STATE OF WISCONSIN
COUNTY OF DANE
BEFORE THE DANE COUNTY BOARD OF SUPERVISORS

In re Appeal of Decision of Dane County
Zoning and Land Regulation Committee
Revoking or Amending Conditional Use
Permit No. 2291

BRIEF OF APPELLANTS ENBRIDGE ENERGY COMPANY, INC. AND ENBRIDGE ENERGY, LIMITED PARTNERSHIP

Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership (collectively "Enbridge"), individually and as agent for Wisconsin Electric Power Company ("WEPCO") hereby submit this brief in support of Enbridge's appeal of the decision of the Dane County Zoning and Land Regulation Committee ("ZLR Committee"), dated September 29, 2015, revoking or amending the July 24, 2015 Conditional Use Permit No. 2291 ("CUP") and issuing the October 9, 2015 CUP, which re-inserts unlawful insurance requirements as a condition to the CUP.

STATEMENT OF FACTS

Enbridge is an interstate liquid pipeline company licensed to do business in Wisconsin. It is a lessee of, and an easement owner on, land owned by WEPCO and is the agent for WEPCO for purposes of this appeal. Enbridge currently leases land from WEPCO on which it has constructed a pump station, which is known as the Waterloo Pump Station and is located in the Town of Medina, Dane County, Wisconsin. Pursuant to a July 8, 1996 Station Site Lease with WEPCO, Enbridge is required to obtain all state and local permits required for the pump station.

In 2012, Enbridge initiated the Mainline Expansion Project (the "Project"), which included, among other things, the installation of additional pumping units along Enbridge's Line

61 to increase the capacity from 400,000 bpd to 1.2 million bpd without the need to construct or install a new pipeline. As part of this Project, Enbridge acquired an easement from WEPCO to expand the Waterloo Pump Station. Pursuant to this easement agreement, Enbridge is required to acquire all zoning or re-zoning permits needed to expand the Waterloo Pump Station.

A. Zoning Permit Revocation And Conditional Use Permit Application.

On April 23, 2014, Enbridge applied for a zoning permit for purposes of constructing a 15,352 square foot pump station and related appurtenances and improvements at the Waterloo Pump Station location. On April 29, 2014, the Dane County Zoning Administrator issued Dane County Zoning Permit No. DCPZP-2014-00199 for "pumping station new construction and improvements" at the Waterloo Pump Station ("Zoning Permit"). On April 30, 2014, Enbridge signed the Zoning Permit agreeing to comply with all Dane County ordinances. Then, on June 12, 2014, the Dane County Zoning Administrator issued a letter to Enbridge revoking the Zoning Permit and contending that the Waterloo Pump Station expansion and improvement was not a permitted land use but rather that it required a conditional use permit.

On August 19, 2014, Enbridge filed a conditional use permit application for the work to be performed at the Waterloo Pump Station. The proposed expansion at the Waterloo Pump Station site is designed in conformance with United States Department of Administration, Pipeline Hazardous Material Safety Administration ("PHMSA") design and safety requirements to ensure that it will not be detrimental to the general public welfare.

The Waterloo Pump Station property is already being utilized for multiple pipeline and utility purposes. A large American Transmission Company ("ATC") distribution substation and the existing Waterloo Pump Station are currently located at the existing pump station site and serve the same function as the expanded pump station facility. By building an additional pump

station on the existing pump station site, and co-locating with other utility uses, Enbridge has minimized the impacts to the surrounding neighbors and land uses. The fact that Enbridge's expansion and improvements to the Waterloo Pump Station are compatible with the neighboring agricultural uses has been demonstrated based on the nearly 20 years that Enbridge has had an existing pump station at the Waterloo Pump Station site.

The Town initially approved the CUP on October 1, 2014 with only two conditions. Those conditions required: (1) "A signed agreement between the Town of Medina & Enbridge for use of Town of Medina Roads" and (2) "A spill basin sized at a minimum 60 minute flow." Enbridge agreed to the two conditions.

B. ZLR Committee Action On Conditional Use Permit.

The ZLR Committee held a public hearing on Enbridge's CUP application on October 28, 2014, and the ZLR Committee postponed action on the application. During several subsequent meetings, the ZLR Committee continued to postpone action on Enbridge's CUP application. During the pendency of its CUP application, and to address safety concerns raised by interested citizens, Enbridge agreed to the Town's request that it install an oversized release basin at the Waterloo Pump Station expansion site sized at a minimum 60-minute flow. Enbridge also agreed that noise associated with operations at the site will be below 50 dBA at the Waterloo Pump Station property line and agreed that exterior lighting shall be down-shrouded to limit light pollution onto adjoining property.

Enbridge offered to provide Dane County the resources necessary to hire a local engineering firm to represent the County and landowners during construction of the pump station. Enbridge notified the ZLR Committee that it carries Comprehensive General Liability Insurance ("CGL"), which includes coverage for Sudden and Accidental Pollution Liability, a

coverage that provides protection in the event of a release that is "Sudden and Accidental" and discovered within thirty (30) days of the release. Enbridge also provided the ZLR Committee notice that $4 billion in funds were available through the Oil Spill Liability Trust Fund administered by the U.S. Coast Guard under the U.S. Department of Homeland Security, pursuant to the Oil Pollution Act, 33 U.S.C. §§ 2701 *et seq.*

The ZLR Committee requested that Enbridge provide the resources to hire a third party to provide advice to the Committee on the insurance matter, which Enbridge did. The insurance consultant to the ZLR Committee also concluded that the current total balance in the Oil Spill Liability Trust fund exceeded $4 billion, and the fund balance was expected to increase by $300 million annually. The consultant confirmed that the money in the Oil Spill Liability Trust Fund is available if Enbridge does not fully respond to a release with its financial resources being used for required remediation, which has never happened.[1]

On April 14, 2015, the ZLR Committee granted Enbridge a CUP for the expansion and improvements at the Waterloo Pump Station. However, as a condition to the CUP, the ZLR Committee required Enbridge to purchase and maintain for the life of the Waterloo Pump Station an additional Environmental Impairment Liability Policy ("EIL") with coverage limits of $25,000,000. As an additional condition to the CUP, the ZLR Committee required Enbridge to procure and maintain CGL coverage of $100,000,000: (a) from an insurance company "with an A.M. Best rating of at least A, XII;" (b) with a self-retention limited to $1 million for both the

[1] The Oil Spill Liability Trust Fund is funded through excise taxes on crude oil received at U.S. refineries and on petroleum products entering into the United States for consumption, use or warehousing. It is not funded by general taxpayer dollars.

EIL and the CGL coverage; (c) that required certain notices from the insurance carriers; and (d) that required Enbridge to waive its subrogation rights, among other conditions.[2]

Since it had amended the CUP approved by the Town, the ZLR Committee sent the CUP back to the Town for approval or rejection. Modification by the Town was not permitted under the ordinance. The Town approved the CUP with the Insurance Requirements on April 20, 2015, and the CUP became effective on April 21, 2015. On May 4, 2015, Enbridge appealed the ZLR's decision to issue the CUP with the Insurance Requirements to the Dane County Board of Supervisors.

C. State Prohibition On Insurance Requirements Being Imposed By A County.

On July12, 2015, the Wisconsin State Legislature enacted 2015 Wisconsin Act 55, which created Wis. Stat. § 59.70(25) that provides: "A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." The Act also created Wis. Stat. § 59.69(2)(bs), which provides: "As part of its approval process for granting a conditional use permit under this section, a county may not impose on a permit applicant a requirement that is expressly preempted by federal or state law."

The Dane County Corporation Counsel issued an opinion letter to the Dane County 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).**" (Emphasis

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[2] The two insurance requirements are referred to individually as the "EIL Requirement" and the "CGL Requirement" and collectively as the "Insurance Requirements."

added.) In reliance on the opinion letter, the Dane County Zoning Administrator issued a revised CUP on July 24, 2015 describing the changes in state law and removing the unenforceable Insurance Requirements. The Effective Date of the Permit continued to be listed as April 21, 2015 and the Revised Date was listed as July 24, 2015.

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 cited no authority under the Dane County Code of Ordinances or otherwise for an advocacy group to file such a petition. 350 Madison did not file an appeal with the Dane County Board of Supervisors seeking review of the issuance of the July 24, 2015 CUP.

The Dane County Corporation Counsel issued an opinion letter to the ZLR Committee, dated August 24, 2015, concluding 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.**" (Emphasis added.) The letter further stated: … "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 [trust fund] condition would find it to be unreasonably arbitrary and capricious." At its September 8, 2015 meeting, the ZLR Committee discussed but decided to take no action on the 350 Petition, based on the opinion letter from Corporation Counsel. 350 Madison did not file an appeal with the Dane County Board of Supervisors seeking review of the ZLR Committee's "no action" decision.

Enbridge has taken action and incurred expenses in reliance on the July 24, 2015 CUP, including the completion of site survey work and construction activities. To date, the site survey has been completed along with four-ways sweeps and pot-holing. The retention and bio-filtration ponds have been constructed, work has been commenced on the main access driveway along with site soil improvements (undercutting and improvements on the sub soil fill). All equipment, including pipe, has been procured and is ready for installation.

Despite the Dane County Corporation Counsel's opinion that the ZLR Committee could not "reconsider or rescind the [July 24, 2015] CUP granted to Enbridge...," at its September 29, 2015 meeting, the ZLR Committee either revoked or amended the July 24, 2015 CUP when it 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." The ZLR Committee did not refer the proposed CUP amendment to the Town for approval.

At the direction of the ZLR Committee, the Zoning Administrator issued a new CUP on October 9, 2015, which included the Insurance Requirements, with an asterisk noting the change in state law that precluded Dane County from imposing them. The Insurance Requirements are now part of the October 9, 2015 CUP issued to Enbridge with an effective date of April 21, 2015.

ARGUMENT

The ZLR Committee's decision either to revoke or amend the July 24, 2015 CUP by issuing the October 9, 2015 CUP with the unlawful Insurance Requirements was: (a) based on

policy or political considerations that exceeded the ZLR Committee's jurisdiction; (b) the result of the application of erroneous legal standards, as described below; (c) and not based on substantial evidence in the record. Consequently, the decision was arbitrary, oppressive and unreasonable, representing the ZLR Committee's will and not its judgment.

The ZLR Committee's decision should be reversed because, as described below:

1. The ZLR Committee did not keep within its jurisdiction;
2. The ZLR Committee lacked the authority to revoke or amend the July 24, 2015 CUP and to issue the October 9, 2015 CUP with the unlawful Insurance Requirements as a condition to obtaining the CUP;
3. The ZLR Committee proceeded on one or more incorrect theories of law;
4. The ZLR Committee's decision was arbitrary, oppressive and unreasonable and represented its will and not its authorized judgment; and
5. The ZLR Committee did not reasonably make the decision to attach the Insurance Requirements as a condition to the CUP based on the evidence before it.

I. THERE WAS NO LEGAL AUTHORITY UNDER THE DANE COUNTY CODE OF ORDINANCES FOR THE ZLR COMMITTEE TO REVOKE OR AMEND THE JULY 24, 2015 CUP AND ISSUE THE OCTOBER 9, 2015 CUP WITH THE UNLAWFUL INSURANCE REQUIREMENTS.

A. The ZLR Committee Had No Authority To Revoke The July 24, 2015 CUP.

The only express authority the ZLR Committee has to revoke a CUP is when the permit conditions and the standards for the issuance of a CUP have been violated. 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)

In issuing its decision to revoke the July 24, 2015 CUP and issue the October 9, 2015 CUP, the ZLR Committee did not identify a single condition Enbridge had violated that would support the revocation of the CUP under the ordinance. Nor can it. Further, there is no basis for an argument that Enbridge had not 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. Therefore, the ZLR Committee had no authority to revoke the July 24, 2015 CUP based on its very limited authority under the ordinance.

B. The ZLR Committee Had No Authority To Amend The July 24, 2015 CUP.

The ZLR Committee also had no authority to amend the July 24, 2015 CUP. The Dane County Corporation Counsel issued an opinion on March 16, 2015 stating that the ZLR Committee has authority to amend a CUP 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)]." The Corporation Counsel 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 under the standards articulated by the Corporation Counsel, the ZLR had no basis to amend the CUP in this case, given the absence of any violation of any permit conditions. Further, the ZLR Committee failed to send the amended October 9, 2015 CUP to the Town for approval as required under the Corporation Counsel's interpretation of the ordinance. Accordingly, the ZLR Committee lacks authority to issue the October 9, 2015 CUP as a matter of law.

C. The ZLR Committee Had No Authority To "Retain" Or "Restore" Unlawful Conditions In The October 9, 2015 CUP.

There is no legal authority for the ZLR Committee to "retain" or "restore" conditions that violate Wisconsin law and that were not included in the July 24, 2015 CUP. Although the ZLR

Committee characterized its action as "retaining" conditions of approval from the original CUP, there is no procedure or authority for the ZLR Committee to take such action. The Insurance Requirements are prohibited under state law and were not part of the July 24, 2015 CUP. The ZLR Committee cannot simply "retain" conditions that are contrary to state law and that did not exist in the reissued CUP. The ZLR Committee either revoked or amended the July 24, 2015 when it issued the October 9, 2015 CUP with the unlawful Insurance Requirements. As discussed above, the ZLR Committee had no authority to revoke or amend the CUP in this case. Accordingly, there was no legal authority for the ZLR Committee to "retain" or "restore" conditions by revoking or amending the July 24, 2015 CUP and issuing the October 9, 2015 CUP with the unlawful Insurance Requirements.

D. Enbridge Has Substantial Vested Rights In The CUP.

The ZLR Committee's authority is also limited by the common law vested rights doctrine. The vested rights doctrine prevents a political subdivision from 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 reliance on the permit.

The doctrine was first established in a series of Supreme Court of Wisconsin decisions known as the *Building Height Cases*, 181 Wis. 519, 195 N.W. 544 (1923). In *Klefisch v. Wis. Tel. Co.*, 181 Wis. at 530-31, a builder obtained a valid building permit and had already begun construction when the Legislature established a new building height restriction that would have prevented construction of the building; the court held that the builder had substantial rights in construction of the building that vested prior to the passage of the restriction. Therefore, under the vested rights doctrine as applied in Wisconsin, where a property owner obtains a permit and

incurs expenses in reliance on that permit, the property owner has substantial vested rights under the permit and the political subdivision cannot prevent construction pursuant to that permit, as long as the initial application complied with the zoning regulations in effect at that time. *See also Lake Bluff Housing Partners v. South Milwaukee*, 197 Wis. 2d 157, 171-72, 540 N.W.2d 189 (1995).

As noted by Dane County Corporation Counsel, Enbridge has substantial vested rights in the July 24, 2015 CUP, which was 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). Further, Enbridge has taken action and incurred expenses in reliance on the July 24, 2015 CUP, including the completion of site survey work and construction activities such as site preparation and excavation. Therefore, the action by the ZLR Committee to either revoke or amend the CUP violates the vested rights doctrine.

II. THE COUNTY IS PROHIBITED UNDER STATE LAW FROM REQUIRING OR IMPOSING THE INSURANCE REQUIREMENTS.

A. The Insurance Conditions Directly Violate State Law.

Even if the ZLR Committee believed that it had authority to resurrect its April 14, 2015 CUP with the Insurance Conditions as long as the newly enacted Wis. Stat. § 59.70(25) was noted, the only action it could legally take was to remove the Insurance Conditions as the Zoning Administrator did in the July 24, 2015 CUP. Wis. Stat. § 59.70(25) provides: "A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." Wis. Stat. § 59.69(2)(bs) provides: "As part of its approval process for granting a conditional use permit under this section, a county may

not impose on a permit applicant a requirement that is expressly preempted by federal or state law."

With full knowledge that it lacks the authority to require or impose the Insurance Requirements, the ZLR Committee issued the October 9, 2015 CUP with the Insurance Requirements. Whether the County actually intends to enforce those requirements in contravention of state law is irrelevant. State law expressly prohibits the County from requiring or imposing the Insurance Requirements as conditions to a CUP. The ZLR Committee simply flouted the newly enacted Wisconsin law as an exercise of its will rather than its authorized judgment because it is dissatisfied with the new law, which is an abuse of its authority as a matter of law.

Additionally, Wis. Stat. § 59.69(2)(bs) expressly prohibits a County from imposing any requirement that is expressly preempted. The Insurance Requirements are expressly preempted by state law under Wis. Stat. § 59.70(25). Therefore, the ZLR Committee had no authority to impose such requirements and its action in issuing the October 9, 2015 CUP to impose the Insurance Requirements violates Wisconsin law. To adopt a county procedure of placing unlawful conditions into a CUP with a mere acknowledgement that they are unenforceable, as the ZLR Committee has done, is simply bad public policy. Far worse, it is unlawful.

B. The Zoning Administrator Properly Removed The Invalid Conditions In Issuing The July 24, 2015 CUP.

The authority of the Dane County Zoning Administrator is described in Section 10.25 of the Dane County Code of Ordinances. Section 10.25(1)(b) provides: "It shall be the duty of the zoning administrator to receive applications for zoning permits and such other permits and licenses provided in this ordinance, and to issue such permits after applications have been examined and approved." That section provides further that it shall be the duty of the zoning

administrator "to take such action as may be necessary for the enforcement of the regulations provided herein." The action of the zoning administrator in reissuing or revising the CUP was a permissible ministerial act under the zoning administrator's broad administrative authority to implement the zoning ordinance.

A public official's duty is ministerial when it is "absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Pries v. McMillon*, 2010 WI 63, ¶ 22, 326 Wis. 2d 37, 784 N.W.2d 648. A court will look to any written law or policy defining the official's duties to evaluate whether the duty is ministerial. *Id.* at ¶ 26. The duty of the zoning administrator under Section 10.25(1)(b) is to "receive applications for zoning permits and such other permits and licenses provided in this ordinance, and to issue such permits after applications have been examined and approved." Here, the ZLR Committee approved the issuance of the CUP with the Insurance Requirements, which were thereafter invalidated by the newly enacted law. Accordingly, the reissuance of the CUP by the zoning administrator without the Insurance Requirements was a ministerial act because it was mandated by the new Wisconsin law "with such certainty that nothing remain[ed] for judgment or discretion."

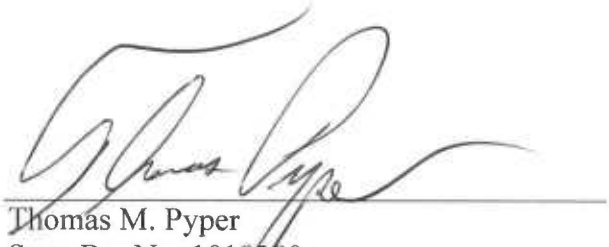
CONCLUSION

For the reasons set forth above, and as it was advised by the Dane County Corporation Counsel, the ZLR Committee had no authority to revoke or amend the CUP issued on July 24, 2015. Enbridge started construction activities in reliance on the July 24, 2015 CUP and has a vested interest in that CUP. It is undisputed that state law prohibits the County from including the Insurance Requirements as a condition to the CUP. Enbridge is aggrieved by the ZLR

Committee's revocation or amendment of the July 24, 2015 CUP and issuance of the October 9, 2015 CUP with the unlawful Insurance Requirements, as a matter of law. Therefore, Enbridge respectfully requests that the Dane County Board of Supervisors:

1. Find that the ZLR Committee: (a) did not keep within its jurisdiction; (b) applied incorrect rules of law; and (c) acted arbitrarily and capriciously as an exercise of its will rather than its authorized judgment by revoking or amending the July 24, 2015 CUP and issuing the October 9, 2015 CUP with the unlawful Insurance Requirements as a condition to the CUP;
2. Reverse the ZLR Committee's decision to impose the Insurance Requirements as a condition to the October 9, 2015 CUP; and
3. Void the Insurance Requirements and order that the Insurance Requirements be removed from the CUP.

Dated this 1st day of December, 2015.



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