STATE OF WISCONSIN	CIRCUIT COURT BRANCH 17	DANE COUNTY
ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY, LIMITED PARTNERSHIP, Petitioners, v. DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE, and ROGER LANE, in his official capacity as the Dane County Zoning Administrator, Respondents,	)	Case No. 16-CV-0008 Case Code: 30955
ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES, and TIM JENSEN, Plaintiffs, v. ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY, LIMITED PARTNERSHIP WISCONSIN, Defendants.	)	Case No. 16-CV-0350 Case Code: 30704

PLAINTIFFS' BRIEF
IN CASE NO. 16-CV-0008

INTRODUCTION

Plaintiffs are landowners who reside near the pumping station Petitioners seek to expand

in northeastern Dane County. The hazardous liquid being pumped through Petitioners' "Line 61" is not simple crude oil, but "tar sands" or "oil sands" produced in Alberta Canada. Plaintiffs' Complaint for an Injunction in Dane Co. in Case No. 16 CV 350 and in their brief in opposition to Petitioner's Motion to Dismiss filed in that case March 24, 2016 set out the uniquely hazardous qualities of tar sands oil and Petitioners' disturbing record of pipeline leaks and spills and poor history of emergency response and long term remediation, including the worst inland oil spill in U.S. history in Marshall, Michigan in 2010 (see Plaintiff's brief pg. 3 footnote 2).

Members of the public presented this information to the Dane County Zoning & Land Regulation Committee on October 28, 2014, and on January 24, 2015 (See Appendix Madison 350, Opposition Letters, Documentation) prior to the issuance of the Conditional Use Permit by the ZLR Committee on April 14, 2015.

Petitioner already operates the largest tar sands oil pipeline in the U.S. across Wisconsin, but as their petition states, the expanded pipeline will more than double its current volume to carry 1.2 million barrels of tar sands diluted bitumen across Dane County each day. Plaintiffs are concerned that Petitioner does not have adequate insurance and may not have adequate resources in the future to protect residents' health and property from a pipeline leak or spill, as the expert David Dybdahl's April 8, 2015 report to the ZLR Committee found. They seek to use the property owner enforcement power under state law, Wis. Stat. §59.69(11) to require Petitioner to obtain Environmental Impairment Liability Insurance under the terms of the Conditional Use Permit.

If Petitioner's are able to overcome the presumption of validity attached to the actions of the governmental entity, in this case the Dane County Board and Dane County ZLR Committee, and have the insurance requirements removed from the CUP, Plaintiffs will be deprived of the protections put in place by the County. Plaintiffs maintain that the July 2015 action of the Wisconsin legislature, in prohibiting a County from imposing more comprehensive insurance requirements on an operator of an interstate hazardous pipeline did not retroactively invalidate the County's justified inclusion of insurance requirements in its April 2015 conditional use permit. Plaintiffs agree that Dane County's decision to require cleanup insurance was based on substantial evidence, including a report from a risk management expert, and was a necessary

condition to protect public safety and property, and that the conditional use permit was never revoked, revised or reissued because the only body with the authority to do those things, the ZLR Committee, did not alter, but confirmed those conditions when challenged by Petitioner.

STATEMENT OF THE CASE

As Petitioner has not presented any argument that Dane County's ZLR Committee was preempted by federal law from imposing the insurance requirements on the CUP it approved April 14, 2015 it has waived that argument and the issues are limited to whether Dane County's ZLR Committee was arbitrary, capricious and unreasonable in including them, whether the insurance provisions were supported by the evidence before the committee, whether the provisions inserting Wis. Stat. §59.69(2)(bs) and §59.70(25) into 2015 Wisconsin Act 55 (the state Budget Bill), retroactively invalidated the County's action whether Petitioners insurance coverage falls within the scope of Wis. Stat. §59.69(2)(bs) and §59.70(25) and whether the actions of the County Zoning Administrator in removing the insurance provisions had any legal effect or created any "vested right" of Petitioner to rely on his act despite the lack of knowledge or assent by the ZLR Committee.

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiffs adopt the County's statement of facts with the expressed exceptions stated therein. This statement of facts by Plaintiffs identifies additional objections to Petitioners statement of facts as well as sets forth supplemental facts that are pertinent to the Court's consideration of this matter.

As an initial matter, many citations to Petitioner's alleged facts are to its own Petition or to the Respondent's Answers. [1]It is improper to rely upon facts outside the record. It is also improper to fail to provide citations to the record as Petitioners have done here. The only facts

[1] The record supplied by attorney David Gault, the County's attorney, is readily able to be cited to by volume number and page number with reference to the pdf page number in each volume. It is baffling that this was not apparent to the Petitioners. Plaintiffs have adopted this convention in its citations to the record in its brief.

admissible in a certiorari proceeding are those in the record before the Zoning and Land Regulation Committee in its docket #2291, and before the County Board at its meeting of December 3, 2015, all of which record has been transmitted by the County to the Court.

Petitioner's statement of facts, which alleges that the pump station avoids the need for an additional pipeline, ignores a critical concomitant fact. That is, to increase the volume through the existing pipe, the internal pressure will have to be increased to as much as 1,200 pounds per square inch. That increases the stresses on the pipe reducing the vital margin of safety, especially when, as here, the oil contains large volumes of abrasive solid contaminants.

Petitioner's version of the facts suggests that the Zoning Administrator revoked the April 29, 2014 building permit for arbitrary political reasons. In reality, as discussed in detail later, the Petitioner had dissembled the truth in its original application by describing its project as a natural gas pipeline in a failed attempt to qualify as a permitted use and for a building permit, when in fact it is a liquid fuel pipeline that under the County Ordinance is a conditional use. Further, inasmuch as Petitioner has failed to establish a legal relationship in this case between that revocation and the County Board's actions, (which are not in the record), its assertions on this matter should be stricken.

The statement of facts also fails to mention or address Petitioner's deplorable safety record which led the National Transportation Safety Board to compare Petitioner's performance to "Keystone Kops" speaks for itself. Vol. VI: 40-41; 48. Petitioner's safety record and that of others involved in the oil pipeline and oil industry business are set forth at Vol. VI: 33-35; 40-41; 48-50; 69; 133-39.

Nor are Petitioners co-location argument with other utility uses pertinent to whether impacts to the surrounding neighbors have been minimized. Their argument that the community has endured the first pump station for 20 years supports its claim that it is compatible with neighboring uses is a non-starter. Petitioner's construction of the original "Line 61" in 2008-09 was the subject of multiple legal actions which appear on the Wisconsin Circuit Court Access site when "Enbridge Energy" is entered in a search, if the Court wants to take judicial notice of those facts.

Regarding the evidence considered by the ZLR Committee in issuing the Conditional Use Permit in April 2015, Petitioner's selective citations to David Dybdahl, the insurance risk

expert's report is inexcusable and warrants censure. The only explanation for such a glaring omission is that Petitioners recognize that the Dybdahl opinion is fatal to their case. Mr. Dybdahl, concluded that Petitioners do not have adequate insurance. Vol. III: 65-70. His testimony, which was unrefuted, was that whatever protections exist today are not relevant to a permit whose term extends as much as 100 years, during which time the greater likelihood is that, in a climate constrained world, this company will be either severely financially weakened or bankrupt, just like all the major coal companies are today. A more detailed description of Mr. Dybdahl's testimony is set forth below in Sections IIA and V.

Petitioners' explanation of the legislature's eleventh hour inclusion in the state budget adopted in July, 2015 of the insurance prohibition stretches credulity [2]

Plaintiffs reiterate the County's strong position that the July 24, 2015 letter personally written by the Zoning Administrator was, on its face, *ultra vires*, and the Petitioner was legally chargeable with knowing that.

Plaintiffs assert that Petitioners' have grossly misrepresented the Assistant Corporation Counsel's opinion on Petitioners alleged vested rights and Petitioners have taken that opinion completely out of context. The Assistant Corporation Counsel has addressed Petitioners misrepresentations in Respondent's brief. As he explained any reference to "vested rights in the CUP referred to the April 2015 CUP". The Corporation Counsel has consistently maintained that the Zoning Administrator had no authority to revise, revoke or issue any CUP.

Finally the record is completely absent of any evidence to support Petitioners' claim on its expenditures reasonably in reliance on a validly issued permit by the County.

BURDEN OF PROOF

The Petitioners bear the burden of proving that there was not "substantial evidence" to support the action of the Dane County Board and its Zoning and Land Regulation Committee in

[2] While Plaintiffs have not yet been able to conduct discovery in its case regarding the Petitioner's role in getting the prohibitions on counties requiring insurance added to the state budget in July, 2015, it is difficult to imagine that Petitioners were not involved.

imposing the insurance requirements on Petitioner. The County's decision is presumed to be correct, as set forth in Respondent Dane County's Certiorari brief on pages 14-16. There is also a presumption in Wisconsin against retroactive legislation, as elaborated in Plaintiffs' Reply Brief filed in Dane Co. Case No. 16 CV 350 on pages 6-12 and in Respondent Dane County's Certiorari Brief on pages 11-14, so in the absence of express language indicating retroactivity, Petitioners must establish that Wis. Stat. §59.69(2)(bs) and §59.70(25) are "remedial" or "procedural," rather than substantive which they have failed to do.

ARGUMENT

I. THE BUDGET RIDERS ARE NOT RETROACTIVE

Plaintiffs adopt the arguments set forth in their brief filed in response to Defendants Motion to Dismiss in Dane Co. Case No. 16 CV 350, pages 6-12. Briefly, it is fundamental that retroactive legislation has long been strongly disfavored in the Federal and Wisconsin Courts due to the risk of special interest legislation being passed by wealthy interests, and the need for predictability and due process, giving citizens advance notice of what behavior is lawful. Furthermore, Petitioners' claim that the statutes prohibiting the county from doing what it did three months earlier are "procedural" fail under legal analysis.

II. DANE COUNTY DID NOT ACT UNREASONABLY, IT ACTED JUDICIOUSLY, RESPONSIBLY BASED ON SUBSTANTIAL EVIDENCE.

Petitioners claim (Petitioner's Initial Br., at p. 17) that Dane County acted "solely for political purposes rather than as a proper implementation of CUP review standards" when, as a prudent and precautionary matter, after extensive public testimony and an expert risk management analysis, it required an extremely modest $25 million in clean up insurance from a company that had recently caused $1.2 billion in damages on another of its tar sands oil pipelines through its own gross negligence. Vol. VI: 33.

First, there is substantial evidence to support the Insurance Condition, as Dane County's brief elaborates (Respondent's Br., at pp.3-7). As important, the evidence of the major threats created by the Petitioner's gross negligence was overwhelming (R-Pt. 6; PDF p. 33 and 77) .

County zoning authority is intended to protect public safety, property values, natural resources and public funds, and there is no presumption that a conditional use serves the public interest Delta Biological Res. Inc. v. Board of Zoning Appeals of Milwaukee, 160 Wis. 2d 905, 912, 467 N.W. 2d 164 (Ct. App. 1991). The Zoning and Land Regulation Committee (Committee) would have neglected its constituents' interests and been culpable of malfeasance had it not acted on Mr. Dybdahl's recommendations to require specific clean up insurance to provide third-party assurances of remediation for the inevitable future spills.

Second, not only is there no evidence that the County acted politically, but it is curious that the Petitioners are asserting the "political card" given the unusual circumstances involving the state legislature's highly irregular eleventh hour intervention in this matter with the adoption of the insurance condition prohibition in the Budget Amendment. Furthermore, as with all of its other claims, Petitioners have never once presented even a scintilla of actual evidence or introduced into this record any facts to establish that undue political considerations intruded into the County's decision here.

A. Not only was did the law permissibly allow the County to impose the Insurance Condition, but Petitioner's reckless and risky conduct compelled it to do so

The Petitioners, do not come before this Court as a hazardous pipeline company with a commendable record. Rather, one of Petitioners' subsidiaries caused the worst inland oil spill in U.S. history in 2010 near Kalamazoo, Michigan when a pipe, whose defects had been detected five years earlier but left unattended, ruptured and leaked 845,000 gallons over 17 hours. The accident might have gone on longer but the spill was finally observed by a local resident, although it had not been detected at the company's alleged "state of the art" control center. Vol. VI: 41.

Tar sands oil presents a much greater threat to public health and safety compared to conventional crude oil, because the contaminating sands and sulfur content make it significantly more corrosive of the pipe wall, and cause it to sink to the bottom of waterways instead of floating, making it almost impossible and much more expensive to remove. Finally, the chemicals used to dilute the tar sands oil so that it can flow through the pipes contain carcinogens, such as benzene, that volatize into the atmosphere when there are leaks. The heat added to liquefy the tar sands in the pipe also increases the rate of corrosion (R-Pt. 6, PDF pp.

40-41).

More than 300 people were overwhelmed by the fumes, 150 families had to be relocated and 40 miles of the Kalamazoo River were badly contaminated. That disaster cost $1.2 billion to remediate, and the task still remains incomplete almost six years later. The accident was so abominably handled by the company that the National Transportation Safety Board found "a complete breakdown of safety" and compared Petitioners' performance to the "Keystone Kops" Vol. VI: 40-41; 48.

Meanwhile in Wisconsin, which only has 2% of Petitioner's pipelines, in 2003, 189,000 gallons of crude oil leaked into the Nemadji River from its Superior terminal. In 2008, the Department of Natural Resources (DNR) found and charged Petitioners with more than 100 environmental violations relating to the construction of Line 61 across the State. Between 2006 and 2014, Petitioner reported 15 spills in Wisconsin, releasing 350,000 gallons of oil, at least one-third of which was not recovered. In 2012, the Petitioner pipeline through Grand Marsh Wisconsin spilled 50,000 gallons of oil, leading regulators to again question the adequacy of the company's safety program. Vol. VI: 40.

Petitioners claims that it has reformed, yet, it is questionable how much reliance can be placed on such assurances. For 10 days before the Kalamazoo disaster Petitioners used almost identical reassuring words, and informed federal regulators it could detect and shut down all leaks within 8 minutes (even though a week and a half later it took *127 times* as long as it then claimed). A subsequent report, investigating the industry claims of near instant detection, found pipeline companies actually only detected 5% of the leaks that were ultimately found between 2002 and 2012 – or only one in twenty leaks. Vol. VI: 48.

In the face of all these heightened risks, the ZLR prudently commissioned a report by Mr. David Dybdahl, the nation's leading risk expert on pollution insurance (R-Pt. 3, PDF p. 44), who spent considerable time meeting with Petitioner and going through their financial reports, insurance policies and risk management practices in relation to the industry's risk profile. After an exhaustive analysis, Mr. Dybdahl concluded that:

> *Enbridge's promise to clean up cannot be relied upon.* Enbridge's promises to fully remediate its oil spills, even if *arguendo* they were valid today, have to be viewed over the 100 year economic lifetime of the pipelines, during which extended period they continue to operate. Over that long a time, in a

climate constrained world, it needs to be considered that the use of fossil fuels could be phased out, and the value of the industry's assets, and the companies' financial health, would seriously deteriorate, making such promises hollow. Even in the short-term when pipeline companies remain financially healthy, the promises are questionable. The fact that the local Enbridge affiliate building the pump station has no assets of its own, and that its ultimate parent, where the assets are located, is buffered by layers of intervening subsidiaries and affiliates, could be used to shield those assets from attachment.

Federal insurance is questionable. The federal Oil Spill Liability Trust Fund does not provide the County with adequate assurances over the relevant time frame. The Fund has already had a shaky funding history, and its future prospects over 100 year time frames is unpredictable as public acceptance of and Congressional support for massive taxpayer bailouts waxes and wanes. Moreover, even if the Fund does continue and receive adequate funding, its capacity to handle multiple major spills in single year's appropriations is questionable, which is more likely to occur more frequently as the fossil fuel industry's finances deteriorate and needed maintenance gets delayed. Finally, a large part of the Fund's finances are assumed to derive from charge backs to the offending oil companies. As the industry declines, those reimbursements will also become more elusive.

Enbridge's existing insurance is also questionable. Enbridge does carry a General Liability insurance policy for $700 million. But, those policies have an explicit exclusion for pollution damage that makes it unknowable whether they will or will not pay off when needed.

For all of these reasons, Mr. Dybdahl strongly recommended that Dane County seek additional assurances in the form of $25 million in Environmental Impairment Liability, or environmental cleanup, insurance Vol. III: 65-70. (Dybdahl Report). It has rightly been said that Petitioner's Southern Access Expansion Project is all risk and no reward for Dane County. The County's officials are entitled if not obligated to demand adequate assurances that there will be funds to properly remediate the inevitable oil spills when they occur.

Under all of these considerations, as the County's brief abundantly demonstrates the Committee had before it substantial evidence to support the Insurance Condition.

B. Petitioner dissembled the truth when it sought a zoning building permit

Petitioners impugn the integrity of the Zoning Administrator for withdrawing the original building permit which was issued in reliance on Petitioners' misrepresentation that the pipeline was for the transport of natural gas. There is only one conclusion for this misrepresentation by a

company that has been engaging in the transport of hazardous oil on this pipeline for years,

When Petitioners initially applied for a permit, it deliberately advised the intake clerk that it was a natural gas pipeline, which is the only type of pipeline qualified for an exemption from local zoning, and treated as a permitted use (R-Pt. 4, PDF p. 2). As the record demonstrates that representation is wholly inaccurate. The record demonstrates that the pipeline and associated pump station were always intended and known to only carry oil (R-Pt. 4, PDF p. 34), which is expressly not exempt from local zoning and is specifically categorized by Dane County's zoning ordinance as a conditional use. §10.123(2)(g)2, Dane County Ordinances.

Conditional uses are not an entitlement, but rather, are subject to a public hearing and deliberation by the ZLR. §10.255(2)(b), Dane County Ordinances, The County Ordinance demands that the approval or disapproval of a conditional use must reflect a balancing of competing interests, *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 701 (1973), as well as be adequately conditioned to meet each and every one of the six standards identified in the County Ordinance. §10.255(2)(h), Dane County Ordinances.

Once the Zoning Administrator learned the true nature of the pipeline and pumping station it was incumbent upon him to revoke the earlier building permit, which had been issued by the Department based upon a clearly erroneous representation of the intended use.

III. THE ZONING ADMINISTRATOR HAD NO AUTHORITY TO ISSUE A CUP

Plaintiffs concur in the arguments advanced in the County's brief and adopt the same as if fully set forth herein.

IV. THE CUP WAS NEVER REVOKED

Plaintiffs concur in the arguments advanced in the County's brief and adopt the same as if fully set forth herein.

V. PETITIONERS HAVE NOT SHOWN THAT IT QUALIFIES FOR COVERAGE UNDER SECTION 59.70(25) AND THEREFORE THE CASE SHOULD BE DISMISSED.

Petitioners rely completely on the provisions of sec. 59.70(25), Wis. Stats., to undergird its entire case, just assuming that it pertains to the instant CUP. If it did, that section in the budget rider that, in certain limited circumstances, prospectively proscribed counties from requiring the kind of clean up insurance that Dane County imposed upon Petitioners as a condition for building the Waterloo Pump Station.

However, the record below in facts shows that Petitioners do not meet the requisite terms of the statute. The section states as follows:

> "Interstate hazardous liquid pipelines. A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if [1] the pipeline operating company carries comprehensive general liability insurance coverage [2] that includes coverage for sudden and accidental pollution liability."

Thus, for an interstate hazardous liquid pipeline company to qualify for sub. (25)'s provisions, it first must carry general liability insurance coverage, which we concede Petitioners do. Second, however, that policy must "include coverage for sudden and accidental pollution liability" (sudden and accidental coverage). The nationally renowned insurance and risk expert retained by Dane County, David Dybdahl, specifically testified that Petitioners did not have sudden and accidental coverage, because insurance companies no longer offer this provision (R-Pt. 3, PDF p. 75). Petitioners submitted nothing in the record to refute Mr. Dybdahl's testimony.

Because the record undisputedly shows that Petitioners' General Liability policy does not include sudden and accidental coverage, the instant CUP does not fall under sub. (25)'s provisions, nothing any longer precludes the County from requiring the specific type of insurance that clearly provides for clean-up insurance that the CUP requires, and the entire basis for Petitioners' petition evaporates. The case must be dismissed because there is no applicable cause of action.

We assume that Petitioners will respond that they carry identical coverage under another name. However, this claim would be wrong. Again, as the Dybdahl Report clearly establishes,

sudden and accidental coverage, which is what sub. (25) requires to qualify for the provisions that place limitations on county permitting requirements, is a very different type of coverage from what Petitioners have, which is called Time Element coverage (R-Pt. 3, PDF p. 74).

Before delving into the details, the very simple reason why this distinction is substantive, and not a mere matter of nomenclature, is that the almost unlimited expansive damages that Courts found that insurers were required to pay for under the undefined "sudden and accidental" terms included accidents that continued undetected for many years. To stem the significant losses that they were incurring, in the 1990s, most insurers stopped offering expansive sudden and accidental coverage and substituted a completely different and very substantially restricted revision called Time Element coverage.

Under the new Time Element plans, an accident that released pollutants had to begin, end and be discovered within just 30 days, and reported to the insurer within 90 days (R-Pt. 3, PDF p. 74).

When the legislature incorporated sub. (25) into the budget, the insurance industry had largely abandoned sudden and accidental and substituted time element coverage 20 years earlier. Insurers had done this not to merely change names as a matter of insubstantial fashion, but to substantively staunch the massive losses that they were incurring on wide open their sudden and accidental policies by fundamentally restricting the new clause's reach.

Thus, since sudden and accidental" is a substantively different policy from a "time element" policy, and since the legislature must be assumed to have known such a long standing change in insurance practice, sub. (25) can only be interpreted to be limited to policies with sudden and not time element in their General Liability policies. Because the undisputed record shows that Petitioners does not have a sudden and accidental policy, Petitioners cannot claim to enjoy the restrictions on what counties can require by way of insurance of oil pipeline companies.

As explained in the record by Mr. Dybdahl, from 1970-1986, the typical General Liability policy (the type of general insurance most companies purchase to cover general types of risks, such as a visitor tripping on the ice on the steps to its offices) contained specific exclusions for pollution damage. As a legacy from the past, however, these exclusions were usually accompanied by an exception to the exclusion for pollution releases that were "sudden and accidental". This use of a double negative was extremely and needless confusing legacy that

wound up being very expensive for insurers, Dybdahl testified (R-Pt. 3, PDF p. 74).

For, by the 1980's, the Environmental Protection Agency began many lawsuits under the new Superfund law seeking cost recovery from polluting industries for brown field remediation efforts. Those industries then sought to recover the damages from their insurers under the sudden and accidental clauses and many Courts interpreted the contracts most favorably to the insureds, ordering insurers to pay damages for pollution events that extended for years. Because the premiums that they had charged for these policies never contemplated this outcome, insurers incurred major losses (R-Pt. 3, PDF p. 74).

For that reason, by the 1990s, most General Liability policies no longer offered wide open sudden and accidental coverage, and substituted an entirely new and more circumscribed coverage called Time Element coverage that limited covered pollution events to those that, as mentioned, began, ended and were detected in 30 days, and reported in 90 days (R-Pt. 3, PDF p. 74). As noted, the latter is the only coverage that Petitioners now has, which does not meet the clear language of sub. (25).

It should be noted that coverage that is time limited in this way, and no longer wide open for pollution extending for years, offers critically less coverage for Wisconsin communities. The record shows that the leak experience in tar sands pipelines shows that leaks can occur for many weeks before being detected, as in the 2015 Cnooc oil spill in Canada discussed in the record (R-Pt. 6, PDF p. 27). Hence, in its infinite wisdom, the legislature has shown that it would not extend the limitation on county insurance requirements to crabbed policies that only may cover pollution releases lasting for a few weeks, but only offer that inducement to pipeline companies with coverage for events that can last for years.

Thus, there is no basis in law for Petitioners to qualify for sub. (25), and its petition must be dismissed.

VI. THERE IS NO LEGAL SUPPORT WHATSOEVER FOR PETITIONERS VESTED RIGHT CLAIMS

One need look no further than to the Wisconsin Supreme Court's seminal decision in the Building Height Cases. *STATE ex rel. Klefisch v. Wisconsin Tel. Co.*, 181 Wis. 519 (Wis. 1923) and its decision in *Lake Bluff Housing Partners v. City of South Milwaukee,* 197 Wis.2d 157

(1995) to recognize that there is utterly no basis for Petitioners vested rights claims. Those cases identify the controlling principles governing a vested right claim under Wisconsin law. Even a cursory analysis of those cases discloses that vested rights are not triggered until either the issuance of a valid, legally authorized building permit or expenditures based upon reasonable expectations that such a permit would be issued.

The Court in *Lake Bluff House Partners* 197 Wis. 2d 157, 171-172 (Wis. 1995) summarized the holdings in the Building Height Cases:

> In the Building Height Cases, 181 Wis. 519, 195 N.W. 544 (1923), this Court established criteria for adjudicating zoning vested rights cases. The Court examined three separate fact situations, and ruled on the nature of the vested rights, if any, in each. In the first case, State ex rel. Klefisch v. Wisconsin Telephone Co., a builder had designed and obtained building permits for an addition of five floors to an eight-story building. Id. at 530-31. The builder had incurred various expenses for materials, and had already begun construction, when the Legislature enacted a restriction on the height of structures which would have forbidden the building. Id. at 531. The Court held that the builder's "substantial rights had [***18] vested" prior to the passage of the restriction, and the builder could proceed with the construction. Id. at 532
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> In the second case, State ex rel. Buchholz v. Hotel Wisconsin Realty Co., a builder had planned to construct an addition to a building which would have violated the height restriction, but had not incurred any expenses. Id. The builder did not attempt to obtain a building permit until after the passage of the height restriction, at which time the permit was denied. Id. The Court held that the builder's rights in the proposed construction had not vested in that case. Id. at 533.
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> In the third case, Atkinson v. Piper, a builder had planned, prior to the enactment of the height restriction, [*172] a building with a prohibited height of 115 feet. Id. at 533-34. The builder had obtained a building permit and started construction, but the Court noted that the builder had not incurred any expense which would be lost if the building were to conform to the new height restriction, and be 100 feet tall instead of 115. Id. at 534. A 4-3 majority held that the builder's rights had nonetheless vested, and allowed the construction of the building at its full [***19] height of 115 feet. Id.

The Court in Lake Bluff concluded,

> From the very beginning of zoning jurisprudence in this state, then, a building permit has been a central factor in determining when a builder's rights have vested. 197 Wis. 2d 157, 172 (Wis. 1995)

The Court further observed,

> Requiring an application for a building permit which conforms to applicable zoning or building code requirements in order to show a clear legal right also serves the goals of the vested rights doctrine. The theory behind the vested rights doctrine is that a builder is proceeding on the basis of a reasonable expectation. See State ex rel. Cities Serv. Oil Co. v. Board of Appeals, 21 Wis. 2d 516, 528-29, 124 N.W.2d 809 (1963); McQuillin, supra, § 25.157, at 701 ("[The vested rights] doctrine is also applicable to an applicant for a permit who acted in reliance on the ordinance as it existed at the time of his or her application for a permit."). Vested rights should only be obtained on the basis of strict and complete compliance with zoning and building code requirements, because a builder's proceeding in violation of applicable requirements is not reasonable. Lake Bluff at 197 Wis. 2d 157, 175 (Wis. 1995)

The record here does not support a finding that Petitioners were either issued a valid, legally authorized building permit or made expenditures based upon reasonable expectations that such a permit would be issued.

As set forth above it is indisputable that Petitioners never received a valid building permit for this hazardous waste pipeline and pumping station. It is indisputable that the original permit issued by the County was based on Petitioners misrepresentations on the nature of the pipeline. Petitioner in submitting to the conditional use process acknowledged as much.

Secondly, a conditional use permit is not an entitlement like a building permit. The law is clear that the approval of a conditional use is subject to the reasonable discretion of the elected County officials. Petitioners have not asserted nor does this record support a conclusion that Petitioners possessed the clear legal right to a building permit for a hazardous pipeline at the time it originally applied for the permit.

VI. CONCLUSION

For all of the reasons set forth above and in the County's papers submitted to this Court, Plaintiffs respectfully respect this Court to deny Petitioners a Writ of Certiorari; deny the Petitioner requests to require the ZLR Committee, Dane County and the Dane County Board to remove the Insurance Conditions from the April 21, 2015 CUP and to declare them void and "reinstate" the ineffective July 24, 2015 CUP; determine that the April 21, 2015 CUP remains in effect, as it was not revoked or preempted by subsequent state laws, which are not retroactive; deny any costs or attorneys' fees to Petitioners; and grant such further relief as it deems just and equitable.

Dated this 27th day of May, 2016.

Respectfully submitted:

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