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September 3, 2015

VIA EMAIL

Mr. Roger Lane
Dane County Zoning Administrator
City County Building, Room 116
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703

Re: Response Of Enbridge Energy, Limited Partnership To The Petition For Reconsideration And Rescission Of Conditional Use Permit #2291

Dear Mr. Lane:

Enbridge Energy, Limited Partnership ("Enbridge") received a Conditional Use Permit ("CUP") from the Town of Medina and Dane County on April 21, 2015, authorizing the installation of an additional pump station on an existing pump station site as part of an expansion project by Enbridge to increase the capacity of an existing interstate pipeline. The CUP was reissued on July 24, 2015 to remove conditions that are not valid under federal and state law.

On August 10, 2015, the advocacy organization 350 Madison filed with the Dane County Zoning and Land Regulation Committee ("ZLR") a document called a "Petition for Reconsideration and Rescission of the Conditional Use Permit and Imposition of a Trust Fund Requirement" ("Petition"). The Petition cites no authority under the Dane County Code of Ordinances or otherwise for an advocacy group to file such a petition.

As discussed herein, there is no legal authority under the Dane County Code of Ordinances or otherwise for a group to file a "petition for reconsideration and rescission," nor is there any legal authority for the ZLR to act on the Petition. Had 350 Madison wanted to challenge the CUP reissued on July 24, 2015, its recourse was to file an appeal under Dane County Ord. § 10.255(2)(j). Its time for doing so, however, has now expired, and it cannot seek

to avoid the time limits under the ordinance by filing its Petition. Accordingly, the ZLR must deny the Petition as a matter of law.

1. **There Is No Legal Authority Under The Dane County Code Of Ordinances For An Advocacy Group To File, Or For The ZLR To Act On, A "Petition For Reconsideration And Rescission."**

The Petition appears to argue that the ZLR has broad, general authority pursuant to Dane County Ord. § 10.255(2)(h), which provides the general standards for issuing a CUP, to take any action to reconsider, rescind, and add new conditions to a CUP that has already been issued. However, the only express authority the ZLR 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 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).

Here, there are no insurance or other financial assurance conditions in the CUP, following the revisions to the CUP on July 24, 2015, and, therefore, there could not be a "violation" of them to support revocation. Further, there is no basis for an argument that the general standards in sub. (2)(h) of the ordinance are not being complied with. This case is distinguishable from other cases where a municipality has cited general conditional use standards as a basis for revoking a CUP where there has been clear action taken by the property owner in violation of the standards. Here, the property owner's use of the property has not changed since the issuance of the CUP on July 24, 2015.

The ZLR's revocation 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. 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 Lake Bluff Housing Partners v. South Milwaukee*, 197 Wis. 2d 157, 171-72, 540 N.W.2d 189 (1995).

Here, Enbridge has substantial vested rights in the 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. Further, Enbridge has taken action and incurred expenses in reliance on the CUP, including the completion of site survey work and construction activities including site preparation. Therefore, any action by the ZLR to revoke or amend the CUP would be in violation of the vested rights doctrine.

Additionally, the ZLR has no authority to amend a CUP as a general matter or under the specific circumstances of this case. In a different matter, Assistant Corporation Counsel David Gault issued an opinion on March 16, 2015 stating that the ZLR has authority to revoke or amend a CUP under sub. (2)(m) if the committee finds that there has been a violation of permit conditions *and* if revocation or amendment would "serve the interests and standards set forth in [sub. (2)(h)]." Mr. Gault also stated that any CUP amendment would require approval of the affected town under sub. (2)(c). Enbridge disagrees as a general matter that the ZLR has the authority to amend a CUP. However, even under the standards articulated by Mr. Gault, the ZLR has no basis to amend the CUP in this case, given the absence of any violation of any permit conditions.

Accordingly, there is no basis for the ZLR to find that there has 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). Additionally, any new conditions the ZLR might seek to impose would be subject to Wis. Stat. § 59.69(2)(bs), which prevents a county from imposing a CUP condition that is expressly preempted by federal or state law. *See* Wis. Stat. § 59.69(2)(bs).

2. There Is No Legal Authority Under The Common Law For A Party To File, Or For The ZLR To Act On, A "Petition For Reconsideration And Rescission."

The Petition cites *Adams v. State Livestock Facilities Siting Review Board*, 2010 WI App 88, 327 Wis. 2d 676, 787 N.W.2d 941, for the proposition that Wisconsin courts have authorized the "full reversal" of a permit where permit conditions are preempted by state law. However, that case arose under the specific statutory framework of the livestock facility siting law in Wis. Stat. § 93.90, which has different standards and procedures than the CUP process.

In particular, *Adams* addressed the situation where the Livestock Facility Siting Review Board—a special administrative body established to consider appeals of municipal decisions related to siting livestock facilities—rejected certain conditions included in a town's approval of a new livestock facility. The board removed conditions that exceeded the scope of the town's authority under that provision, and the court upheld the board's decision to remove certain conditions rather than reject the entire permit. *Adams*, 2010 WI App 88, ¶ 50.

The town in that case argued that it would not have issued the permit if it knew the board was going to invalidate certain conditions, and, therefore, the board should have allowed the

town to impose an alternative condition. In *dicta*, the court said a municipality might have a valid argument to that effect under certain circumstances, but specifically decided to "leave this issue for another day." *Id.* at ¶ 51. Notably, the Wisconsin Supreme Court decision that followed the Court of Appeals decision cited in the Petition contains no mention of the issue of whether a town could impose an alternative condition in place of an invalidated condition. *See Adams v. State Livestock Facilities Siting Review Board*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404.

Even applying the *dicta* from the Court of Appeals decision in *Adams*, the present situation is different—here the county issued the revised CUP *after* the budget bill was passed and with full knowledge that the state had removed its authority to enforce the insurance conditions. It is not a situation like in *Adams* where the county arguably would have made a different decision if it had known that the conditions were unenforceable—the County Board had the opportunity to consider the CUP again after the budget bill was passed and instead chose to cancel the hearing and allow the CUP to go into effect. Additionally, any principle allowing the imposition of an alternative condition under the livestock facility siting law has no applicability to a CUP process involving a different process and different standards.

In general, cases where courts have upheld a municipal action revoking or amending a CUP are based on some action taken by the property owner in violation of the permit conditions or specific standards in the ordinance after the permit was issued, and further based on specific procedures set forth in the ordinance. For example, in *Bettendorf v. St. Croix County Board of Adjustment*, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999), the property owners violated the parking restrictions of their CUP and refused to comply with the zoning administrator's order to bring the property into compliance. *Id.* at 738. In lieu of revoking the permit, the board of adjustment attempted to add a condition to the CUP. The court found that the board had no authority under the ordinance to amend a CUP and reversed the board's decision. *Id.* at 741.

In this case, the Dane County Code of Ordinances allows for revocation of a CUP 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). That provision does not expressly provide for the modification of a CUP in lieu of revocation. Additionally, Enbridge has not taken any action subsequent to the issuance of the revised CUP on July 24 in violation of either the specific conditions in the CUP or the general conditions in the ordinance. Moreover, the revised CUP was issued after the law had been enacted with full knowledge of the constraints the law imposed. Therefore, this is not the type of situation where other municipalities have exercised their authority to revoke or modify a CUP following clear action by the property owner in violation of the permit conditions or the underlying ordinance.

3. 350 Madison Lacks Standing To File A "Petition For Reconsideration And Rescission" And The Deadline For 350 Madison To Have Challenged The CUP Has Passed.

The proper avenue for a party to challenge the issuance of a CUP is through the appeal process provided in Dane County Ord. § 10.255(2)(j). That section requires an aggrieved party to appeal the CUP within 20 days after its issuance. Even under an interpretation that the CUP without the insurance conditions was "issued" on July 24, 2015 when the Zoning Administrator issued the letter removing the insurance conditions, 350 Madison would have had to file its appeal by August 13, 2015. 350 Madison failed to file an appeal under sub. (2)(j) by that deadline.

The Petition is not an appeal under sub. (2)(j). The Petition does not "specify the grounds thereof in respect to the findings of the zoning committee, town board or both." *See* Dane County Ord. § 10.255(2)(j). Nor does the Petition specify "the reason why the appellant is aggrieved." *Id.* In particular, the Petition does not state how 350 Madison, as an advocacy organization, or any of its members are aggrieved by the ZLR or town action. Finally, the Petition was directed to the ZLR itself, not to the County Board, which is the proper forum for an appeal under sub. (2)(j). Therefore, in the absence of any timely appeal that complies with the standards under sub. (2)(j), 350 Madison has no standing to challenge the issuance of the CUP.

4. Conclusion.

Accordingly, there is no legal authority under the Dane County Code of Ordinances or otherwise for 350 Madison to have filed its Petition, nor is there any legal authority for the ZLR to act on the Petition. The ZLR must deny the Petition as a matter of law.

Please transmit a copy of this correspondence to the Dane County Zoning and Land Regulation Committee members in advance of their September 8, 2015 meeting.

Very truly yours,

Thomas M. Pyper
Jeffrey L. Vercauteren

TMP/JLV
cc: David Gault, Dane County Assistant Corporation Counsel