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

RESPONSE BY 350-MADISON TO MR. GAULT'S LETTER OF AUGUST 24, 2015

On August 10th, we submitted a Petition to the Committee which asked that its Conditional Use Permit #2291 (CUP) for the Enbridge Waterloo Pump Station issued on April 21st be revoked. After revocation, we further requested that the CUP be re-issued with a trust fund requirement substituted for the insurance condition, which had been affected by the July 13, 2015 enactment of §59.70(25), Stats., as an 11th hour elision in the State Budget.

This memorandum is to provide our counsel's response to Mr. Gault's short letter to Sup. Kolar who asked two questions: (1) may the Committee revoke the CUP in light of the budget rider, and (2) if so, can the Committee require a trust fund to substitute for the impacted insurance requirement.

Mr. Gault opines as to the first question that Enbridge acquired a vested right in the pump station when the CUP was issued. Even if it had not, he believes the Committee may not substitute the trust fund, or any other alternative, for insurance because any financial assurance requirements would be arbitrary and capricious. As a final fillip, counsel adds his view that the Committee does not presently even have the power to revoke the CUP.

With respect, Mr. Gault appears to labor under a serious misapprehension of the facts in this case, which has led him to shoehorn inapplicable law, to ignore other key cases on point incompatible with his views, and, ultimately, to his conclusions that are without foundation in fact or law.

It is our opinion that, the applicable law is clear that there are no rights for Enbridge to vest. Also contrary to Mr. Gault's view, the Committee is compelled to revoke the CUP and substitute another financial assurance mechanism for insurance.

As we previously informed the Committee, on August 17th, Enbridge told the Wisconsin State Journal that construction would not begin for 60 to 90 days, yet a few days later they accelerated the construction schedule in a disturbing effort to outflank the Committee.

We recognize that we are all racing as best we can to avert Enbridge's making a mockery of the County's interests, while bringing the best legal analysis to the fore as quickly as possible. Tonight we ask two things of you. First, we ask that you write Enbridge and request them to voluntarily postpone construction until after the Committee's September 29th meeting when you should have sufficient information and time to make a reasoned decision. Second, we also ask that you request Ms. McKenzie assign a second set of fresh eyes to review the issues raised in our counsel's response to Mr. Gault by the same 29th date. — Peter Anderson and Mary Beth Elliot

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ARGUMENT

Enbridge has no vested rights

There are no vested rights for conditional uses. At its core, 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 the rules then in effect, from the government later changing those rules.

To that end, a series of court made guidelines have been created to help zoning officials interpret those constitutional principles in different types of factual cases. Mr. Gault takes the view that the Wisconsin Supreme Court's *Building Height* Cases[1] are squarely on point to the facts in this case. He states that they provide Enbridge vested rights entitling it to build the proposed pump station without any financial assurance mechanism, which the Committee previously held to be necessary.

But, the principles applied in the *Building Heights* cases to determine whether vesting 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, that is irrelevant because this is not a building permit case. This is a completely different type of case involving a *conditional use permit.*

This factual distinction between the two is fundamental to the inapplicability here of those constitutionally protected fairness issues that vesting seeks to enforce. In a building permit case, there are upfront rules providing quantifable criteria for such things as set back requirements and height limitations. Key, once those pre-defined requirements for a building permit have been complied with, property rights vest and the permit's issuance is compelled.

It is eminently understandable why that is the case in regard to building permits. Everyone who follows those rules is legally entitled to a permit, and, therefore it follows, also to be protected against losses due to mid-stream changes in those rules. Otherwise, that would, the courts have long held, violate property, contract and due process rights.

A conditional use permit is the opposite situation that confers no legal rights. In this case, the prime agricultural land in the Town of Medina has long been zoned A-1 Exclusive, which precludes industrial buildings like an industrial pump station, unless a conditional use permit is granted.[2]

Completely different than the building permit type of case, for a conditional use permit, the zoning authority is charged with determining, in its discretion, whether permission to build ought

to be granted at all. For the proposed use is not normally permitted in that area unless sufficiently strong conditions can be developed and imposed to insure the public will not be endangered, the value of adjoining land will not be impaired, orderly future development will not be impeded, as well as three other qualitative standards that must also be met.[3] This is why the courts have specifically held that conditional use permits do not confer property rights that can be vested.[4]

Unless and until the zoning authority makes all of these six findings, as an act of discretion, no vested rights ever arise for consideration. Thus, in the *Lake Bluff* case the Court quoted with approval "No rights may vest where either the application submitted or the permit issued fails to conform to the existing zoning or building regulations," as are conditional uses by definition. The court added "[v]ested rights should only be obtained on the basis of strict and complete compliance with zoning and building code requirements."

Enbridge has not proceeded in good faith necessary to vest rights. There are reciprocal obligations on an applicant to be qualified to claim vested rights. Among them are the requirement to be acting in good faith and with a reasonable expectation that his or her modification of the property is in compliance with the then-existing zoning codes.[5]

Similar, the many cases where the courts did intervene almost invariably involved instances in which *the government* in some manner, shape or form changed the rules in midstream to the detriment of a private party who, in good faith had made significant investments in a project which, prior to those changes, conformed to the rules then in force.[6]

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

Enbridge's seeming duplicitous actions here are the precisely the type of deceit that meets strong disapprobation from the courts, such as the case where the court rebuffed a bar that started offering adult entertainment a week before a new restrictive ordinance took effect in an admitted attempt to be "grandfathered."[7]

Therefore, the hinge around which the vested cases swing, namely the unfairness when government changes rules mid-stream, is absent from this case, and, ironically, it is the applicant claiming vesting rights, not the government, who appears to be the guilty party.

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 son 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 that course is, as we will argue, compelled. Although the Committee members' comments indicate that they, too, believe otherwise, in his view, "a zoning permit [has] been issued to Enbridge and no further proceedings are pending," and "the committee has no legal obligation to consider this petition."

To the contrary, irrespective of whether our particular Petition seeking revocation and substitution must be considered, since no vested rights exist to encumber necessary action, the County's ordinances require the Committee to itself commence proceedings to revoke of 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."[8] 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 are the left standing after §59.70(25), Stats., was enacted in July.

This is because the Committee was only able issue the CUP after it found that 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."[9]

Now, by recent action of the legislature, the key insurance leg holding up in the CUP chair has been removed, it can no longer stand, and affirmative action must be taken to fill that vacuum if Enbridge is to be allowed to continue erecting a non-conforming pump station on prime ag land without the conditions previously found necessary under the ordinance.[10] Contrary to Mr. Gault's view, the legislature's enactment of §59.70(25), Stats., did not implicate that ordinance obligation in any way.

Because the insurance condition the Committee found essential has exogenously been removed, the only way to sustain Mr. Gault's view that the matter is closed is to assume that the Committee did not last April need to require insurance in order to comply with the county zoning ordinances strictures that must be met before a CUP can issue.[11] But, to assume that is to conclude that the Committee acted arbitrarily and capriciously in April without Mr. Gault's drawing their attention to his concerns. Actually, at that time, so different from today, Mr. Gault endorsed the legality of insurance.

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, and therefore that insurance was necessary to comply with subdivision (h) of the ordinances, then his problem is that the CUP shorn of insurance by an act of the Legislature no longer complies with that subdivision, regardless of whether Enbridge's fingerprints on that Act are immediately obvious or not.

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 types of the broader category of financial assurances, condition, 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. Therefore, if Mr. Gault's opinion hypothetically were valid, neither did the Committee have the power last April to impose the insurance requirement that it did when he thought they did have the necessary authority.

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 a non-solution.

Deeply troubling, this selective quotation has been excised from its context to incorrectly foster the diametric opposite understanding of what 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.[12]

The other point Mr. Gault raises to support his claim that the Committee would not survive a court challenge were it to substitute a trust fund for the original insurance requirement is his opinion that "it could be argued that Wis. Stat. §59.70 (25) is a strong indication of legislative intent against such a requirement."

Let us put aside for the moment the question of why 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, and instead now asks if "it could be argued" otherwise by Enbridge. Regardless of why that is, the standard test of statutory interpretation since time immemorial that pertains when the legislature proscribes a specific action instead of a general class is the *exclusio* rule, which assumes the choice was deliberate. *Exclusio* thus holds that when the specific is included (or excluded), the legislature intended to not extend that stricture to any other members of the class, here the class of financial assurance mechanisms.[13]

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ENDNOTES

1. 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).

2. §10.123(3)(c), DCO.

3. §10.255(h) 1-6, DCO:

> "Standards. No application for a conditional use shall be granted by the town board or zoning committee unless such body shall find that all of the following conditions are present:
>
> 1. That the establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare;
> 2. That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by establishment, maintenance or operation of the conditional use;
> 3. That the establishment of the 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 have been or are being made;
> 5. That adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets; and
> 6. That the conditional use shall conform to all applicable regulations of the district in which it is located."

4. *Rainbow Springs Golf Co., Inc. v. Town of Mukwonago*, 2005 WI App 163, 284 Wis. 2d 519, 702 N.W.2d

5. Hearst-Argyle Stations, 260 Wis.2d 494, 28 n. 12, 659 N.W.2d 424; *State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis.2d 516, 528-29, 124 N.W.2d 809 (1963); AMERICAN LAW OF ZONING § 12:34; RATHKOPF'S §72:16.

6. *State ex rel. Humble Oil Refining Co. v. Wahner*, 25 Wis.2d 1, 130 N.W.2d 304 (1964); *State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis.2d 516,528-29, 124 N.W.2d 809 (1963); and *State ex rel. Schroedel v. Pagels*, 257 Wis. 376,378, 43 N.W.2d 349 (1950).

7. *Cross Plains v. Kitt's Field of Dreams*, 2009 WI App 142; 775 N.W.2d 283 (2009).

8. §10.255(m), DCO.

9. §10.255(h)1-3, DCO.

10. §10.255(h) 1-6, DCO.

11. §10.255(h)1-6, DCO.

12. David Dybdahl, *An Insurance and Risk Management Report on the Proposed Enbridge Pumping Station* (April 8, 2015), at pp. 8-9.

13. Clifton Williams, "Expressio Unius Est Exclusio Alterius," *Marquette Law Review* (June 1931).