STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

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

Petitioners,

v.

DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE, and ROGER LANE, in his official capacity as the Dane County Zoning Administrator,

Respondents.

Case No. 16-CV-0008
Case Code: 30955

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

Plaintiffs,

v.

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

Defendants.

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

PETITIONERS' INITIAL BRIEF ON REMEDY

This certiorari review action was brought pursuant to Wis. Stat. § 59.694(10). That statute sets forth the scope of a court's authority in reviewing a challenge to a county zoning decision as well as the available remedies that may be granted. Specifically, "[t]he court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review."

Id. Thus, a reviewing court has express authority under Wis. Stat. § 59.694(10) to modify a conditional use permit ("CUP") by striking conditions it determines are unlawful. In contrast, the statute does not authorize a court to remand a CUP to a zoning committee to amend or revoke a CUP as a result of the court's decision. At the conclusion of the hearing on July 11, 2016, the Court properly determined that the Insurance Requirements are void pursuant to the clear mandate set forth in Wis. Stat. § 59.69(2)(bs) and Wis. Stat. § 59.70(25). The Court should now exercise its express authority under Wis. Stat. § 59.694(10) and modify the CUP by removing those unlawful Insurance Requirements from the CUP.[1]

I. THE COURT HAS EXPRESS AUTHORITY TO REMOVE THE UNLAWFUL INSURANCE REQUIREMENTS FROM THE CUP.

A. The Court Is Expressly Authorized Under Wis. Stat. § 59.694(10) To Modify A CUP In A Certiorari Review Proceeding.

A certiorari review proceeding involving the review of a county zoning decision is governed by Wis. Stat. § 59.694(10). The plain language of that statutory section authorizes the Court to "reverse or affirm, wholly or partly, or … modify, the decision brought up for review." Wis. Stat. § 59.694(10). There is no requirement that the court remand the decision to the county zoning agency for additional proceedings upon finding that the county decision was improper. Indeed, the statute does not authorize such a remand to the zoning authority. Rather, the Court has the authority to modify the decision—in this case by removing the unlawful Insurance Requirements from the CUP.

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[1] In 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.

B. An Order Removing The Unlawful Conditions From The CUP Is The Proper Remedy.

An order modifying the CUP by the removal of the unlawful Insurance Requirements is warranted here. Enbridge's Petition for Certiorari Review and the Court's decision on the merits were based solely on the legal question of whether the County had the authority to impose the Insurance Requirements as conditions in the CUP. Neither the Petition nor the Court's decision questioned any findings of fact by the County or otherwise require the County, as the initial finder of fact, to make any further determinations. Instead, the Court determined that the County's decision was in violation of statutory law. Therefore, the proper remedy is to require the removal of the unlawful Insurance Requirements from the CUP without remanding the decision to the County for further proceedings. *See Riviera Airport, Inc. v. Pierce Cty. Bd. of Adjustment*, No. 00-0599, 2000 WL 1725156, 2001 WI App 1, ¶¶ 36, 46 (affirming county's issuance of conditional use permit but reversing unlawful condition included in permit without invalidating remaining provisions of permit and without remanding to the county for reconsideration of the permit).

The Wisconsin Supreme Court recently reached this same conclusion in a case involving the Livestock Facility Siting Review Board's role in a livestock siting review proceeding under Wis. Stat. § 93.90(5), which is similar to a court's role in a certiorari proceeding. Pursuant to Wis. Stat. § 93.90(5)(d), the Siting Review Board "shall reverse the decision of the political subdivision" if it finds that the decision included unlawful conditions. The term "shall reverse" empowers the Siting Board to remove the offending conditions without invalidating the entire permit. *Adams v. Wis. Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 61, 342 Wis. 2d 444, 820 N.W.2d 404.

In *Adams*, after finding that the municipality had imposed unlawful conditions in a permit for the siting of a livestock facility, the Supreme Court rejected the town's request for the Court to reverse the Siting Review Board's deletion of unlawful conditions from the CUP and instead remand the CUP for reconsideration by the town. *Adams*, 2012 WI 85, ¶ 61. Instead, the Court affirmed the Siting Review Board's "modifi[cation] [of] the CUP, striking conditions one, three, five, and seven as invalid, narrowing condition two as overbroad, and affirming the unchallenged conditions (four and six)." *Id.* ¶ 60. According to the Supreme Court, the remedy of striking the unlawful conditions in *Adams,* rather than reversing and remanding the CUP to the town, was proper for a number of reasons.

First, "the Town committed the initial error that the Siting Review Board was required by law to rectify. The Town imposed the impermissible, extra-legal conditions." *Id.* ¶ 63. "It would make little sense, therefore, to read the Siting Law as prohibiting the Siting Board from correcting the problem in as efficient a manner as possible." *Id.* Similarly, here, the County imposed the unlawful conditions in the CUP with full knowledge that the conditions were unlawful and in direct contravention of state law. It would "make little sense" to subject Enbridge to additional proceedings before the County where Enbridge has been seeking a CUP without the unlawful Insurance Requirements from the County for the past two years and the County has demonstrated its willingness to directly contravene state law. Removing the offending conditions from the CUP is the more efficient remedy rather than reopening the County permitting proceeding.

Second, according to the *Adams* Court, "long and unnecessary delays in the process were the problem [that prompted the Siting Law], and it would only compound that problem to 'reward' farm operators challenging invalid CUPs by returning them to the beginning of

the application process." *Id.* ¶ 64. Similarly, the County's lengthy permitting process, marked by numerous delays, would provide no remedy to Enbridge and would inequitably "reward" the County for its unlawful actions. As stated by the Supreme Court, "[i]t would be absurd for the Siting Board to tell Larson, which filed an application more than four years ago and was entitled to a permit shortly thereafter, that it was required to return to the beginning of the application process because of the Town's mistake." *Id.* ¶ 65. Similarly, it would be "absurd" to require Enbridge to essentially restart the permitting process when Enbridge has been seeking a permit from the County since April 2014, when the County's unlawful action in imposing the Insurance Requirements prompted the current action.

Removal of the unlawful conditions, rather than remanding the CUP for reconsideration by the ZLR Committee, is the only action that would provide an appropriate remedy to Enbridge for the County's unlawful actions without imposing additional burdens on Enbridge. Subjecting Enbridge to further proceedings before the County would essentially reward the County for directly contravening state law and provide the County with yet another opportunity to reconsider or revoke the CUP. *See Part II, infra.* Such a result could hardly be considered a "remedy" for Enbridge as the prevailing party on the merits. Accordingly, the Court should remove the unlawful Insurance Requirements from the CUP.

C. The Court's Authority Under Wis. Stat. § 59.694(10) Differs From The Court's Authority To Review An Administrative Proceeding.

The Court noted at the hearing that its role in a certiorari review proceeding under Wis. Stat. § 59.694(10) is similar to a court's role in an administrative review proceeding under Wis. Stat. § 227.57. This is correct in part, but the language of these two statutes is

different with regard to a court's authority to remand for further proceedings after the court has ruled. Chapter 227 describes in specific detail the actions a court is authorized to take depending on the findings of the court in reviewing the agency decision. If the court finds that the agency has erroneously interpreted a provision of law, the court "shall set aside or modify the agency action . . . or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5). If the court finds that the agency action is in violation of a constitutional or statutory provision, the court "shall reverse or remand the case to the agency." Wis. Stat. § 227.57(8). Therefore, in the Chapter 227 context, a court is authorized to reverse, set aside or modify a decision that is contrary to law and order the agency on remand to issue a decision under a correct interpretation of the law. In contrast, in this certiorari review proceeding under Chapter 59, the Court is authorized to reverse or modify the County's decision, but the Court is neither required nor authorized to remand the action to the County to make further findings of fact or to reconsider the decision made below.

II. THE COUNTY ALREADY HAD MULTIPLE OPPORTUNITIES TO RECONSIDER THE CUP FOLLOWING THE ENACTMENT OF THE STATE LAWS INVALIDATING THE INSURANCE REQUIREMENTS.

A. The County Repeatedly Upheld And Reissued The CUP Knowing The Insurance Requirements Were Unenforceable.

The County's last ditch effort to obtain another opportunity to reconsider the CUP only after the Court's decision on the merits is procedurally improper and substantively disingenuous. Prior to the end of the hearing on July 11, the County never took the position that the removal of the Insurance Requirements from the CUP should allow the County to consider additional conditions or revoke the CUP in its entirety. In fact, soon after the laws

invalidating the Insurance Requirements were enacted, Assistant Corporation Counsel Gault, who argued for remand following this Court's decision on the merits, advised the County that it could not reconsider or revoke the CUP because of the state laws invalidating the Insurance Requirements (*see* discussion at pp. 7-9, *infra*), and the County has followed that advice and declined to reconsider or revoke the CUP. Therefore, the County has waived its ability to reconsider or revoke the CUP under the current circumstances. *See Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 36, 325 Wis. 2d 135, 785 N.W.2d 302 (a party waives a right where it intentionally relinquishes the right with actual knowledge of the right being waived).

The County has already had multiple opportunities to consider imposing different or additional conditions in the CUP following the enactment of the new state laws. The County has repeatedly declined to do so:

- On July 13, 2015, Majid Allan, Senior Planner, Dane County Planning & Development, notified Enbridge that its CUP appeal had been removed from the July 16, 2015 Dane County Board meeting agenda because, due to the newly enacted laws, "the appeal is moot since the county cannot enforce the insurance requirements of CUP #2291 that were the subject of the Enbridge appeal." (Ltr. from Majid Allan to Aaron Madsen, July 13, 2015). Assistant Corporation Counsel Gault issued an opinion letter to the Zoning Administrator, dated July 17, 2015, that concluded: "By the express language of the statute, effective July 14, 2015 the county is prohibited from requiring the [Insurance Requirements]. When the CUP was approved is irrelevant. The [Insurance Requirements] are rendered unenforceable prospectively by the language of §59.70(25)." (R. 129-130 and 171-172, Ltr. from David Gault, Assistant Corporation Counsel, to Roger Lane, Zoning Administrator,

July 17, 2015). In reliance on the opinion letter, the Zoning Administrator issued a revised CUP on July 24, 2015 describing the changes in state law and removing the unenforceable Insurance Requirements. The revised CUP did not include any new or modified conditions and the CUP was not revoked.

- On August 10, 2015, the advocacy organization 350 Madison filed with the ZLR Committee a document called a "Petition for Reconsideration and Rescission of the Conditional Use Permit and Imposition of a Trust Fund Requirement" ("350 Petition"). The 350 Petition requested that the ZLR Committee either revoke the CUP or impose additional conditions in the CUP requiring Enbridge to establish a trust fund in lieu of the invalidated Insurance Requirements. (R. 406, 350 Madison Petition, Aug. 10, 2015).

- On August 24, 2015, Assistant Corporation Counsel Gault issued an opinion letter to the ZLR Committee stating that the committee could not reconsider or rescind the CUP due to the vested rights doctrine and the county ordinance governing revocation. The letter concluded that "the committee cannot reconsider or rescind the CUP granted to Enbridge for the pumping station at this time" due, in part, to Enbridge's "vested rights in the CUP." The letter further stated: "Dane County has no … statutory authority to impose a trust fund requirement on an interstate pipeline. In fact, it could be argued that Wis. Stat. § 59.70(25) is a strong indication of legislative intent against such a requirement. Therefore, I believe it is likely that a court reviewing the proposed [trust fund] condition would find it to be unreasonably arbitrary and capricious." (R. 160, Ltr. from David Gault, Assistant Corporation Counsel, to ZLR Committee, Aug. 24, 2015).

- On September 8, 2015, 350 Madison filed a reply to the Corporation Counsel's letter arguing that Enbridge has no vested rights in the CUP, that the CUP can be revoked under the county ordinance because the insurance conditions are not being complied with, and the ZLR Committee has authority to impose a trust fund requirement. (R. 400, Ltr. from 350 Madison to ZLR Committee, Sept. 8, 2015)

- Later on September 8, 2015, the ZLR Committee heard testimony on the 350 Petition but concluded, based on the opinion of Assistant Corporation Counsel Gault, that the ZLR Committee had no authority to act on the petition and any action would likely prompt further legislative action. The ZLR Committee took no action on the 350 Petition and did not reconsider or revoke the CUP, even though the ZLR Committee acknowledged that the Insurance Requirements had been invalidated. (R. 112-118, Minutes of Sept. 8, 2015 ZLR Committee Meeting).

- On September 29, 2015, the ZLR Committee, despite Assistant Corporation Counsel Gault's opinion that the ZLR Committee could not "reconsider or rescind the CUP granted to Enbridge," voted to "direct the Zoning Administrator to have Conditional Use Permit #2291 reflect the exact conditions of approval as approved by the Zoning and Land Regulation Committee on April 14, 2015. A note shall be added to the conditional use permit which identifies that the County's ability to enforce conditions 7 & 8 are affected by the State Budget Bill, 2015 Wisconsin Act 55, that was enacted on July 12, 2015." (R. 119-126, Sept. 29, 2015 Mtg. Tr. 47:3-48:14). The ZLR Committee did not impose any new or modified conditions despite expressly acknowledging in the CUP that the Insurance Requirements were unenforceable.

- On October 9, 2015, at the direction of the ZLR Committee, the Zoning Administrator issued a new CUP, including the Insurance Requirements, with an asterisk noting the change in state law. (R. 133-136, Ltr. from Roger Lane, Dane County Zoning Administrator, to Aaron Madsen, Enbridge Energy Company, Oct. 9, 2015). The revised CUP did not include any new or modified conditions and the CUP was not revoked.

- On December 3, 2015, the Dane County Board held a hearing on Enbridge's May 4, 2015 appeal, which it had not previously decided based on mootness grounds but which was still pending, and Enbridge's October 19, 2015 appeal of the ZLR Committee's reimposition of the Insurance Requirements as conditions to the CUP. Pursuant to its authority under the Dane County Ordinances, the County Board received additional evidence and independently decided to issue the CUP without any modification due to the laws prohibiting the Insurance Requirements conditions. *See* Dane County Ord. § 7.68(2) ("The county board shall make its decision based on the record. (a) The record is composed of the following sources of information: 1. All evidence submitted to the Zoning and Land Regulation Committee, and documents incorporated therein. 2. Testimony heard by the county board in the hearing on the appeal."); Dane County Ord. § 10.255(2)(j)("The action of the zoning committee, town board or both, shall be deemed just and equitable unless the county board … reverses or modifies the action appealed from.").

- Immediately following the hearing on December 3, 2015, the Dane County Board dismissed both appeals and upheld the ZLR Committee's April 14, 2015 and September 29, 2015 CUP decisions imposing the Insurance Requirements as conditions to

the CUP. The final CUP did not include any new or modified conditions and the CUP was not revoked.

In summary, the ZLR Committee and the County Board have had several opportunities to reconsider or revoke the CUP and consider additional conditions following the statutory invalidation of the Insurance Requirements, but instead chose to approve the CUP with its existing conditions and simply to acknowledge that the Insurance Requirements were unenforceable. If the ZLR Committee believed the CUP could not be issued without the Insurance Requirements, and that some other conditions were needed, it might have attempted to add new conditions to the CUP on September 8, 2015 in response to the 350 Petition. Similarly, the ZLR Committee might have attempted to add new conditions to the CUP on September 29, 2015 when reviewing the action of the Zoning Administrator. And, finally, the County Board might have attempted to add new conditions to the CUP on December 3, 2015 pursuant to its independent review authority contained in Dane County Ord. § 7.68 and Dane County Ord. § 10.255(2)(j).

Instead, on all three occasions the County decided, with full knowledge that the new state statutes had been enacted and the Insurance Requirements had been invalidated, to uphold and reissue the CUP without any additional conditions beyond those originally included in the CUP. The County had at least three chances to take the action it now asks the Court for another opportunity to take, and which the same Assistant Corporation Counsel now requesting remand advised the County it could not take. The Court should reject the County's improper request for another chance to reconsider or revoke the CUP made only after the County has lost on the merits.

B. Even If The Decision Were Reversed And Remanded To The County, The County Could Not Impose New Conditions In The CUP.

Even if the Court were to grant the County's request to remand this action to the County for further proceedings to amend or revoke the CUP, the County has no authority under its own ordinance to do so. The only authority the ZLR Committee has under the Dane County Code of Ordinances related to a CUP that has already been issued is the Committee's limited authority to revoke a CUP upon finding that (1) the permit conditions *and* (2) the standards for the issuance of a CUP have been violated.[2] Dane County Ord. § 10.255(2)(m) provides:

> *Revocation of a conditional use permit.* If the zoning committee finds that the standards in subsection (2)(h) and the conditions stipulated therein are not being complied with, the zoning committee, after a public hearing as provided in subs. (2)(f) and (g), may revoke the conditional use permit. Appeals from the action of the zoning committee may be as provided in sub. (2)(j).

After months of deliberation and approval by both the Town of Medina and the ZLR Committee, the County issued the CUP to Enbridge with the following conditions:

> 1. The pumping station shall be located and constructed as depicted in the presented plans.

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[2] Similarly, the ZLR Committee has no authority to amend the CUP. Assistant Corporation Counsel Gault issued an opinion on March 16, 2015 stating that the ZLR Committee has authority to amend a CUP only if there has been a violation of permit conditions *and* if amendment would "serve the interests and standards set forth in [Dane County Ordinance § 10.255(2)(h)]." (Ltr. from David Gault, Assistant Corporation Counsel, to Patrick Miles, ZLR Committee Chair, Mar. 16, 2015). He also stated that any CUP amendment would require approval of the affected town. Enbridge disputes that the ZLR Committee has the authority to amend a CUP. However, even if it did, under the standards articulated by Attorney Gault, the ZLR Committee has no basis to amend the CUP in this case, given the absence of any violation of a permit condition.

2. Enbridge shall be responsible for obtaining a road use agreement with the Town of Medina prior to the construction of the pumping station to ensure repairs for any damage to local roadways.

3. A spill containment basin shall be constructed around the pumping station to handle a minimum of a 60 minute flow prior to the operation of the pumping station.

4. The pumping station shall be designed and constructed to limit the operating noise to a maximum of 50 decibels dba as measured at property lines.

5. Exterior lighting shall be down-shrouded to limit light pollution onto adjoining property.

6. Enbridge shall agree to indemnify and hold harmless Dane County for pollution losses Per the terms as detailed in Enbridge's proposal titled "CONDITIONAL USE PERMIT ("CUP") CONDITIONS", submitted and entered into the public record on January 27, 2015, which is incorporated herein by reference.

7. Enbridge shall procure and maintain liability insurance as follows: $100,000,000 limits in General Liability insurance with a time element exception to the pollution exclusion (currently in place), and $25,000,000 of Environmental Impairment Liability insurance. Enbridge shall list Dane County as an Additional Insured on the total $125,000,000 of combined liability insurance.

8. The required General Liability Insurance and Environmental Impairment Liability insurances shall meet the technical insurance specifications listed in Appendix A of the insurance consultant's report, which is incorporated herein by reference.

9. Applicant shall maintain an Emergency Response Plan that is in compliance with the applicable requirements of local, state and federal agencies with jurisdiction. A copy of the Emergency Response Plan shall be made available to the Dane County Department of Emergency Management Hazardous Materials Planner within 30 days of permit approval.

10. The applicant warrants that it will at all times have available, on the county and/or regional level, sufficient emergency response staff, equipment, and materials to immediately and fully respond to any spill, leak, rupture or other release of Petroleum Products or Hazardous Substances from applicant's facilities.

11. On a biennial basis, the applicant shall conduct training exercises for first responders in coordination with the Fire Chiefs in the Waterloo and Marshall area. The first such exercise shall be conducted within 30 days of completion of the pumping station, with future exercises scheduled in consultation with the Fire Chiefs. The applicant shall provide advance notice of the scheduled training exercises to the Dane County Hazardous Materials Planner and invite his/her participation and involvement at the exercises.

12. These emergency response conditions do not relieve the applicant of any applicable regulatory responsibilities related to safety and emergency response planning.

Based on those conditions, and pursuant to its authority under the Dane County Code of Ordinances, the ZLR Committee concluded that Enbridge had satisfied the standards for the issuance of the CUP and the County issued the CUP to Enbridge. The County has not identified, nor can it identify, any condition of the CUP that Enbridge has violated. In issuing its September 29, 2015 decision to reimpose the Insurance Requirements in the CUP with the notation that they are unenforceable, the ZLR Committee did not identify a single condition Enbridge had violated that would support the revocation or amendment of the CUP under the ordinance.

Enbridge has also complied with the general standards in sub. (2)(h) of the ordinance. There has been no action taken by Enbridge in violation of those standards. On the face of the CUP (including the CUP issued on October 9, 2015 following the invalidation of the Insurance Requirements), the ZLR Committee made the following findings:

THE ZONING AND LAND REGULATION COMMITTEE AFTER PUBLIC HEARING AND IN THEIR CONSIDERATION OF THE CONDITIONAL USE PERMIT MADE THE FOLLOWING FINDINGS OF FACT:

1. That the establishment, maintenance and operation of the proposed conditional use will not be detrimental to or endanger the public health, safety, morals comfort or general welfare.

2. That the uses, values, and enjoyment of other property in the neighborhood for purposes already permitted will not be substantially impaired or diminished by the establishment, maintenance, and operation of the proposed conditional use.

3. That the establishment of the proposed 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 will be made.

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

6. That the proposed conditional use does conform to all applicable regulations of the district in which it is proposed to be located.

Accordingly, there can be no basis under the Dane County Code of Ordinances for the County to reconsider, revoke, amend or take any other action affecting Enbridge's rights in the CUP. The County has not identified, and cannot identify, which of the twelve conditions in the CUP Enbridge has violated. Nor can the County identify which of the six CUP standards Enbridge has violated. To the contrary, the ZLR Committee's action on September 8, 2015 rejecting the 350 Madison request to amend or revoke the CUP, the ZLR Committee's action on September 29, 2015 reissuing the CUP with the notation that the Insurance Requirements are unenforceable, and the County Board's action on December 3, 2015 upholding the CUP all confirm that Enbridge has complied with the general CUP standards and the specific conditions in the CUP. There is simply no basis at this point, after the County has lost on the merits, for the County to now assert the right to amend or revoke the CUP.

The ZLR Committee's authority is also limited by the vested rights doctrine. The vested rights doctrine prevents a political subdivision from amending or revoking a permit

where the permittee's rights have vested through the submission of a valid permit application and the issuance of a permit, especially where the property owner has taken action in compliance with and in reliance on the permit. A property owner has substantial vested rights under a permit and a political subdivision cannot prevent construction pursuant to that permit, as long as the initial application complied with the zoning regulations in effect at the time of application and the property owner has incurred expenses in reliance on the permit. *See Building Height Cases, e.g., State ex rel. Klefisch v. Wis. Tel. Co.*, 181 Wis. 519, 530-31, 195 N.W. 544 (1923) (builder obtained a valid building permit and had begun construction when the Legislature established a new building height restriction that would have prevented construction; the court held that the builder had substantial rights in construction of the building that vested prior to the passage of the restriction). *See also Lake Bluff Hous. Partners v. S. Milwaukee*, 197 Wis. 2d 157, 171-72, 540 N.W.2d 189 (1995).

Enbridge has substantial vested rights in the CUP and the August 4, 2015 Zoning Permit,[3] which were obtained through a valid permit application and issued in compliance with the zoning regulations in effect at the time of application and issuance, including Wis. Stat. §§ 59.69(2)(bs) and 59.70(25). In fact, the County does not dispute Enbridge's vested rights in the CUP and Zoning Permit. (*See* R. 159-161, Ltr. from David Gault, Assistant Corporation Counsel, to ZLR Committee, Aug. 24, 2015). The County issued the Zoning Permit to Enbridge before Enbridge incurred its expenses and commenced construction activities and well before the County reimposed the unlawful Insurance Requirements in the October 9, 2015 CUP after the new laws had been enacted.

[3] A Zoning Permit is issued by the County to authorize construction activities instead of a building permit. *See* Dane County Ord. §§ 10.25(2)(a), (f) and (i).

Enbridge has taken action and incurred expenses in reliance on the CUP and the August 4, 2015 Zoning Permit, including the completion of site survey work and construction activities such as site preparation and excavation. (R. 660-661, Dec. 3, 2015 Hr'g Tr. 38:13-39:23). As of December 3, 2015, Enbridge had paid approximately $10 million for construction expenses in reliance on the permits, including the completion of site survey work and construction activities. (R. 661, Dec. 3, 2015 Hr'g Tr. 39:18-23). The site survey has been completed along with four-way sweeps and pot-holing. The retention and bio-filtration ponds have been constructed, and work has been commenced on the main access driveway along with site soil improvements (undercutting and improvements on the sub soil fill and concrete and pounded pile foundation work). All pump station equipment to be installed, including pipe, has been procured and is ready for installation. (R. 660-661, Dec. 3, 2015 Hr'g Tr. 38:13-39:17).

In summary, the Dane County Code of Ordinances allows for amendment or revocation of a CUP only upon a finding that the permit conditions have been violated and the general conditional use standards are "not being complied with." Dane County Ord. § 10.255(2)(m). There is no legal basis for the County to find, now that the Court has ruled in Enbridge's favor regarding the unenforceability of the Insurance Requirements, that there had been any violation of the CUP conditions or that the use of the property no longer complies with the general CUP standards in sub. (2)(h), and the County is further prohibited from revoking or amending the CUP under the vested rights doctrine. Accordingly, even if the Court were to remand this action to the County for further proceedings, there is no legal basis for the County to take any action on remand except to remove the unlawful Insurance Requirements from the CUP, which is the remedy Enbridge has requested from the outset.

CONCLUSION

Now that the Court has found that the Insurance Requirements were unlawful when finally imposed by the County, Enbridge respectfully requests that the Court modify the CUP by striking the Insurance Requirements. In addition, Enbridge requests that the Court dismiss the Plaintiffs' Complaint, with prejudice. Since the Insurance Requirements must be removed from the CUP, Plaintiffs cannot seek to enforce them, as a matter of law.

Dated this 1st day of August, 2016.

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