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August 24, 2015

Supervisor Mary Kolar
Dane County Zoning and Land Regulation Committee
Room 106, City-County Building
Madison, WI 53703

RE: CUP # 2291

Dear Supervisor Kolar:

You have requested an opinion regarding the "petition" submitted by 350- Madison requesting rescission of CUP # 2291 issued to Enbridge Energy Company (Enbridge) and imposition of a new condition requiring a $25 million trust fund in lieu of the unenforceable insurance condition. Specifically, the committee has posed two questions: 1) what are the consequences if the ZLR would rescind the CUP and reapprove it with a condition requiring a $25 million trust fund for spill cleanup? and 2) are there other options to address the guarantees of spill clean up? Although the answer to the first question is multifaceted, the bottom line is that the County is likely to lose the inevitable litigation resulting from such action. My response to the second question is that there are no practical options for the committee or the county to take at this time.

Initially it is important to note that this issue is not currently pending before ZLR. CUP #2291 and a zoning permit have been issued to Enbridge and no further proceedings are pending. On or about August 10, 2015, 350- Madison submitted a "Petition" requesting rescission of the CUP. Procedurally 350-Madison has no standing to petition for rescission of a CUP, and the committee has no legal obligation to consider this petition.

I also note that 350-Madison prefaces their petition upon the claimed retroactive effect of Wis. Stats. §59.70(25). As I stated in my opinion dated July 17, 2015, "There is no issue of retroactive application of the statute. By the express language of the statute, effective July 14, 2015 the county is prohibited from requiring the insurance coverage. When the CUP was approved is irrelevant. The insurance conditions are rendered unenforceable prospectively by the language of §59.70(25)."

In my opinion the committee cannot reconsider or rescind the CUP granted to Enbridge for the pumping station at this time. Pursuant to the long standing common law of zoning in Wisconsin, Enbridge has vested rights in the CUP. *See Lake Bluff Housing Partners v. City of*

South Milwaukee, 197 Wis.2d 157 (1995) and *Building Height Cases*, 181 Wis. 519 (1923). Therefore, the committee has no legal authority to "reconsider" granting the CUP. Madison-350 has asserted that the Legislature's enactment of §59.70(25) authorizes the committee to revoke the permit and cites as authority *Adams v. State Livestock Facilities Siting Review Board*, 327 Wis.2d 676 (Ct. App. 2010). The language quoted by Madison-350 simply is not precedent for the legal proposition asserted. The Zoning Code has a procedure for revocation of a CUP in DCO §10.255(2)(m). However, grounds do not currently exist to proceed under that provision.

Assuming for the sake of argument that the committee could rescind the CUP at this time, imposition of a new condition requiring a $25 million trust fund would first require approval by the Town of Medina. If so approved, the new condition would be subject to appeal to the full county board and subsequent certiorari review by the circuit court.

On certiorari review the court would consider whether the committee's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and whether the evidence was such that the committee could reasonably reach the determination under review. *Snyder v. Waukesha County Zoning Bd. Of* Adjustment, 74 Wis.2d 468, 475 (1976). The findings of the county's consultant provide some factual basis for an argument that a trust fund condition would not meet these standards. On page 4 of the Executive Summary the consultant concludes that "Between the General Liability insurance coverage that Enbridge purchases with its modified Pollution Exclusion, the current liquid assets of Enbridge including profits and the funds available in government sponsored oil spill clean-up funds, there are sufficient liquid assets and other financial resources available in 2015 to fund the remediation of a Maximum Probable Loss (MPL) spill from line 61 in Dane County;.." This appears to state that Enbridge currently has sufficient insurance and assets to clean up the worst case scenario spill. Therefore, the proposed condition purports to require additional assurances of financial responsibility that are not currently needed.

Although many regulated industries have prospective requirements for financial assurance, such requirements are specifically authorized by statute and implementing regulation. As an example, Madison-350 cites the federal authority for requiring financial assurance for closure of solid waste facilities. (40 C.F.R. 258.71, *et seq.)* However, Dane County has no such 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 condition would find it to be unreasonably arbitrary and capricious.

My answer to your first question leads me to the conclusion that there are no other practical or legal options for the county to impose additional financial assurance requirements on Enbridge at this time. If in the future it appears that Enbridge does not have sufficient financial assurance to cover a spill clean up, the committee may be able to use it's authority under §10.255(2)(m) to revoke the CUP if there is evidence to establish that the standards in sub (2)(h)1 and not being complied with.

Please contact me if you have questions regarding this opinion.

Sincerely,

David R. Gault
Assistant Corporation Counsel