7 and 8 of the April 14, 2015 conditional use permit provide:

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), (emphasis added) 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 Insurance shall meet the technical insurance specifications listed in Appendix A of the insurance consultant's report, which is incorporated herein by reference.

before had a court ruling that its Insurance Condition was impermissible.

In supplement to the County's arguments Plaintiffs offer the following:

A. ONLY THE ZLR HAS AUTHORITY TO ISSUE CONDITIONAL USE PERMITS AND THE ZLR ACTED WITHIN ITS AUTHORITY UNDER THE LAW IN PLACE.

It is indisputable that the Dane County Zoning and Land Regulation Committee ("ZLR") is the sole and exclusive entity vested with authority to grant or to deny conditional use permits for uses which 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." §10.255(2)(a), Dane County Ordinances (DCO). It is also indisputable that the proposed pumping station is such a facility that mandates treatment as a conditional use. The ZLR is authorized to grant or deny a CUP based upon its evaluation as to whether the evidence supports a finding that the six standards provided in §10.255(2)(h), DCO, have been met by the applicant. "**No application for a conditional use shall be granted**..." unless all the conditions are met.

Here, the County has amply demonstrated the probability that ZLR would not have granted the CUP without adequate financial assurances. Under these circumstances it is appropriate that the Court remand the matter of the CUP to the ZLR to consider issuing or denying the CUP without the insurance condition.

In deciding whether to excise the offending part or remand when the Court concurs that the challenged condition is impermissible, the ZLR's exclusive authority to make the balancing test that is involved in deciding whether to issue a CUP in the first instance mandates that the Court remand to ZLR. In this, the question bears a similarity to the issue of severability in constitutional challenges where a part of a law is found unconstitutional. Although there is no way to remand a law to Congress, before the reviewing Court may strike just a part of a law, it

must determine if the legislature would have "preferred what is left of its statute to no statute at all." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). Here, where the overwhelming evidence documented by the Corporation Counsel demonstrates that ZLR would not have granted the CUP without adequate financial assurances, the Court must remand for the Committee to reconsider the permit's issuance in the current posture where it cannot include an insurance condition.

At the time the ZLR issued the conditional use permit there existed no state prohibition on requiring financial assurances of a hazardous pipeline company. That prohibition only came into being after the ZLR had imposed the condition. The ZLR had no forewarning or prescience that the State Legislature would adopt such a prohibition in the State Budget Rider[2].

B. ADDITIONAL CASE LAW IN SUPPORT OF DANE COUNTY'S ARGUMENT THAT THIS IS A COMMON LAW, NOT A STATUTARY CERTIORARI PETITION AND THAT REMAND IS AN APPROPRIATE REMEDY.

As the County demonstrates in its Brief, Enbridge's assertion that this Court may strike conditions but may not remand a conditional use permit to the ZLR is plumb wrong. The County correctly demonstrates that Enbridge's error is premised on the false assertion that this appeal is brought under the statute pertaining to appeals from zoning boards of adjustment, Wis. Stat. §59.694 County zoning, adjustment board, subpart (10). This proceeding did not implicate either the Board of Adjustment or its jurisdiction and therefore statutory certiorari is not implicated in this proceeding.

[2] Wisconsin Act 55, known as the 2015-2016 State Budget Rider

The general rule in common law certiorari is that the circuit court does not take evidence on the merits of the case and the scope of review is limited to the record presented to the tribunal whose decision is under review. *Klinger v. Oneida County*, 149 Wis. 2d 838, 846, 440 N.W.2d 348 (1989). (Cited by *Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App 111, 254 Wis. 2d 538, 562, 648 N.W.2d 878, 889.)

In *Browndale International, Ltd. v. Bd. of Adjustment*, 60 Wis. 2d 182, 198-99, 208 N.W.2d 121, 129 (1973) the Court made it abundantly clear that common law certiorari operates upon an entirely different set of rules,

> "We point out again . . . that a review by a writ of certiorari has different characteristics than the common-law writ of certiorari. The latter writ is granted in the discretion of the court, *Consolidated Apparel Co. v. Common Council* (1961), 14 Wis. (2d) 31, 109 N. W. (2d) 486, while the statutory review by certiorari is a matter of right and a proceeding which is much enlarged in scope because it inquires into not only the jurisdiction of the board or body making the determination but also the merits of the determination. . . ."

While Plaintiffs recognize that this Court is not empowered to take any additional evidence under common law certiorari review, the Wisconsin Supreme Court forty years ago in *Snajder v. State*, 74 Wis. 2d 303, 310-11, 246 N.W.2d 665, 668-69 (1976) recognized the efficacy of remanding a committee's decision after part of it was reversed in a certiorari action.

> In *State ex rel. Momon v. Milwaukee County Civil Service Comm.*, 61 Wis.2d 313, 212 N.W.2d 158 (1973), this court expanded the options of the certiorari review. In Momon, a hospital employee had been discharged by the civil service commission for violation of three commission rules. The Milwaukee County Circuit Court, on certiorari review, held that the findings concerning two rules were correct, but that there was "no evidence whatsoever" to support the finding concerning the violation of the third rule. The circuit court believed that because of the nature of the certiorari proceeding it was bound to either reject the decision of the commission in total or accept it as it was. The circuit court held that it could not approve the decision because to do so would permit the commission to exceed its jurisdiction by imposing a penalty in part upon the hospital employee for violating a rule which had not been substantiated by any evidence. The court set aside the suspension, thereby vacating the entire commission ruling. On appeal, this court,

> citing *Meehan v. Macy*, 392 F.2d 822, 839 (D.C. Cir. 1968), held that the circuit court was not bound to an either-or proposition. *Momon*, supra at 319-21. After agreeing with the circuit court that there was no evidence to support a finding of a violation of a third civil service rule, we remanded to the circuit court with instructions to remand to the civil service commission to determine whether the same or different penalty was appropriate where the violation of two rules, not three, had been established.

Enbridge's reliance on *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404 and *Riviera Airport, Inc. v. Pierce Cty. Bd. of Adjustment*, No. 00-0599, 2000 WL 1725156, 2001 WI App 1, ¶¶ 36, 46 (an unpublished opinion) are of no avail in light of the Supreme Court's holding that remand is an available and appropriate remedy in a common law certiorari action.

Remand is particularly appropriate here (as it was in *Snajder*) where this Court cannot hear evidence or make findings to support or deny the decision granting the CUP and (as the County correctly demonstrated) the Court is without authority to substitute its judgment for the ZLR's. The record does not support a conclusion that the ZLR would have issued the CUP without the insurance conditions, based on the record before this Court.

II.

ENBRIDGE HAS FAILED TO DEMONSTRATE THAT THE INSURANCE IT CARRIES SATISFIES THE BUDGET RIDER

Enbridge is in error in its argument that "[i]n light of the Court's decision that the Insurance Requirements are void pursuant to Wis. Stat. § 59.69(2)(bs) and Wis. Stat. § 59.70(25), Enbridge also requests that the Court grant Enbridge's Motion to Dismiss the Plaintiffs' claims in Case No. 16-CV-350, which claims are premised on the enforceability of the Insurance Requirements. (Petitioners' Initial Brief on Remedy at p. 2, n. 1). (See this Section II.)

The relief sought by the Petitioners should be denied because as set forth below 1) the Petitioners have failed to meet their burden of proof in establishing that they satisfy the necessary predicate for application of the Budget Rider; and 2) Petitioners waived their right to assert that the Dane County Board met *de novo* when it heard Enbridge's appeal on December 3, 2015. (See Section III below.)

A. NEITHER THE ZLR NOR THE COUNTY BOARD EITHER HAD THE OCCASION TO OR EXPRESSLY FOUND THAT ENBRIDGE HAD SUDDEN AND ACCIDENTAL COVERAGE.

The Court preliminarily found that "there is substantial evidence to support that determination" [that Enbridge does in fact have sudden and accidental coverage][3]

> THE COURT: ...I have the final question of whether there is a sufficient record, did the [Dane County] Board make a sufficient determination of the applicability of the statute to the insurance that Enbridge does in fact have or did in fact have in the fall [of 2015]? And I again agree with Enbridge that based on this record, which includes Mr. Dybdahl's report, but it's not limited to Mr. Dybdahl's report, also includes the opinion of Corporation Counsel, there is *substantial evidence* to support that determination, which is what they made, that it did not apply.[4]

Such a preliminary finding is at odds with this Court's expressed recognition that the County never reached a decision on whether Enbridge qualified under the limited statutory exception. Initially, the Court clearly acknowledged that the County had made no finding whether Enbridge qualified under the Budget Rider. This Court's colloquy with Mr. Gault establishes this:

> THE COURT: Sudden and accidental pollution liability.
> MR. GAULT: Right.
> THE COURT: Coverage for sudden and accidental pollution liability.
> MR. GAULT: And it's my understanding they have a policy that says that.
> THE COURT: When you say it's your understanding, you're not a fact finder, though; right?
> MR. GAULT: No, your Honor.

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[3] 7/12/2016 Court Transcript pp. 94-95.
[4] 7/12/2016 Court Transcript at pp. 94-95 (emphasis added).

> THE COURT: Have they made this finding? Has somebody in the County made this finding that this statute actually applies to this company?
> MR. GAULT: The zoning people have told me that they've got an insurance policy that provides that coverage.
> THE COURT: So they may well have that. But has anybody whose decision I'm reviewing made that determination?
> MR. GAULT: No, your Honor.
> THE COURT: So at least, I mean, that then raises this question of their standing to raise the question or, alternatively, the Court's authority if I'd reverse on the statute – on the Conditional Use Permit if they should make that determination at this time.[5]
> * * *
> MR. PYPER: They hired – well, two things. Number one, they hired an expert to find out what kind of insurance Enbridge had. And we have to presume they relied on that. And then, as Mr. Gault said earlier today, he had also written a letter to them telling them that the insurance conditions were not enforceable because of the new law.
> THE COURT: And that's Mr. Gault. He's – what's his expertise on it? He's, like – he's a lawyer.[6]

As the Court recognizes here any findings or opinions by anyone other than the ZLR or the County Board are of no legal effect in a review such as the one being conducted by the Court.

Such a preliminary finding is at odds with the record. Neither the ZLR nor the County Board– which are the only two entities legally empowered to initially make this finding – reached any such decision.

Such a conclusion is evident from the Corporation Counsel statement in open court that neither he the County nor its insurance consultant were given the opportunity to examine or review Enbridge's insurance policy.

The record establishes that neither the ZLR nor the County Board made a determination as to whether Enbridge's insurance policy satisfied the Budget Rider requirement of Sudden and Accidental coverage. The ZLR meeting on September 29, 2015, was for the limited purpose of

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[5] 7/12/2016 Court Transcript, at pp. 60-61.
[6] 7/12/2016 Court Transcript, at p. 75.

determining whether the Zoning Administrator had acted *ultra vires* on July 24, 2015. The December 3, 2015, Dane County Board meeting was to hear Enbridge's appeal.

The only instance in the record where Enbridge's satisfaction of the insurance condition was ever implicated occurred at the ZLR's September 29, 2015 meeting. In the context of addressing the language of the footnote to the CUP the ZLR rejected language expressly finding that the Budget Rider applied to Enbridge and precluded enforcement of the CUP. Instead, the footnote approved by the ZLR simply quoted the language of the Budget Rider without reaching any conclusion that might suggest whether it applied to Enbridge.[7]

The reasonable inference is that the ZLR expressly rejected language which would even by implication support a conclusion that Enbridge satisfied the insurance condition. The asterisked footnote simply quotes the language of the Budget Rider without reaching any conclusion that might suggest whether Enbridge satisfied the Budget Rider Insurance condition or not.[8]

The ZLR's position is consistent with the fact no one in the County had seen the policy to determine whether Enbridge qualified. It is incontrovertible that in order to make such a determination the policy would have to be examined and reviewed by one with expertise in such an area of insurance. As the Court correctly respectfully observed, the Corporation Counsel did not possess either the expertise or the authority to render a credible determination on this issue. The only basis for such a finding is Enbridge's unsubstantiated and unsupported claim.[9]

Significantly, such an expert was available to the County to make such a determination but for reasons known only to Enbridge it refused to give up the policy for Mr. Dybdahl's review. As a result there is no evidence in the record to support a finding that Enbridge possesses the requisite

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[7] R: 588; 9/29/2015 ZLR Transcript, at pp. 45.
[8] R: 588; 9/29/2015 ZLR Transcript, at pp. 45.
[9] 7/12/2016 Court Transcript, at pp. 60-61.

insurance to fall within the proscriptions in the Budget Rider. It is apparent that neither the ZLR nor the County Board either had the occasion to or expressly found that Enbridge had Sudden and Accidental coverage.

B. THERE IS SIGNIFICANTLY GREATER PROTECTION AFFORDED UNDER SUDDEN AND ACCIDENTAL INSURANCE COVERAGE.

The Budget Rider bars counties from imposing additional insurance requirements on hazardous pipelines if a certain financial protection in the form of Sudden and Accidental coverage is in place. Such a requirement necessarily results in any insurance coverage less than "Sudden and Accidental" failing to qualify for the proscription from local insurance requirements under the Budget Rider. The coverages provided by Time Element insurance are substantially less than Sudden and Accidental insurance. Sudden and Accidental coverage insures victims from releases that lasted and were not detected for decades – more than 200 times longer than Time Element. In comparison, Time Element coverage excludes pollution releases lasting more than 30 days, those pollution releases discovered after 90 days and excludes coverage to any adjoining property and homes. Such limitations on coverage are extremely significant in an industry that experiences slow or prolonged leaks.[10]

Therefore, when interpreting the statute, it is apparent from this record that Time Element provides substantively less coverage than Sudden and Accidental insurance and, therefore, does not qualify for state override of local insurance requirements.

C. THE INSURANCE INDUSTRY DEFINITION, NOT COLLOQUIAL USAGE BY THE OIL AND GAS INDUSTRY CONTROLS.

The term "Sudden and Accidental" is a carefully developed term of art in the insurance industry, it is the result of exhaustive study and was originally incorporated formally into the

[10] R: 421-537.

standard General Liability policies in 1971 by the industry's standards setting group, F.C. & S. Bulletins in a lengthy formal report. That effort was intended to include some, but not all, pollution releases, specifically those occurrences that were "sudden and accidental" and to exclude those that were either "deliberate or cumulative."[11]

Mr. Dybdahl first explained that in the insurance industry the term "Sudden and Accidental" had that particular technical meaning, but that changed in conjunction with evolving case law. Second, while "Sudden and Accidental" was offered in the 1970s and early 1980s, it is less often offered in General Liability policies today because of adverse court rulings. Third, today's policy that have generally substituted Time Element are very significantly more limited in their coverage. (R-108, 110-11; Dybdahl Report pp. 10, 12-13.)

Thus, Mr. Dybdahl explained that General Liability Insurance starts with broad pollution exclusions from coverage to make clear that the policies do not insure for damages caused by the release of pollutants. In the 1970's, insurers carved out an exception to the general pollution exclusion if the release was "Sudden and Accidental." As a grammatical double-negative, this meant that some pollution releases would be covered, the extent to which would depend on how the terms were interpreted by the courts.[12]

In the 1980's, when enforcement ramped up under the new Superfund law, which imposed large cleanup costs on leaking landfills, recovery was sought for those costs from their insurers. They did so even for releases that had extended, and not been detected, for decades, notwithstanding the fact that would not seem "sudden" to the average person.[13]

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[11] F. C. & S. Bulletins: Casualty & Surety Sections, *Liability for Commercial Risks: Contamination or Pollution Exclusion* (May 1971), at pp. 125-127.
[12] R: 211; Dybdahl Report, at p. 13.
[13] R: 210-211; Dybdahl Report, at p. 12-13.

Because court decisions often wound up favoring the insureds by re-interpreting "sudden" to mean "unexpected,"[14] insurers lost money. To avoid further losses, by 1986, many insurers began to phase out offering those "Sudden and Accidental" exceptions. In their place, the insurance industry began to shift to a new "Time Element" exception to the pollution exclusion that defined "sudden" by limiting coverage to pollution releases that did not extend for longer than 30 days and were detected within 90 days.

To further limit their losses, they also added a double-double negative, in the form of a new exclusion from the exception to the exclusion, in order to exclude any coverage for damage to properties along the pipeline corridor impacted by an oil spill including pollutant releases to the aquifer.[15]

Since leaks into underground water supplies are unseen and can take decades to be detected, and since recent pipeline oil spills have caused substantial property damage to adjoining homeowners,[16] the disparity in coverage for the interests protected by the statute is profoundly significant.

As a result of Mr. Dybdahl's testimony, the ZLR approved the CUP with Conditions 7 and 8.[17]

By the time the State Budget was enacted, the term of art "Sudden and Accidental" was recognized in the law to provide coverage for pollution events that are essentially unlimited in their duration. The more common and newer "Time Element" policies were known to add

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[14] *City of Edgerton v. General Cas. Co.*, 172 Wis. 2d 518, 550-552, 493 N.W.2d 768 (Ct. of App. 1992).
[15] R: 212; Dybdahl Report at 14.
[16] R: 421-537.
[17] See Footnote 1

restrictions to include only those releases that do not extend for more than 30, and are detected in 90 days, and even then, exclude property damage.[18]

The Courts have long held that terms of art like "Sudden and Accidental", are to be used in their established legal sense, not in their ordinary or colloquial usage:

> We acknowledge that, read according to its common and ordinary meaning, the phrase does not clearly exclude guarantors. Thus, reasonable people could read the language to cover the Boyers. Nonetheless, it is clear to us that the phrase "personally liable for the debt" is a term of art that must be given its legal meaning. We conclude that, by using the phrase "personally liable for the debt," the legislature intended to use the phrase's specific legal meaning and did not intend it to encompass guarantors who guarantee a debt through a contract separate from the note creating the debt.[19]

Thus, for the purpose of interpreting statutes under established rules of statutory construction, the Legislature by its choice of words and its decision to use the term of art "Sudden and Accidental," is presumed to have been aware of its legal meaning. Thus when the Budget Rider was adopted and became effective it included the following language:

> 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) Wis. Stats. (e.s.)

The rules of statutory construction hold that, because "Sudden and Accidental" is a legal term devised and provided as a specific commercial product over an extended period by the insurance industry. It is a term which has been subject to judicial interpretation. Consequently, the technical definition in use by the insurance industry and applied by the courts, controls. Contrary to Enbridge's assertions, the colloquial usage by the oil and gas industry, which,

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[18] R: 210-211; Dybdahl Report, at p. 12-13.

[19] *Bank Mutual v. S.J. Boyer Construction*, 326 Wis. 2d 521, 544, 785 N.W.2d 462 (2010). See, also, *Estate of Matteson*, 309 Wis. 2d 311, 749 N.W.2d 557 (2008); *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 271 Wis.2d 633, 681 N.W.2d 110 (2004).

apparently, may have failed to keep abreast of major changes in the insurance market, would not be relevant to divining the legal meaning of "Sudden and Accidental", as a legally recognized term of art [20]

As a result, because Enbridge has provided no evidence in this record to establish that, in fact, it has Sudden and Accidental coverage. It is consistent with the record to find that Enbridge has failed to establish that it has satisfied the insurance requirements which are a predicate to exemption under the Budget Rider from local insurance requirements.

Alternatively, as discussed in Part I above, the Court could remand the case to the ZLR for the purpose of reviewing Enbridge's insurance policies to enable the ZLR to make a factual determination whether Enbridge substantively has "Sudden and Accidental" or Time Element Coverage. The Court could retain jurisdiction to review the determination of the ZLR.

III.

ENBRIDGE FIRST RAISED THE ARGUMENT THAT THE APPEAL BY DANE COUNTY WAS DE NOVO IN ITS REPLY BRIEF, WHICH VIOLATES THE RULES OF PRACTICE AND THE 11TH HOUR CLAIM MUST BE STRICKEN

In its closing brief on the merits, Enbridge argued for the first time that:

> When the County Board considers a CUP appeal, it does not just review the ZLR Committee's decision—it receives new evidence, which includes but is not limited to the evidence before the ZLR Committee, and conducts a de novo review of the CUP on behalf of the County. In this case, that included reaching a decision as to whether the Insurance Requirements should be imposed on Enbridge.[21]

Counsel made no reference whatsoever in any manner, shape or form to this new *de novo* argument in his opening brief, nor for that matter in its Petition for Certiorari, nor for that matter in its appeal of the ZLR CUP to the Dane County Board. Therefore, Enbridge has neither

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[20] *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990).
[21] Petitioner's Reply Brief, at p. 4.

exhausted its administrative remedies, nor brought the issue into the certiorari proceeding, nor provided fair notice of this claim to opposing counsel in its briefs.

As such, the matter should not have been heard by the Court at oral argument, which is why Plaintiffs registered our objection to hearing the issue at that time.[22] In all of the competing matters during oral argument, the Court never ruled on our objection. The following are the reasons why the Court may wish to rule now on the question of whether Enbridge had long waived any right to carry its de novo argument. If the Court agrees that it failed to either exhaust or give proper notice, then there can be no ruling on whether the de novo claim, had it been timely made, was correct.

Below before the County, Enbridge's Notice of Appeal and Appeal to the County Board, dated October 19, 2015, at p. 10,[23] did not even attempt to ask for application of the Budget Riders to any of the matters it put into controversy. The relief sought was as follows:

> 32. The ZLR Committee's decision either to revoke or amend the July 24, 2015 CUP by issuing the October 9, 2015 CUP with the unlawful Insurance Requirements was based on: (a) policy or political considerations that exceeded the ZLR Committee's jurisdiction; (b) were the result of the application of erroneous legal standards, as described below; (c) and not based on substantial evidence in the record. Consequently, the decision was arbitrary, oppressive and unreasonable, representing the ZLR Committee's will and not its judgment.
> 33. The ZLR Committee's decision should be reversed because, as described below:
> (a) The ZLR Committee did not keep within its jurisdiction;
> (b) The ZLR Committee lacks the authority to revoke or amend the July 24, 2015 CUP and to issue the October 9, 2015 CUP with the unlawful Insurance Requirements as a condition to obtaining the CUP;
> (c) The ZLR Committee proceeded on one or more incorrect theories of law;
> (d) The ZLR Committee's decision was arbitrary, oppressive and unreasonable and represented its will and not its authorized judgment; and
> (e) The ZLR Committee did not reasonably make the decision to attach the Insurance Requirements as a condition to the CUP based on the evidence before it.

[22] 7/12/2016 Court Transcript, at p. 86.
[23] R: 3.

Thus, Enbridge's appeal confined the issues before the County Board on December 3rd to the propriety of the ZLR's actions: (1) with regard to whether it was required by law to accept as valid a letter sent by the Zoning Administrator on his own volition and purporting to be a revised CUP (and whether it was political motivated and willful not to), and (2) the legitimacy of the ZLR's action taken on April 21, 2015, in terms of whether it was arbitrary, oppressive or unreasonable, supported by evidence and so on, but not whether it violated the Budget Riders. Having failed to raise its 11th hour *de novo* argument below, it has failed to exhaust and foreclosed from raising it for the first time in Court.[24]

Enbridge did include in its Petition for Certiorari that it challenges the actions of the ZLR and later of the County Board for not recognizing that the Budget Rider was retroactive to the CUP.[25] However, nowhere in the petition is any reference made to the claim that the Board heard the appeal of the ZLR's CUP de novo. Since the matter was not raised in the Petition, Enbridge could neither argue the matter in its Reply Brief nor at oral argument under the doctrine of issue exhaustion.[26] Dane County ordinances specifically provide a means for an aggrieved party to challenge a CUP issued by the ZLR, which is condition predicate to any further appeal to court via certiorari, namely first through an appeal to the full County Board.[27] But, Enbridge failed to do so in regard to its new *de novo* claim, and, therefore, it has waived the *de novo* argument for appeal.

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[24] *State v. Outagamie Cnty. Bd. of Adj.*, 244 Wis. 2d 613, 621, 628 N.W.2d 376 (2001); *Sims v. Apfel*, 530 U.S. 103, 109 (2000).
[25] Petition for Certiorari, at par. 51(f), on p. 16.
[26] *Merkel v. Village of Germantown*, 218 Wis. 2d 572, 579, 581 N.W.2d 552 (1998).
[27] §10.255(j), DCO.

Even if, *arguendo*, counsel had included his *de novo* argument in the Petition, the issue still could not be heard because he did not argue the matter in his opening brief to give Plaintiffs notice that he intended to maintain the argument.[28]

Raising new arguments in reply briefs is prohibited under Wisconsin case law:

> The grounds for such a rule are fundamental fairness. It is inherently unfair for an appellant to withhold an argument from its main brief and argue it in its reply brief because such conduct would prevent any response from the opposing party. The same holds true for allowing a party to raise an issue at oral argument that was not briefed. It prevents the opposing party from having an adequate opportunity to respond.[29]

Furthermore, it defies logic for Enbridge to maintain on the one hand that its permit application had no final action until December, 2015 yet that it had a "vested right" in the portion of the permit it liked and began construction on its expanded Dane County pumping station August 4, 2015, as its representatives informed the Dane County Board at the appeal hearing December 3, 2015.

Rules of practice for civil procedure bar attempts to raise new issues for the first time in reply briefs.

For all three of these reasons it is just and appropriate for the Court to hold that Enbridge waived its de novo claim with regard to the type of action the County Board took on December 3, 2015.

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[28] Petitioner's Initial Brief.

[29] *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285, 292 (Ct. App. 1998). *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000); *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997). See, also, Barry A. Miller, *Sua Sponte* Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard, 39 San Diego L. Rev. 1253 (2002).

IV

CONCLUSION

Based on this Court's Joint Order to Consolidate, dated April 18, 2016, Plaintiffs respectfully pray to the Court for the entry of an order reaffirming its full party status in 16-CV-0008.

It further prays to the Court for the entry of an Order granting it leave to file its Amended Answer previously filed with the Court on July 1, 2016.

For all of the reasons set forth above, and in the County's Brief, Plaintiffs respectfully request the following relief from this Court:

(1) Find that the County made no determination that Enbridge has "Sudden and Accidental" coverage;

(2) Deny Enbridge the exemption from the local insurance requirements finding that Enbridge has failed to meet its burden of proof establishing that it carries the required insurance under the Budge Rider which is a predicate to the exemption;

(3) In the alternative, remand the case to the ZLR to determine whether to (a) reissue the permit without the insurance condition, or (b) substitute an alternative financial assurance condition, or (c) deny the permit; and

(4) Strike and Dismiss Petitioner's de novo claim, eliminating the issue from the case;

(5) Reaffirm Plaintiffs full party status in 16-CV-008;

(6) Grant Plaintiffs leave to file their Amended Answer filed with the Court on July 1, 2016;

(7) Deny Enbridge's Motion to Dismiss; and

(8) Such other and further relief as the Court deems just and proper

Dated this 23rd day of August, 2016.

Respectfully submitted:

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