

Dane County Zoning and Land Regulation Committee #CUP 2291
PETITION BY 350 MADISON REQUESTING RECONSIDERATION AND RECISSION
OF THE PERMIT AND, THEREUPON, IMPOSITION OF A TRUST FUND
REQUIREMENT IN SUBSTITUTION FOR THE INSURANCE REQUIREMENT
REGARDING ENBRIDGE'S WATERLOO PUMP STATION

SUPPLEMENTAL RESPONSE BY 350 MADISON TO
MR. GAULT'S LETTER OF AUGUST 24, 2015 AND
COMMENTS ON THE SEPTEMBER 29, 2015 AGENDA ITEM H

This filing by 350 Madison is for two purposes:

1. ***Provide completed brief on vesting and revocation.***

The last Zoning and Land Regulation Committee meeting came up too quickly to complete a finally edited brief on vesting and revocation. Since that meeting, our counsel has had time to complete editing her original opinion of September 8th for clarity.

With the Committee's permission, we ask if the attached revised version of her original opinion can be substituted in its files for the one submitted September 8th. Inasmuch as Enbridge has announced to its investors that it soon intends to build a new twin pipeline next to Line 61, these issues remain vital, and we hope the Committee has occasion to read this revised brief.

If you find these views of concern to the reliability of those provided by Atty. Gault, we hope that you do not find it too bold on our part to suggest that you may want to consider asking the Corporation Counsel to have others in her office provide a second set of eyes to look at the issues. It seems to us that, especially when substantive questions have been raised – and will re-emerge later, soliciting a diversity of views Counsel's office cannot help but be useful for the Committee's deliberations.

2. ***Submit comments on Item H (retain or delete insurance condition).***

Item H on Tuesday's agenda asks whether the Committee should "allow the conditions of approval as revised by the Dane County Zoning Administrator on July 24, 2015 or to retain the conditions of approval as approved by the Zoning and Land Regulation Committee on April 14, 2015 with notations of State Legislative changes.

The same issues discussed in the revised legal opinion for our counsel turn out to overlap the questions Item H asks. We submit that the Zoning Administrator was without power to erase a condition that, regardless of what the Legislature did, was imposed by the Committee, and that, even the Committee cannot erase all assurance conditions.

First, only the Zoning Committee, not the Zoning Administrator, has the authority to issue – and therefore, amend – a conditional use permit. Therefore, a staff members letter purporting to withdraw the insurance requirement imposed by the Committee was illegal, leaving the original CUP in effect.

Sec. 10.255(2)(b) Authority. Subject to sub. (c), *the zoning committee*, after a public hearing, shall, within a reasonable time, grant or deny any application for conditional use. Prior to granting or denying a conditional use, the zoning committee shall make findings of fact based on evidence presented and issue a determination whether the prescribed standards are met. No permit shall be granted when the zoning committee or applicable town board determines that the standards are not met, nor shall a permit be denied when the zoning committee and applicable town board determine that the standards are met.

Second, even the Committee, in response to §59.70 (25), cannot simply erase the insurance condition in September that it adopted in April. In that month, after long deliberations, the Committee found financial assurances were necessary to comply with §10.255(h), DCO, in order to protect the public health and other concerns of the adjoining property owners, whose rights are to be balanced with the applicant in conditional use cases, according to the *Skelly* case cited by our counsel.

As she states:

..[.T]he Committee found itself able to issue the CUP only after it concluded insurance and nine other conditions made it possible that the pump station would “not be detrimental to or endanger the public health,” that the “enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially [be] impaired,” and that it “will not impede the normal and orderly development and improvement of the surrounding property.”

Now, by recent action of the Legislature, the key insurance leg holding up the CUP chair has been removed. That chair can no longer stand. Affirmative action must first be taken to back-fill for that absence if Enbridge is to be allowed to continue erecting an otherwise non-compliant pump station on prime agricultural land without the conditions previously found necessary under the ordinance to be an approvable project.¹

Contrary to Mr. Gault’s view, the Legislature’s enactment of §59.70 (25), which specified that one particular condition could no longer be enforced, did not also make the entire conditioning process nugatory.

As noted, the Legislature declined to enact any further statutory changes regarding CUPs that lessened the obligation to impose those conditions necessary to ensure that the project “will not be detrimental to or endanger the public health, safety, comfort or general welfare” (along with the five other tests that Dane County required² pursuant to other state statutes.)

That is to say, if insurance can no longer be required to provide essential financial assurances that there will be funds for clean ups, then some equivalent condition is now necessary to achieve that purpose necessary to respect the property rights of those now residing in the area, which is also recognized in law. If there were no equivalent condition, then the CUP could not be re-issued.

Thank you for consideration of our views in these two matters. Your attention and care is greatly appreciated.

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ARGUMENT

Enbridge has no vested rights

Vested rights pertains to building permits, not to conditional uses. The constitutional principle of “vested rights” seeks to protect those who in good faith have made investments in new building projects, which were permitted in compliance with existing building codes, from mid-course changes in those rules.

To that end, extensive case law has evolved to help zoning officials interpret which of those constitutional protections pertain in different types of factual situations. Mr. Gault takes the view that the Court’s *Building Height* cases,³ with their strong holdings for vested rights, are squarely on point to the facts in this case. He states that they provide Enbridge with vested rights, entitling it to a permit to build the proposed pump station without the financial assurances that the Committee previously held to be necessary.

But, the principles applied in the *Building Heights* cases to determine whether vested rights exist turn on whether a *building permit* has been granted (or should have been granted based upon the rules in effect at the time the application was filed). However, none of that is on point here, because this is not a building permit fact case. This is a completely different type of proceeding involving a *conditional use permit*.

That fundamental distinction between the two is key as to why those constitutional fairness issues that vesting seeks to protect do not normally carry forward to conditional uses. In the building permit cases that lead to a successful vesting determination, the proposed building indisputably complies with local zoning. All that remains for regulatory reviews are clear building codes providing quantifiable criteria for such things as set back requirements, height limitations and adequate electric systems and plumbing. Once those requirements for a building permit have been complied with based upon the rules in effect at the time, the building codes provide no room for the regulator to impose new conditions on a conforming use to accommodate neighbor’s concerns, and leave no further substantive room for the permitting agency’s exercise of discretion. Property rights generally vest and the permit’s issuance is compelled, with some exceptions discussed later.

Therefore, it is eminently understandable why property rights often accrue and vesting arises in regard to building permits. Legally, everyone who adheres to those rules is entitled to a permit, and, therefore, it follows, also is to be protected against losses from after-the-fact changes in those standards. Otherwise, the courts have long held, post-hoc rule changes would violate property, contract and due process rights.

A conditional use permit is the opposite kind of situation that confers no constitutional rights for this reason. As illustrated in this case, the prime agricultural land in the Town of Medina has been zoned “A-1 Exclusive” long before Enbridge conceived of the need for a pump station and began making associated investments. That classification precludes industrial buildings like a major pump station, unless the Zoning and Land Regulation Committee finds that the requirements for a conditional use permit can be met by the imposition of essential conditions to protect the neighbor’s equally valid property rights.⁴

Thus, this is completely different from the building permit type of proceeding where there is no outstanding issue whether the proposed building adheres to zoning requirements. In the case of a conditional use permit, the zoning ordinance specifically enumerates the proposed use to be non-conforming and conditional. In such cases, the permitting authority is charged with determining, in its discretion, what conditions are necessary to ensure that an otherwise incompatible use can be pursued without impairing the competing established property rights of those residing in the zoning district. Thus, in the *Skelly Oil* case, the Court stated:

“[C]ertain uses (e.g., gasoline service stations, electric substations, hospitals, schools, churches, country clubs, and the like) which may be considered essentially desirable to the community, but which should not be authorized generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, *may be permitted* upon a proposed site *depending upon the facts and circumstances of the particular case.*”⁵

Skelly highlights the several ways that conditional use permits are different from building permits. That illumination leads directly to the first reason why there are no property rights that could have vested in this case, relating to these permit’s character as a limited revision of a zoning ordinance for a use that had not been compatible with the designation.⁶ The courts have held that there can be no property rights in a legislative zoning designation, and that a conditional use permit is another type of zoning ordinance.⁷ Thus, they concluded, a CUP does not confer any property rights entitled to constitutional protection.⁸

Another relevant way that conditional uses are critically distinct from a building permit, apart from their legislative character, relates to their discretionary nature. The interests of the applicant in building a project with some publicly recognized benefits, *Skelly* observes, must be balanced against the equally valid property rights of existing residents that also warrant protection against things like noise, congestion and effects on public health. There can be no entitlement to a conditional use permit, because, unlike a non-discretionary building permit, CUPs are a balancing process that can, depending on the case, go either way.

The final way that it is impossible to freight conditional uses into the building permit context is that the two are too incongruous for that to be done and make any sense. For in a correctly drafted building permit applications, the building complies with applicable zoning, while in CUPs, by definition, the building does not. In the *Lake Bluff* case, the Court pointed out that “[n]o rights may vest where either the application submitted or the permit issued *fails to conform to the existing zoning* or building regulations,” which again by definition applies to every single conditional use permit. That is to say, if an attempt were nonetheless made to import building permit principles into conditional use cases, *Lake Bluff* states that the vesting test would ask if the use is compatible with the zoning, which it cannot be until the prerequisite conditions for compatibility have first been determined and met. As *Lake Bluff* stated, “[v]ested rights should only be obtained on the basis of strict and complete *compliance with zoning* and building code requirements,” which, by definition, neither a CUP application nor permit can.

In this case involving a conditional use, Enbridge never had a right to build the industrial facility on the agricultural land, and never acquired a vested right by either applying for or receiving a valid CUP. Even if it were argued that vesting could arise upon compliance with the conditions in a conditional use permit, there is no case law to that effect, and it is dubious that there could be because, as *Skelly* notes, CUPs are legislative in nature. Even if *arguendo* vesting could occur in a legislative and discretionary CUP, that could still not possibly arise until after Enbridge fully complied with all of the conditions. According to the findings of Zoning and Land Regulation Committee after a year-long study, including the retention of a risk management expert, the CUP was conditioned on the company first purchasing \$25 million of environmental impairment liability insurance.⁹ On information and belief, Enbridge has not purchased such a policy.

The enactment of §59.70 (25) does not create any new grounds for vesting in CUPs. Note, the unavailability of vesting for conditional uses is the case regardless of whether, presumably at Enbridge’s behest, the Legislature subsequently imposed limits in new §59.70 (25) on the County’s ability to enforce the previously adopted insurance requirement. This is because the new statute contained no parallel statutory changes affecting either the legislative context or the long-standing statutory and code obligations for issuance of CUPs. After the budget’s passage, just as it had before, the zoning laws imposed, and continue to impose, strict limits on the ability of permitting authorities to issue conditional use permits for otherwise non-approved uses unless the harms from the project, which the State’s laws and the County’s ordinances vigilantly guard against, can be averted.¹⁰

These zoning requirements are not voided just because, on information and belief, Enbridge successfully lobbied for the passage of §59.70 (25). For the rules of statutory construction require harmonization of two separate statutory provisions bearing on the same subject, not the arbitrary negation of one by the other.¹¹ When the enforcement restriction, §59.70 (25), is harmonized with the conditional use statute, §59.694 (1), Stats. (and Dane County's zoning ordinances enacted thereunder), it can be seen that the new law does not lessen the Zoning and Land Regulation Committee's obligations to condition the CUP on the financial assurances it found to be necessary. For in April the Committee concluded that an assurance condition was required before it could allow this non-compliant pump station on prime agricultural land under §59.694 (1). Thus, the need to impose necessary conditions co-exist with the County's new inability to enforce one particular form of financial assurance, insurance, but not others, such as trust funds and performance bonds.

Bringing these facts to bear on the question of whether Enbridge is eligible to claim a vested right even if *arguendo* vesting could arise for a conditional use, the answer is still no. The company could not claim a vested right under any contemplation until it has purchased the insurance that the Committee concluded was an essential predicate to issuance of the CUP. That remains the case regardless of the fact that the County no longer numbers among those who can enforce an insurance condition.

For, as discussed later, had Legislators not, apparently at Enbridge's behest, inappropriately threatened retaliation if Dane County took any further action on the company's permit, the present legal tension would have been resolved between the inability on the part of the county to enforce the insurance condition and on the part of Enbridge to assert a vested right (were it the case that a CUP can vest). By now, as attested to by the public comments of the Committee's members, the CUP would either have had to have been revoked and reissued with another equivalent mechanism that provides financial assurance, or else, denied. Since this past April when the Committee found financial assurances were a necessary precondition to approve the pump station on agricultural land, there no longer is any option to simply erase the insurance condition from the CUP. That would impermissibly expose the zoning district's residents to the harms that §59.694 (1), Stats., and §10.255(2)(h), DCO, continues post-§59.70 (25) to protect them against.

To assume that Enbridge could claim vested rights when there is no legal right to do so, has no basis in fact or law. The zoning laws still provide that Enbridge cannot be permitted to build an incompatible industrial project on agriculturally zoned land without some other equivalent assurance to protect the property rights of others in the area. §59.70 (25) created no new right for Enbridge to supercede long standing zoning laws for conditional uses. Mr. Gault presents no arguments to explain how such an outcome, which would negate instead of harmonize the zoning code, as well as eviscerate the property rights of existing residents, can be legally sustained.

Enbridge has not proceeded in good faith necessary to vest rights. Even in cases that do raise protected property rights involving building permit where they can arise, there are reciprocal obligations on an applicant in order to be qualified to claim rights have vested. Among them are the requirement to be acting in good faith and with a reasonable expectation that his or her alteration of the property is in compliance with the then-existing zoning codes.¹²

Similar, the many cases where the courts did intervene invariably involved instances in which it was *the government* that, in some manner, shape or form, changed the rules in mid-stream. This was to the detriment of a private party who, in good faith, had made significant investments in a project which, prior to those changes, and contrary to the facts in this case, fully conformed to the rules then in force.¹³

Here –and again distinguished from the cases where courts enforced vested rights – Enbridge has not acted in good faith or upon reasonable expectations. It was not a government entity that sought the legislative changes to overturn county authority to impose insurance requirements, which is the thing that has precipitated the need to substitute another assurance mechanism. Rather, on information and belief, it was the complainant, Enbridge itself, which underhandedly went around the Committee’s back to the Legislature to, post-hoc, bar the local insurance requirements Dane County found necessary. As described later, that is what compels the Committee to reopen the proceeding and revoke the permit.

Enbridge’s duplicitous actions here are precisely the type of deceit that meets strong disapprobation from the courts, such as a case where the court rebuffed a bar that, in a brazen attempt to be “grandfathered,” began offering adult entertainment a week before a new restrictive ordinance took effect.¹⁴

Therefore, the hinge around which the vested cases swing, namely the unfairness when it is the government that changes rules mid-course, is absent from this case. Ironically, here it was the applicant claiming vesting rights, not the government, who is the guilty party whose actions imposed the change.

For Enbridge to claim vested rights in this case, where the need to substitute conditions in the CUP stems from its own acts, not the government’s, is akin to the child who murders his parents and then pleads for mercy from the court because he is an orphan. Nothing in the *Building Height Cases* or their progeny would support such an absurd result.

With no vested rights, the CUP has to be revoked

Mr. Gault does not believe it is possible to re-open the CUP now, nonetheless that such a course is, as we argue, compelled. Although the Committee members’ comments indicate that they, too, believe otherwise (were it not for the threat of future legislative retaliation), in his view, “a zoning permit [has] been issued to Enbridge and no further proceedings are pending.” “[T]he committee,” he states, “has no legal obligation to consider this petition.”

To the contrary, irrespective of whether consideration must be given to our particular Petition, which, upon revocation of the CUP, seeks the substitution of a trust fund for insurance, the County’s ordinances require the Committee to itself commence proceedings to revoke the permit. This is because the Dane County ordinances provide that revocation is in order when “the conditions stipulated in [the original] CUP are not being complied with.”¹⁵ Of import, this is the case regardless of whether this (the applicant) or that entity (the Legislature) was responsible. The sole question is whether all of the *original* conditions from April, which includes insurance, are being complied with, and not just the ones that counsel believes remain enforceable after §59.70 (25) was enacted in July.

Again, this is because the Committee found itself only able to issue the CUP after it concluded insurance and nine other conditions made it possible that the pump station would “not be detrimental to or endanger the public health,” that the “enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially [be] impaired,” and that it “will not impede the normal and orderly development and improvement of the surrounding property.”¹⁶

Now, by recent action of the Legislature, the key insurance leg holding up in the CUP chair has been removed. That chair can no longer stand. Affirmative action must first be taken to back-fill that hole if Enbridge is to be allowed to continue erecting a non-compliant pump station on prime agricultural land without the conditions previously found necessary under the ordinance to be an approvable project.¹⁷

Contrary to Mr. Gault’s view, the Legislature’s enactment of §59.70 (25), which specified that one particular condition could no longer be enforced, did not also make the entire conditioning process nugatory.

As noted, the Legislature declined to enact any further statutory changes regarding CUPs that lessened the obligation to impose those conditions necessary to ensure that the project “will not be detrimental to or endanger the public health, safety, comfort or general welfare” (along with the five other tests that Dane County required¹⁸ pursuant to other state statutes¹⁹.)

That is to say, if insurance can no longer be required to provide essential financial assurances that there will be funds for clean ups, then some equivalent condition is now necessary to achieve that purpose necessary to respect the property rights of those now residing in the area, which is also recognized in law. If there were no equivalent condition, then the CUP could not be re-issued.

It needs to be underscored that there is no statutorily recognized option to capriciously issue a CUP that omits protections that the county’s ordinance finds essential to be met.

Because the insurance condition the Committee found essential has been removed by others, the only way to sustain Mr. Gault’s view that the matter is closed is to assume that, last April, the Committee did not need to require insurance in order to comply with the county zoning ordinances strictures that must be met before a CUP can issue.²⁰ But, to assume that would be to conclude that the DYBDAHL REPORT, which showed why assurances were essential, did not exist, and the Committee acted arbitrarily and capriciously.

In contrast with his present position, earlier the legality of the insurance condition under state law was so axiomatic that no one even argued otherwise. Instead, the only claim in contention was whether insurance was federally preempted. Then Mr. Gault rejected that claim stating: “it remains my opinion that a CUP condition imposing a financial responsibility requirement is not preempted by federal law.”²¹

Certainly Mr. Gault cannot mean to suggest that last April the Committee did not need to require insurance in order to comply with the ordinance, and imposed it on a whim. If he concedes that was not his intent, then his actions suggest he previously believed insurance was necessary to comply with the County’s ordinances, and now needs to be more forthcoming as to the reasons for his turnabout.

The Committee has the same power to require trust funds as it once did insurance

Mr. Gault also opines that the Committee cannot substitute a trust fund for its earlier insurance condition in order to provide the County, and its taxpayers, with the financial assurances it found is needed.

Since insurance and trust funds are essentially different variations of the broader category of financial assurances, until §59.70 (25) was enacted, they were legally indistinguishable in terms of whether the Committee could impose one or the other in a CUP.²² Therefore, if hypothetically, Mr. Gault’s current opinion was valid, then the Committee also did not have the power last April to impose the insurance condition that it did when Mr. Gault had, to the opposite effect, opined that it could.

In addition to that fatal incongruity, Mr. Gault’s stated basis for his conclusion turns the undisputed facts in this case literally upside down. He claims that the DYBDAHL REPORT stated that “there are sufficient liquid assets and other financial resources available in 2015 to fund remediation,” and, since there is no problem, there is no basis to impose what he considers to be a non-solution.

Deeply troubling, this selective quotation has been excised from its context to incorrectly foster the diametrically opposite understanding of what in fact was stated. For, in the next sentence, the REPORT continues “[h]owever, this ability to pay for an oil spill through these resources could deteriorate over the life of the proposed conditional use” (emphasis added). Mr. Dybdahl pointed to the recent bankruptcies in the coal industry due to climate action and a plethora of other risk factors for pipeline operators that pertain over the line’s decades long lifetime.²³ With Mr. Gault’s deliberate misrepresentation of the undisputable facts removed, the basis for his legal conclusion also collapses.

The other point Mr. Gault raises to support his claim that the Committee's actions would not survive a court challenge if it substituted a trust fund for insurance is his view that "it *could be argued* that Wis. Stat. §59.70 (25), which bars the county from imposing an insurance requirement, is a strong indication of legislative intent against a trust fund requirement (emphasis added)."

In this, Mr. Gault is no longer evaluating the questions put to him on the appropriate basis of whether the Committee's contemplated actions are reasonable and legally supportable. That is the criterion that was correctly used in April.

Now, he has fundamentally altered the test to apply, as he instead asks if "it could be argued" otherwise, presumably by Enbridge, which we do not understand to be his client. Were the County to limit its actions compelled by major policy concerns to those that are guaranteed to be supported by every judge in every circumstance, then so little would pass muster that the county's ability to act as needed would be fatally and needlessly compromised.

To the question here, when the Legislature proscribes a specific action instead of the general class, the *exclusio* rule applies. *Exclusio* holds that the express mention of one matter, or one type of a broader category, excludes other similar matters not mentioned. Here that means the specific reference to insurance, which is one type of financial assurance, means that the Legislature intended to not extend that limitation to any other members of the class, here the class of other financial assurance mechanisms.²⁴ Mr. Gault's view that "it could be argued" to the opposite effect would require that the reviewing court be ignorant of the *exclusio* rule whose antecedents extend back into legal antiquity.

Mr. Gault's letter to Supervisor Kolar is wrong on the facts and law. In my opinion, it should be accorded no weight by the Committee.

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September 27, 2015

ENDNOTES

1. §10.255(h) 1-6, DCO.
2. §10.255(h) 1-6, DCO.
3. 181 Wis. 519, 195 N.W. 544 (1923). Also, *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis.2d 157, 540 N.W.2d 189 (1995).
4. §10.123(3)(c), DCO.
5. *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 701 (1973) (italics added).
6. Sometimes those claiming vested rights have argued that there must be a legal obligation on the zoning committee to permit a conditional use. *Sills v. Walworth County Land Management Committee*, 254 Wis. 2d 538 (Ct. of App. 2002). But, there is scant support for such a view. Key to the legal question here, there is no case that holds there is an automatic entitlement to a permit for all conditional uses regardless of the facts of the case. Thus, there are no cases holding there is a right that overrides the adopted criteria for the zoning committee to apply before it may issue a conditional use permit, such that, if one of the criteria is not met, a permit must nonetheless be issued. Yet, such an extreme holding would be required as a necessary legal foundation for anyone attempting to shoe horn the type of vested rights in building permit cases into conditional use cases. Since the zoning committee in this case did issue a CUP, since the condition is modest in its reach and in no way impedes the company's plans (so long as the market concurs that the risks are low), and since one of the key conditions it imposed (which was undisputedly lawful when issued), has never been complied with, there is nothing to vest, regardless of whether §59.70(25), Stats., precludes the County from enforcing that condition in the future.
7. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 372 (1996).
8. *Rainbow Springs Golf Co., Inc. v. Town of Mukwonago*, 284 Wis. 2d 519 (Ct. of App. 2005).
9. Dane County Conditional Use Permit #2291, issued April 21, 2015, at ¶¶9 and 10.

To avoid any confusion, it should be clear which CUP is controlling in this case. It is true that, on July 24th, the Zoning Administrator Roger Lane sent a letter to Enbridge that, in response to §59.70 (25), purported to erase the insurance condition that the Zoning and Land Regulation Committee had imposed on April 21st. Letter dated July 24, 2015 from Mr. Roger Lane, Dane County Zoning Administrator, to Mr. Aaron Madsen, Enbridge Energy.

However, this well-intentioned but completely unauthorized letter was ultra vires and had no force or effect. Indeed, it later ensued that Mr. Lane did not even inform the Committee that he had attempted to unilaterally alter the Committee's CUP at the time and for two months afterwards. Under Dane County's zoning ordinances, §10.255(2)(b), DCO, only the Zoning and Land Regulation Committee, not the zoning administrator, has the authority to issue – and, therefore, to modify – a conditional use permit.
10. §59.694, Stats.; 10.255 DCO.
11. *Lewis Realty v. Wisconsin Real Estate Brokers' Board*, 6 Wis. 2d 99 (1958); *Watt v. Alaska*, 451 U.S. 259, 267 (1981).
12. *Hearst-Argyle Stations*, 260 Wis.2d 494, 28 n. 12; *State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis.2d 516, 528-29, (1963); AMERICAN LAW OF ZONING § 12:34; RATHKOPF'S §72:16.
13. *State ex rel. Humble Oil Refining Co. v. Wahner*, 25 Wis.2d 1 (1964); *State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis.2d 516,528-29 (1963); and *State ex rel. Schroedel v. Pagels*, 257 Wis. 376,378 (1950).
14. *Cross Plains v. Kitt's Field of Dreams*, 2009 WI App 142; 775 N.W.2d 283 (2009).
15. §10.255(m), DCO.

16. §10.255(h)1-3, DCO.
17. §10.255(h) 1-6, DCO.
18. §10.255(h) 1-6, DCO.
19. §59.694(1), Stats.
20. §10.255(h)1-6, DCO.
21. Memorandum dated December 4, 2014, from Atty. David Gault to Zoning and Land Regulation Committee, re Enbridge Pump Station CUP, at pp. 1-2.
22. Instead of being legally distinct, insurance and trust funds each provide a different mix of assurance relative to cost-efficiency. By spreading risk for a probabilistic event among a larger pool, the cost of insurance to Enbridge would be substantially lower for a low probability event, which is the reason why fire insurance for one's several hundred thousand dollar house only costs a few hundred dollars per year. On the hand it terms of assurance to the protected party, there is the risk in insurance that the insurer may not be able to pay a large claim, which is not the case in a fully funded, segregated trust fund. Presumably, the Zoning and Land Regulation Committee concluded that the loss in assurance to the County from insurance was warranted because of its substantially lower cost to Enbridge.
23. David Dybdahl, *An Insurance and Risk Management Report on the Proposed Enbridge Pumping Station* (April 8, 2015), at pp. 8-9.
24. *Perra v. Menomonee Mutual Insurance Co.*, 239 Wis. 2d 26 (Ct. of App. 2000) . Clifton Williams, "Expressio Unius Est Exclusio Alterius," *Marquette Law Review* (June 1931).