STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

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

Petitioners,

v.

Case No. 16-CV-0008
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,

v.

Case No. 16-CV-0350
Case Code: 30704

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

Defendants.

PETITIONERS' REPLY BRIEF ON REMEDY

The single question before the Court is what remedy is appropriate now that the Court has ruled on the merits and concluded that Dane County improperly and invalidly imposed the Insurance Requirements as conditions to Enbridge's CUP. The County and the Plaintiffs, however, spend much of their response briefs addressing issues *wholly unrelated to the*

question of remedy in an attempt to distort the claims in this action.[1] The County and the Plaintiffs now seek a "remedy"—remand to the County—that no party has requested up until this point in the proceeding. Remanding this matter to the County to commence an entirely new permitting process is not authorized by law and would be grossly inequitable to Enbridge as the prevailing party.

The Court should reject the untimely and improper request by the County and the Plaintiffs for another opportunity to impose new conditions on Enbridge, particularly where the County already had multiple opportunities to do just that but declined to do so. This action was limited to the question of whether the Insurance Requirements are invalid. The Court has concluded that the Insurance Requirements are indeed invalid as a matter of law. The Court should also now conclude that remand is inappropriate and unnecessary and that by striking the unlawful Insurance Requirements the CUP has been modified accordingly.

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[1] The Plaintiffs devote half of their brief—a full 9 pages—to arguing the issue of whether Enbridge carries the type of insurance required to fall under the protections of the new state laws. (Pls.' Resp. Br. on Remedy, pp. 6-14). That issue has nothing to do with the proper remedy in this proceeding and was already addressed at length by the parties and the Court. The County conceded that issue early in this proceeding. (*See* County Resp. Br., p. 7 ("There is no dispute that Wis. Stat. § 59.70(25) applies to Petitioners' Line 61 and renders the insurance conditions imposed on CUP 2291 unenforceable by Dane County.")). The Court has already determined there is sufficient evidence in the record to support the County's conclusion that Enbridge carries the type of insurance required under the statute. (July 11, 2016 H'rg Tr. pp. 94-95). Also, the forms of relief requested by the Plaintiffs in their response brief on remedy are beyond the scope of the remedy phase of this proceeding and relate to issues already addressed and rejected by the Court in its decision on the merits. (*See* Pls.' Resp. Br. on Remedy, pp. 18-19). In a bifurcated case like this where the Court has already issued its decision on the merits and the only issue that remains is the question of remedy, a party cannot relitigate issues decided in the first phase of the case. *See Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1127 (7th Cir. 1999) (issues decided in first half of bifurcated trial become law of the case and cannot be reargued by the parties).

Enbridge respectfully requests that the Court reject the County's and Plaintiffs' remand request, dismiss Plaintiffs' complaint with prejudice, and issue a final order consistent with its ruling on the merits declaring that the CUP has been modified by the striking of the unlawful conditions.

I. THIS PROCEEDING INVOLVES STATUTORY CERTIORARI REVIEW GOVERNED BY WIS. STAT. § 59.694.

The County and the Plaintiffs never challenged whether this proceeding was properly brought pursuant to Wis. Stat. § 59.694(10) until they realized that the purported remedy they seek is not authorized by that section. Their feigned objection to the Court issuing a decision pursuant to its authority under that section is without merit and has been waived. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) ("a party must raise and argue an issue with some prominence to allow the trial court to address the issue and make a ruling").

A. The County And The Plaintiffs Admitted Wis. Stat. § 59.694(10) Applies To This Proceeding.

Enbridge specifically alleged in its Petition for Certiorari Review that the petition was "brought pursuant to Wis. Stat. § 59.694(10) and the common law right of certiorari review codified in Wis. Stat. § 781.01." (Enbridge Pet., ¶ 8). In their Answers, both the County and the Plaintiffs admitted the proceeding is governed by that section. The County stated: "In response to paragraph 8, the County admits that this action may be commenced pursuant to Wis. Stat. § 59.694(10), but denies that the Petitioners have a right to common law certiorari review." (Cnty. Answer, ¶ 2). The Plaintiffs simply stated: "Property Owners admit the allegations." (Pls.' Answer, ¶ 8). Given that both the County and the Plaintiffs admitted that this proceeding was properly brought pursuant to Wis. Stat. § 59.694(10), they cannot now

argue that the provision does not apply. In particular, the County expressly denied in its Answer that Enbridge was entitled to common law certiorari review and now argues for the first time in its response brief on remedy that common law certiorari review is Enbridge's exclusive remedy. (Cnty. Resp. Br. on Remedy, p. 4). However, the County and the Plaintiffs are prohibited from arguing a position directly contrary to admissions they have made in their Answers, as a matter of law. *Klapps v. American Ins. Co.,* 26 Wis. 2d 664, 667-68, 133 N.W.2d 248 (1965) (a party is bound to admissions made in its answer and admitted issues cannot be contested late in the case). Accordingly, the Court should reject their argument that Wis. Stat. § 59.694(10) is inapplicable.

B. Dane County's Choice To Have The ZLR Committee's CUP Decision Reviewed By The Full Dane County Board Of Supervisors Instead Of The Board Of Adjustment Does Not Make Wis. Stat. § 59.694(10) Inapplicable.

There is no merit to the argument by the County and the Plaintiffs that Wis. Stat. § 59.694(10) does not apply because Dane County's unique CUP review process designates the County Board of Supervisors rather than the County Board of Adjustment ("BOA") as the reviewing body for the ZLR Committee's CUP decision. (Cnty. Resp. Br. on Remedy, p. 4; Pls.' Resp. Br. on Remedy, p. 4). Wis. Stat. § 59.694(1) allows, but does not require, a County Board to establish a BOA and delegate the authority to the BOA to review CUP appeals. *See* Wis. Stat. § 59.694(1) ("The county board *may* provide for the appointment of a board of adjustment.") (emphasis added). However, that section also provides that nothing precludes the County Board from deciding instead to have CUP decisions reviewed by the full County Board. *Id.* ("Nothing in this subsection precludes the granting of special exceptions by . . . the county board."). If a county does not delegate all authority under Wis.

Stat. § 59.694(1) to the BOA, the remaining provisions of Wis. Stat. § 59.694, including sub. (10), apply to zoning decisions made pursuant to the authority provided in that section. The Judicial Council Note, 1981, makes clear that any departures in the review of county zoning decisions from the ordinary certiorari procedures are provided in sub. (10). Therefore, Wis. Stat. § 59.694(10) applies to the review of county zoning decisions, regardless of whether a county board, such as the Dane County Board of Supervisors, has made the decision to retain certain zoning authority rather than delegating it to a BOA. *See Bd. of Regents of Univ. of Wis. v. Dane Cty. Bd. of Adjustment*, 2000 WI App 211, ¶ 4, n.3, 238 Wis. 2d 810, 618 N.W.2d 537 (discussing unique situation in Dane County where CUP appeals are heard by the County Board of Supervisors rather than the County BOA). An internal decision by a county of how to structure CUP reviews does not affect the rights available to an aggrieved person under Wis. Stat. § 59.694(10).[2]

The County and the Plaintiffs implicitly admit that Wis. Stat. § 59.694(10) does not authorize the Court to remand a CUP for reconsideration by the ZLR Committee when the Court has already modified the CUP to remove two unlawful conditions. It is for that reason that they now belatedly assert that this is a common law certiorari review. However, whether a statutory or a common law certiorari review, none of the cases they rely on support their argument that remand would be the appropriate remedy here.

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[2] Indeed, the County has participated in countless judicial reviews of CUP decisions. It knows Wis. Stat. § 59.694(10) applies to those judicial reviews, which is why it admitted that the statute governs this proceeding and expressly denied that the County Board CUP decisions were entitled to common law certiorari review. *See* Part I., A., *supra.*

The primary case cited by the County involved reversal of a CUP decision *denying* a CUP; in other words, the court was not reviewing an approved permit. *Westel-Milwaukee Co. v. Walworth Cty.*, 205 Wis. 2d 244, 247, 556 N.W.2d 107 (Ct. App. 1996). Once the Court reversed the denial of the CUP, the CUP application was still pending before the County. In another case cited by the County, the court was reviewing an allegation of bias by the ZLR Committee; the court was not reviewing the validity of any conditions in the CUP. *Keen v. Dane Cty. Bd. of Supervisors*, 2004 WI App 26, ¶ 21, 269 Wis. 2d 488, 676 N.W.2d 154 (ordering the ZLR Committee to reconsider the decision without the offending committee member).[3] The County and the Plaintiffs have not cited any case law supporting remand of a CUP under either Wis. Stat. § 59.694(10) or common law certiorari review for wholesale reconsideration due to invalid conditions where the remainder of the CUP conditions are valid and uncontested. The cases cited by the Plaintiffs allegedly establishing an "entirely different set of rules" for statutory and common law certiorari review do not stand for that proposition. (*See* Pls.' Resp. Br. on Remedy, pp. 5-6). *Browndale Int'l Ltd. v. Bd. of Adjustment for Dane Cty.*, 60 Wis. 2d 182, 208 N.W.2d 121 (1973), addresses only the ability of a court to take additional evidence as authorized under statutory certiorari review. *Snajder v. State*, 74 Wis. 2d 303, 246 N.W.2d 665 (1976), was not a zoning case and

[3] The other cases cited by the County did not even involve the review of county CUP decisions, much less specific conditions imposed in a CUP. *See Marris v. City of Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993) (reversing city board of zoning appeals decision on nonconforming use status due to evidence of bias); *Arndorfer v. Sauk Cty. Bd. of Adjustment*, 162 Wis. 2d 246, 469 N.W.2d 831 (1991) (reversing county BOA decision denying variance due to inadequate evidence); *Guerrero v. City of Kenosha Hous. Auth.*, 2011 WI App 138, 337 Wis. 2d 484, 805 N.W.2d 127 (reversing city housing authority order on housing assistance due to inadequate evidence).

involved certiorari review in the context of parole revocation where there was a lack of evidence in the record.

The standards applied under statutory and common law certiorari review are the same, except as modified by statute. *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cty. Bd. of Adjustment*, 131 Wis. 2d 101, 121-22, 388 N.W.2d 593 (1986). There is no "inherent authority" for a court to invalidate a CUP. (*See* Cnty. Resp. Br. on Remedy, p. 3). Wis. Stat. § 59.694(10) provides the scope of available remedies in this proceeding—none of those allowable remedies include remanding a CUP to the zoning committee where the Court has already invalidated the unlawful conditions.

C. Plaintiffs' Argument That Enbridge Raised The *De Novo* Review Argument For The First Time In Its Reply Brief Is Devoid Of Merit.

Plaintiffs spend a large portion of their response brief arguing that Enbridge improperly asserted that the Dane County Board reviews the ZLR Committee's CUP decisions *de novo* in its reply brief. (Pls.' Resp. Br. on Remedy, pp. 14-17). They are legally wrong. Enbridge included its argument that the County Board's review is *de novo* in its reply brief on the merits in direct response to the County's and the Plaintiffs' arguments in their response briefs that the County had issued its final decision on the CUP when the ZLR Committee issued the original CUP prior to the passage of the new state laws. (Enbridge Reply Br., pp. 3-4). Enbridge's argument that the County Board's *de novo* review demonstrates that final action by the County had not been taken at the time the new laws took effect, directly contradicted the arguments made by the County and the Plaintiffs in their response briefs, which is not raising a "new issue" on reply. *See Hartley v. Wisconsin Bell, Inc.*, 930 F. Supp. 349, 353 (E.D. Wis. 1996), *aff'd*, 124 F.3d 887 (7th Cir. 1997)

(concluding that a party has a right to reply to issues raised in another party's response brief). Moreover, rather than making that assertion at the hearing, Plaintiffs fully responded to the substance of that argument during the hearing and cannot now claim that the issue was not properly before the Court based on procedure. *See Chicago Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1349 (7th Cir. 1983) (rejecting objection to an issue to which the complaining party responded at trial). Finally, Plaintiffs' argument that the Court should have rejected Enbridge's *de novo* review argument ignores the fact that the Court did just that. The Court expressly found that it made no difference to the Court whether the hearing before the County Board was *de novo* where new evidence was taken; instead, the Court found that until the County Board ruled following its hearing on December 3, 2015, the County's decision was not final. (July 11, 2016 H'rg Tr. pp. 47-49). Therefore, the question of the standard of review applied by the County Board was not a factor in the Court's decision.

II. THERE IS NO AUTHORITY SUPPORTING THE WHOLESALE RECONSIDERATION OF A CUP WHERE THE COURT HAS ALREADY STRICKEN THE INVALID CONDITIONS UNLAWFULLY IMPOSED BY THE ISSUING BODY.

Realizing that Wis. Stat. § 59.694(10) does not provide the remedy they seek, and that there is no other support for their proposed remedy under common law certiorari standards in Wisconsin, the County and the Plaintiffs grasp at authority outside of Wisconsin and outside of the context of a zoning permit to support their remedy request. However, the cases on which they rely are inapposite and not binding precedent.

A. *Adams* Provides The Clearest Authority Supporting Removal Of The Offending Conditions Without Remand.

The only Wisconsin case law offering facts comparable to the current case is *Adams v. Wisconsin Livestock Facilities Siting Review Board*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404.[4] That case provides clear authority for removing the offending conditions without invalidating the entire permit. (*See* Enbridge Initial Br. on Remedy, pp. 3-5). The County and the Plaintiffs essentially have no response to the clear directive provided in *Adams*. Instead, the County latches on to *dicta* in the *Adams* decision in which the Supreme Court stated there might be situations where reversal of a permit due to faulty conditions might be proper, such as where "had the municipality known that a critical condition was defective, it could have imposed an alternative proper condition." (County Resp. Br. on Remedy, p. 6).

Notwithstanding the fact that the language is *dicta* and that the County asks the Court to establish new law through this case based on that *dicta* rather than the actual holding of *Adams*, in this case *the County knew the conditions were defective* when it acted on the CUP. The ZLR Committee knew the conditions were defective on September 8, 2015 when the committee denied the request by 350 Madison to impose a trust fund requirement in place of the Insurance Requirements. The ZLR Committee knew the conditions were defective on September 29, 2015 when the committee reissued the CUP with the Insurance Requirements and an asterisk noting the passage of the new state laws affecting the conditions. And the

[4] The County argues that Enbridge should not have cited *Riviera Airport, Inc. v. Pierce County Board of Adjustments,* No. 00-0599, 2000 WL 1725156, 2001 WI App 1, ¶¶ 36, 46 (unpublished) because it was unpublished and not binding precedent. (Cnty. Resp. Br. on Remedy, p. 6.) Enbridge was entitled to cite it for its persuasive authority, which is what it did. *See* Wis. Stat. § 809.23(3)(b).

County Board knew the conditions were defective on December 3, 2015 when it upheld the CUP with the unlawful Insurance Requirements rather than modifying it, which it had the authority to do. *See* Dane County Ord. § 10.255(2)(j). This is certainly not the case potentially envisioned by the *Adams* court where a municipality did not know that a condition was defective. The County knew full well that the Insurance Requirements were defective and, rather than devising any alternative conditions, the County repeatedly reaffirmed the CUP with a footnote acknowledgement that the conditions were unlawful.

The County does not have the right to another opportunity to impose additional conditions on Enbridge only after the County lost on the merits in defending its unlawful insurance conditions. The County made the decision to proceed knowing the Insurance Requirements were invalid, notwithstanding the County's "asterisk" in the permit. The County lost. The losing party in the case does not have the right to a "do-over" just because they do not like the result. Nothing in *Adams* supports a different result. It would be absurd and inequitable to require Enbridge to return to the beginning of the application process, two years after filing its initial application, due to the County's unlawful actions.

B. Cases From Other Jurisdictions Do Not Support Remand Due To The Two Unlawful Conditions Stricken By The Court.

The County and the Plaintiffs cite and discuss a long list of cases from other jurisdictions allegedly supporting the "remand" of a permit to the issuing body. However, none of the cases address the situation here, where the issuing body is seeking to reconsider a CUP as a result of the invalidation of two unlawful conditions it knowingly imposed after it three times already acted on the CUP without modifying it after the two conditions were declared unlawful by the Legislature. The cases are therefore distinguishable and do not change the clear directive established in *Adams*.

Decisions based on procedural errors or insufficient evidence in the record are inapposite; there has been no argument that the County committed any procedural error or that the evidence in the record does not support the County's decision.[5] Cases where conditions were reversed based on the lack of sufficient evidence in the record or procedural error are distinguishable. The Insurance Requirements are not invalid based on procedural errors or insufficient evidence. They are invalid because the Legislature declared them to be invalid. There is no further evidence for the County to gather and no procedural error for the

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[5] *See Floch v. Planning and Zoning Comm'n of Westport*, 659 A.2d 746 (Conn. Ct. App. 1995) (reviewing special use permit conditions due to procedural error); *Dep't of Envtl. Servs., City and Cty of Honolulu v. Land Use Comm'n,* 275 P.3d 809 (Haw. 2012) (reviewing special use permit decision due to insufficient evidence in record); *Hochberg v. Zoning Comm'n of Wash.*, 589 A.2d 889 (Conn. Ct. App. 1991) (reviewing special use permit due to insufficient evidence in record); *Bd. of Appeals of Dedham v. Corp. Tifereth Israel*, 386 N.E.2d 772 (Mass. App. Ct. 1979) (reviewing special use permit due to insufficient evidence in record); *O'Donnell v. Bassler*, 425 A.2d 1003 (Md. Ct. App. 1981) (reviewing special use permit due to lack of substantial evidence in record)(abrogated on other grounds, *see Changing Point, Inc. v. Maryland Health Resources Planning Com'n*, 589 A.2d 502 (Md. Ct. App. 1990)).

County to correct. There is nothing the County can do to make the unlawful Insurance Requirements lawful. The cases relied on by the County and Plaintiffs from other jurisdictions allowing remand to the issuing body are simply inapposite. Similarly, cases based on other types of government decisions other than CUP decisions are unpersuasive, particularly in the context of the Wisconsin certiorari review standards.[6] None of the cases cited by the County or the Plaintiffs address a situation such as the present case where two permit conditions are invalid as a matter of law and the remainder of the CUP conditions are uncontested.

Additionally, there are cases from other jurisdictions that *support* the authority of a court to modify a zoning permit by removing unlawful conditions. 3 Rathkopf's The Law of Zoning & Planning § 61.49 (4th ed. 2016) ("In some jurisdictions, a court is permitted to modify the conditions imposed by a special permit."); *see, e.g.*, *Beckish v. Planning & Zoning Comm'n of Columbia*, 291 A.2d 208, 212 (Conn. 1971) (removing unlawful condition from special use permit and upholding remainder of permit where the commission lacked the authority to impose the offending condition); *Parish of St. Andrew's Protestant*

[6] *See Borough of N. Plainfield v. Perone*, 148 A.2d 50 (N.J. Super. Ct. App. Div. 1959) (reviewing permit conditions in the context of an enforcement action, not the appeal of a zoning decision); *Bd. of Selectment of Stockbridge v. Monument Inn, Inc.*, 391 N.E.2d 1265 (Mass. App. Ct. 1979) (reviewing conditions imposed by the trial court, not by a zoning board); *Vaszauskas v. Zoning Bd. of Appeals of Southbury*, 574 A.2d 212 (Conn. 1990) (reviewing conditions placed on a variance, not a conditional use permit); *The President and Dirs. of Georgetown Coll. v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58 (D.C. 2003) (reviewing conditions of approval of campus master plan); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985) (reviewing federal agency decision on nuclear power facility); *Orloski v. Planning Bd. of Borough of Ship Bottom*, 545 A.2d 261 (N.J. Super. Ct. 1988), *aff'd*, 559 A.2d 1380 (J.J. Super. Ct. App. Div. 1989) (upholding variance conditions); *Alperin v. Mayor and Twp. Comm. of Middletown*, 219 A.2d 628 (N.J. Super. Ct. 1966) (upholding variance conditions).

Episcopal Church v. Zoning Bd. of Appeals of Stamford, 232 A.2d 916, 919 (Conn. 1967) (removing unlawful condition from special use permit and upholding remainder of permit where modification rather than remand would end further litigation).

III. THE COUNTY ALREADY CHOSE NOT TO AMEND THE CUP AFTER THE INSURANCE REQUIREMENTS WERE RENDERED INVALID BY THE NEW LAWS AND WOULD HAVE NO AUTHORITY TO TAKE ANY FURTHER ACTION FOLLOWING REMAND.

Neither the County nor the Plaintiffs respond to the extensive evidence in the record demonstrating that the ZLR Committee and County Board had multiple opportunities to attempt to reconsider or revoke the CUP following the passage of the new state laws and instead chose, knowingly and upon the advice of counsel, to reissue and reaffirm the remaining conditions of the CUP knowing the Insurance Requirements were unenforceable. (*See* Enbridge Initial Br. on Remedy, pp. 6-11). The County and the Plaintiffs repeatedly assert in their response briefs that remand is necessary to determine whether the ZLR Committee would have issued the CUP without the unlawful Insurance Requirements. Those assertions are disingenuous at best. The record shows conclusively that the ZLR Committee and the County Board considered the CUP on multiple occasions following the passage of the new state laws and repeatedly reissued and reaffirmed the CUP knowing the Insurance Requirements were invalid.

Plaintiffs cite *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006), in support of remand to determine whether the County would have issued the CUP without the unlawful Insurance Requirements. (Pls.' Resp. Br. on Remedy, pp. 3-4). *Ayotte* stated that a court, when invalidating part of a statute, should ask: "Would the legislature have preferred what is left of its statute to no statute at all?" 546 U.S. at 330. Assuming that

principle applied in this context, here the Court can easily answer that question on the basis of the record—*the County has already reissued and reaffirmed the CUP knowing the Insurance Requirements were invalid.* There is no question that the County chose to issue the CUP without any further amendments, notwithstanding the fact that the insurance conditions had been invalidated by state statute.

The ZLR Committee and the County Board correctly concluded they could not take any action to amend or revoke the CUP following statutory invalidation of the unlawful Insurance Requirements. (*See* Enbridge Initial Br. on Remedy, pp. 12-15). The County's assertion that Enbridge does not have vested rights in the CUP and the Zoning Permit is contrary to prior positions taken by the County, where the County concluded Enbridge does have vested rights in those permits. (*See* Enbridge Initial Br. on Remedy, p. 9). Enbridge did not commence construction and spend in excess of $10 million (as of the date of the Board hearing) until after the Zoning Permit was issued, and no party has challenged the validity of the Zoning Permit.[7] Having taken such actions in reliance on the Zoning Permit indisputably gives Enbridge vested rights that the County cannot now infringe by reconsidering the CUP.

Remand does not give the County more authority than it would otherwise have. Remanding the matter to the County to essentially restart the permitting process would be unlawful and inequitable, and is precisely the result rejected by the Supreme Court in *Adams*.

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[7] The Zoning Permit was issued on August 4, 2015 after the CUP was issued. It is the Zoning Permit, rather than the CUP, that allows construction to proceed. *See* Dane Co. Ord. §§ 10.25(2)(a), (f) and (i).

CONCLUSION

The County and the Plaintiffs have lost on the merits and are now seeking to manipulate the remedy in this proceeding in order to give the County another opportunity to deny Enbridge the CUP that has already been issued and upon which Enbridge has already relied. However, remand is not appropriate in this certiorari proceeding, and doing so would substantially harm Enbridge and deprive it of a remedy, even though Enbridge is the prevailing party on the merits. Accordingly, the Court should reject the County's and Plaintiffs' remand request and enter a final order dismissing Plaintiffs' complaint with prejudice and, consistent with the Court's prior decision on the merits, declaring that the CUP has been modified by the striking of the unlawful Insurance Requirements.

Dated this 1st day of September, 2016.

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