ENBRIDGE ENERGY COMPANY, INC., and
ENBRIDGE ENERGY, LIMITED
PARTNERSHIP,

Petitioners,

v.

DAKE COUNTY, DAKE COUNTY BOARD OF
SUPERVISORS, DAKE COUNTY ZONING
AND LAND REGULATION COMMITTEE, and
ROGER LANE, in his official capacity as the Dane
County Zoning Administrator,

Respondents.

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.

CERTIORARI BRIEF OF DAKE COUNTY

The Respondents, Dane County, Dane County Board of Supervisors, Dane County
Zoning and Land Regulation Committee, and the Dane County Zoning Administrator,
(hereinafter “Dane County”) hereby submit the following responsive Brief:
STATEMENT OF FACTS

With a few exceptions, Dane County agrees with the Statement of Facts provided in the Petitioners’ Brief. The Petitioners correctly state that they originally applied for a zoning permit for the Waterloo Pump Station on April 23, 2014. On April 29, 2014 the Zoning Administrator issued a zoning permit for the pump station as a permitted use in the A-1 Exclusive Zoning District. Subsequently, on June 12, 2014 the Zoning Administrator issued a letter to the Petitioners revoking the zoning permit and stating “Upon further review, in consultation with Dane County’s Corporation Counsel’s Office, we have determined that the permit for the Enbridge pump house issued on April 30, 2014, was issued prematurely. We have concluded that your proposed use is not a permitted use, and that a conditional use permit (CUP) is instead required. Please be advised that Zoning Permit No. DCPZP-2014-00199 is hereby revoked.” (Pet. ¶ 23, Answer ¶ 9). That decision was indeed made after a determination by Corporation Counsel that due to a change in law the pump station was now a conditional rather than permitted use.

Due to what can best be described as an unfortunate coincidence, on that same date the Dane County Board of Supervisors adopted a Resolution urging the Wisconsin DNR to prepare a new EIS for Line 61 and to revoke the air permit already issued for the expansion of Petitioners’ storage tank capacity at its Superior terminal. The Petitioner infers there is linkage between the two actions, but in fact there is no evidence to support that inference. One fact that is clear is that the Petitioners, with unlimited funds and legions of lawyers, did not utter an objection to the Zoning Administrator’s decision. Rather, knowing that a CUP would be controversial and contentious, they applied for the CUP on August 19, 2014.
The Petitioners have notably glossed over the information provided by the independent insurance consultant, Mr. David J. Dybdahl. The Petitioners mention one comment by Mr. Dybdahl regarding the Oil Liability Trust Fund, but the remainder of Mr. Dybdahl’s 30 page report was ignored by the Petitioners.

Mr. Dybdahl was retained at the Petitioner’s expense to provide a “risk management overview to the Zoning & Land Regulation (ZLR) Committee on risk bearing capacity of Enbridge Energy Partners to address the clean-up and other potential damages resulting from an oil spill at the proposed pumping station upgrade on Line 61.” (R.- Dybdahl Report p. 3) Mr. Dybdahl’s extensive experience in environmental risk management was set forth in his CV included with his report and in the Executive Summary.

Mr. Dybdahl’s Report was extensive and is 30 pages long. His findings and conclusions based upon the Petitioners’ liability insurance program, their 2014 financial statements and the government sponsored oil spill response programs were summarized in the Executive Summary of the Report:

- Enbridge is strictly liable under US environmental laws to pay to clean up an oil spill at one of their lines;
- 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;
- Enbridge has proven in the past to pay for oil spill clean ups in a responsible manner through a combination of partially recoverable General Liability insurance proceeds and profits from ongoing operations;
- The very healthy financial picture of Enbridge today is not necessarily predictive of the future ability of Enbridge to meet the financial obligations associated with an oil spill over the duration of the Conditional Use Permit;
- Enbridge Energy Partners is only partially insured in both “Limits of Liability” and the scope of the insurance coverage for a known potential magnitude oil spill arising from one of their pipe lines;
• The $700 million of General Liability insurance coverage that Enbridge currently purchases is less than the known loss cost of the $1.2 billion Enbridge oil spill in 2010 on Line 6B in Michigan;
• Enbridge purchases a General Liability insurance policy which contains a pollution exclusion and defined exceptions to the pollution exclusion for spills which meet certain time element requirements;
• There is ongoing insurance coverage litigation associated with the Enbridge Line 6B spill in 2010 that highlights the insurance coverage ambiguity inherent in a General Liability insurance policy containing a Pollution Exclusion exceptions to the exclusion instead of genuine Pollution Insurance or more accurately Environmental Impairment Insurance;
• Controversy over these missing coverages in the General Liability insurance policies currently purchased by Enbridge lie at the core of the Line 6B insurance coverage litigation involving $103,000,000 in uncovered insurance proceeds for the Line 6B spill;
• Subject to the Pollution Exclusion, the Enbridge General Liability insurance policies insure “Property Damages” and do not include specific insurance coverages for clean-up costs, restoration costs and natural resources damages normally associated with an oil spill;
• Enbridge does not currently purchase Environmental Impairment Liability (EIL) insurance on Line 61. In contrast to the General Liability insurance policies which only apply to liability arising from “Property Damage”, EIL insurance policies contain specific insurance coverage for “Clean-up Costs, Restoration Costs” and “Natural Resources Damages” associated with an oil spill.

Mr. Dybdahl added that “[b]ecause the proposed conditional use is of unlimited duration, risk factors which may be encountered decades into the future need to be incorporated into the permitting process today. The county may not be able to add changes to the permit related to risk management issues in the future. These future risk factors could include:

• The potential (likely) down turn in the use of fossil fuels over time;
• Reduced cash flow and profitability for Enbridge as a result of a general down turn in the throughput of crude oil in pipelines;
• A general down turn in their business would lead to the reduced ability of Enbridge to maintain robust safety and loss control protocols and to upgrade their pipelines over time;
• Overtime, the aging pipe line systems would become more prone to spills, and;
• In the above scenario, Enbridge may not have the liquid assets that they have today to pay for a significant spill at the same time they are more likely to have a spill due to aging infrastructure.
Based upon the foregoing findings and conclusions, and his over 30 years of insurance and risk management experience, Mr. Dybdahl recommended the following:

- That Enbridge agree to indemnify and hold harmless Dane County for pollution losses per the terms as outlined in Enbridge’s proposal titled “CONDITIONAL USE PERMIT (“CUP”) CONDITIONS”;
- That Enbridge procure and maintains liability insurance, including Environmental Impairment Liability Insurance, making Dane County an Additional Insured to a level equal to 10% of the Line 6B loss costs, $125,000,000;
- As part of this overall liability insurance requirement, Enbridge should purchase $25,000,000 of EIL insurance on the proposed pumping station in Dane County;
- Technical insurance specifications for General Liability Insurance and Environmental Impairment insurance appear in Appendix A.

Mr. Dybdahl explained the compelling reasons for Dane County to require the Petitioners to obtain environmental insurance as opposed to General Liability insurance as a condition of CUP approval:

- Accessing through the insurance underwriting process, an independent and objective evaluation of the environmental risks associated with the Enbridge pumping station in Dane County;
- Back stopping the insurance coverage problems which can arise when a General Liability Insurance policy containing “Pollution” exclusion is relied upon to insure pollution losses from an oil spill. This problem is evidenced by the fact that Enbridge is currently involved in litigation over $103,000,000 in unrecovered General Liability insurance from the 2010 spill on Line 6B. Some lawsuits over the meaning and effect of pollution exclusions in General Liability insurance policies can take over 20 years or more to resolve in the courts. General Environmental Impairment Insurance is much more reliable than General Liability insurance to pay for pollution losses.

(R. Dybdahl Report, pp. 4-5). Mr. Dybdahl provided a more detailed explanation of the differences between General Liability Insurance and genuine Pollution insurance on Page 15 of his Report.
At the hearing before ZLR on April 14, 2015, Mr. Dybdahl was asked to explain the difference in coverage between Environmental Impairment Insurance and General Liability Insurance:

So, on a general liability policy, all general liability policies have a pollution exclusion. General liability policies cover bodily injury and property damage and then if somebody sues you, defense costs. The environmental policy works the same way. It covers bodily injury and property damage plus defense costs, but it only applies if the source of the loss was the emission, discharge, escape, release or dispersal of a pollutant. So it’s excluded in the general liability policy. It’s covered by the environmental impairment liability policy.

The environmental impairment liability policy, since it’s designed to cover environmental impairment like a spill, has coverage elements that are not incorporated in a general liability policy. There’s no reason in a general liability policy to be talking about covering clean-up costs, it excludes pollution out of the chute. But an environmental impairment policy covers clean-up costs, restoration costs, which means put it back to the condition it was in before the environment was impaired, restoration costs, clean-up costs and damage to natural resources. So, if you kill the fish, it’ll pay to put the fish back.

The glitch in the general liability policy that Enbridge ran into when – and lots of people run into the same glitch, when you ask for a general liability policy to respond to clean-up costs, it doesn’t look like the definition of property damage. So when you slam your car into somebody else’s car and you damage their car, that’s property damage. If you get a letter from the DNR that you owe them $22 for every dead trout, that doesn’t look like property damage in the definition of the insurance policy. So, an environmental policy is designed to insure that loss exposure of general environmental damages.

(R. Transcript of 4/14/15 ZLR Hearing, pp. 6-7)

The Petitioners have relied upon the availability of government backed oil spill funds to support their argument that there are sufficient assets to cover a worse case scenario spill in Dane County. Mr. Dybdahl included these funds in his analysis. He identified the Oil Spill Liability Trust Fund as the most likely source of available funding, and found that “[t]he $4 billion fund subject to its $1 billion dollar per incident cap in the short term and foreseeable future has sufficient funding to address all of the costs associated with a spill at a pump station in Dane
County even if Enbridge has no cash or insurance available to reimburse the fund.” He further concluded “[h]owever, there is no way to reliably predict the status of future funding of the Oil Spill Liability Trust Fund over the term of a conditional use permit.” (R. Dybdahl Report, p.22)

On April 14, 2015, the ZLR voted to approve CUP 2291 with twelve conditions. This included Conditions #7 and 8 that stated:

7. Enbridge shall procure and maintain liability insurance as follows: $100,000,000 limits in General Liability insurance with a time element exception to the pollution exclusion (currently in place), and $25,000,000 of Environmental Impairment Liability insurance. Enbridge shall list Dane County as an Additional Insured on the total $125,000,000 of combined liability insurance.
8. The required General Liability Insurance and Environmental Impairment Liability insurances shall meet the technical insurance specifications listed in Appendix A of the insurance consultant’s report, which is incorporated herein by reference.

(R. – April 14, 2015 Minutes of ZLR Committee, pp. 2-5) Conditions 7 & 8 were adopted directly from Mr. Dybdahl’s recommendations. The Petitioner refers to these as the “Insurance Requirements” in their Brief, and they are the substance of this action. CUP 2291 was issued by the Zoning Administrator with an effective date of April 21, 2015.

On May 4, 2015 the Petitioners appealed the ZLR’s decision to impose the insurance conditions to the Dane County Board of Supervisors. While that appeal was pending, the legislature enacted the state Budget Bill, 2015 Wisconsin Act 55. That Act was published on July 13, 2015 and became effective on July 14th. Section 1923e of the Budget Bill created Wis. Stat. §59.70(25), which states:

A county may not require an operator of an interstate hazardous pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability.

There is no dispute that Wis. Stat. §59.70(25) applies to Petitioners’ Line 61 and renders the insurance conditions imposed on CUP 2291 unenforceable by Dane County. On July 17,
2015, the Dane County Corporation Counsel’s Office wrote an opinion to the Zoning Administrator that concluded:

Section 59.70(25) expressly prohibits a county from requiring a pipeline operator to obtain insurance if they have the required coverage. Therefore, Dane County has no authority to require Enbridge to obtain additional insurance coverage. 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).

(R – Opinion of Asst Corporation Counsel David R. Gault dated July 17, 2015.)

What happened next has confused the issues in this case. The Petitioners’ summary and characterization of the actions by the Zoning & Land Regulation (ZLR) Committee after the initial issuance of CUP 2291 is inaccurate. On July 24, 2015 the Zoning Administrator reissued CUP 2291 with the insurance conditions removed. As the Petitioners acknowledge in their Brief, “The effective Date of the Permit continued to be listed as April 21, 2015 and the Revised Date was listed as July 24, 2015.” (Petitioners’ Brief p. 9) But, there is no legal authority for the Zoning Administrator to amend or revise a CUP. Pursuant to Dane County Code of Ordinances §10.255, only the ZLR has authority to issue or amend a CUP. At the hearing before the County Board on December 3, 2015, the Zoning Administrator explained his reissuance of CUP 2291:

However, as part of the state budget, changes were made to legislation to prohibit counties from requiring additional insurance from pipeline transportation companies. After this legislation was passed, Enbridge requested that the Conditions be removed from the Conditional Use Permit. After request from Enbridge and a memo from corporation counsel verifying that the Conditions are unenforceable, I removed the Conditions to reflect the legislative changes. It seemed prudent at the time. But, in hindsight, I realized that I had no authority to change Conditions once approved by the Zoning and Land Regulation Committee. The authority lies with the Zoning and Land Regulation Committee.

(R. – Transcript of December 3, 2015 Hearing before Dane County Board, p. 21).
After learning that CUP 2291 had been revised, the Chair of ZLR placed the matter on the committee’s agenda for the September 29, 2015 meeting. At that meeting the Chair stated:

This is the discussion and possible action of the conditions of approval for CUP 2291, that is the Enbridge pumping station. And I requested this item be put on the agenda because I was learning for the first time at our last meeting that the [CUPs] were reissued after the state legislative action. And it was my opinion that – that that action was not proper, that what should have been released as the permit should have been reflective of the committee action, even though one – you know, one of the conditions was rendered unenforceable by the state legislative action. .....I don’t think the Conditional Use Permit application should have been changed in there that didn’t reflect committee action.

(R – Transcript of September 29, 2015 ZLR Meeting, p. 41-42). The ZLR’s entire debate on the action is found on pp. 41 – 48 of the transcript. The ZLR minutes reflect the following unanimous action:

A motion was made by KOLAR, seconded by MATANO, 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 relevant portion of the 2015 Act 55 is Section 1923e: 59.70(25) of the statutes is created to read: 59.70(25) Interstate hazardous liquid pipelines. 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 for sudden and accidental pollution liability. The Zoning Administrator did not have the authority to revise the conditions of approval as noted in the Zoning Administrator’s letter dated 7/24/2015.

(R- Minutes of the September 29, 2015 ZLR Meeting, p.6)

On October 19, 2015 the Petitioners appealed the September 29, 2015 action to the County Board. The Petitioners’ entire case before the County Board dealt with the ZLR’s action on September 29th, rather than the initial issuance of the CUP on April 14, 2015. In support of their position that a valid CUP was issued on July 24, 2015, the Petitioner took the position that the Zoning Administrator had ministerial authority to unilaterally remove conditions 7 & 8 from
the CUP. (R- Transcript December 3, 2015 County Board Hearing, pp. 35 & 49.) During deliberations by the board a member inquired of Corporation Counsel about the Zoning Administrator’s authority to remove the conditions from the CUP:

The reference was made to it being a ministerial act. A ministerial act is something that a public officer has to do because the law requires it without discretion. A couple examples I can think of is if – including the zoning administrator – if somebody comes in and wants to get a zoning permit to build a house and if they got the correct zoning classification on that property and if they have the proper setbacks and they meet all the requirements in the ordinance, he doesn’t have any discretion to turn that down. He’s got to grant them a permit. That’s a ministerial act. If somebody comes in to the county clerk and wants to get a marriage license and they meet all the requirements set forth in the statute to get a marriage license, he doesn’t get to determine whether or not they get a marriage license. That’s a ministerial act. He’s got to give them a marriage license.

The zoning administrator doesn’t have that unfettered discretion to just say, I’m gonna knock some conditions off a Conditional Use Permit that only the zoning committee can approve.

He’s got discretion to say, I’m not gonna enforce those conditions because Corporation Counsel told me they’re unenforceable but he doesn’t have discretion to wipe them off. So in my opinion – there’s a legal term called ultra vires, which means it was done without authority. I mean, with the greatest of intentions, Roger issued a document in July that really didn’t have any legal authority. So in my opinion what the committee did was simply tell him that we want the Conditional Use Permit to reflect the Conditions that we adopted in April. And that’s what’s really still there as a matter of law in my opinion.

(Id. at 138-39). The County Board then voted 27 -2 to affirm the decision of the ZLR Committee. (R- Transcript 12/3/16 hearing, pp. 157-58.)
ARGUMENT

I.

THE ZLR COMMITTEE HAD AUTHORITY TO IMPOSE
THE INSURANCE CONDITIONS ON CUP 2291

When the ZLR Committee approved CUP #2291 on April 14, 2015, it had legal authority
to impose the insurance conditions.\(^1\) Subsequently, the legislature adopted Wis. Stat. §§
59.69(2)(bs) and 59.70(25) and they became effective on July 14, 2015. While §59.70(25)
prospectively bars Dane County from enforcing the insurance conditions, neither has retroactive
effect that invalidates ZLR’s imposition of the insurance conditions on April 14, 2015.

The Petitioners argue that §§ 59.69(2)(bs) and 59.70(25) apply retroactively to invalidate
the ZLR’s action on April 14, 2015. Section 59.69(2)(bs) states:

59.69(2)(bs) 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 Petitioners have advanced no argument before either the Dane County Board or this court
regarding any preemption by federal law, therefore any such claim is waived. The only
argument that the Petitioner advances regarding preemption by state law relates to §59.70(25).
Therefore, their retroactivity argument only pertains to §59.70(25).

Section 59.70(25) cannot be applied retroactively because the legislature did not by
express language or necessary implication indicate an intent that it be applied retroactively; and
the statute is substantive rather than procedural or remedial. Section 59.70(25) states:

59.70(25) INTERSTATE HAZARDOUS LIQUID PIPELINES.
A county may not require an operator of an interstate hazardous liquid pipeline to
obtain insurance if the pipeline operating company carries comprehensive general

---

\(^1\) This is the only CUP that was approved or legally existed. As will be discussed *infra*, the Petitioners arguments
regarding a subsequent CUP being issued in July and revised in September are without merit.
liability insurance coverage that includes coverage for sudden and accidental pollution liability.

As stated, Dane County acknowledges that §59.70(25) prospectively prohibits it from enforcing the insurance conditions. But, it does not operate retroactively to invalidate the ZLR’s imposition of those conditions before the statute was adopted.

The general rule in this state is that statutes are applied prospectively. *Snopek v. Lakeland Medical Center*, 223 Wis.2d 288, 293, 588 N.W.2d 19 (1999), citing *Schulz v. Ystad*, 155 Wis.2d 574, 597, 456 N.W.2d 312 (1990). “Strong common law tradition defines the legislature’s primary function as declaring the law to regulate future behavior.” *Id*. There are two recognized exceptions to this general rule. “A statute may be applied retroactively if: 1) by express language or by necessary implication, the statutory language reveals legislative intent that it apply retroactively, or 2) the statute is remedial or procedural rather than substantive...” *Id.*, at 294, citing *Schulz*, 155 Wis.2d at 597, and *Gutter v. Seamandel*, 103 Wis.2d 1, 17-18, 308 N.W.2d 403 (1981).

Clearly there is no express language in §59.70(25) that would rebut the general rule that statutes are only applied prospectively. The Petitioners are correct that intent for retroactive application can be implied by the legislature. But the case cited by the Petitioners, *Overlook Farms Home Ass’n, Inc. v. Alternative Living Servs.*, 143 Wis.2d 485, 422 N.W.2d 131 (Ct. App. 1988), certainly does not support such an application in this case. In that case, the statute in question prohibited deed restrictions regarding community living arrangements for 8 or fewer persons single family and two family residences. But, the statute concluded with the sentence “Covenants in deeds which expressly prohibit the use of property for community living arrangements are void as against public policy.” *Id.*, at 493 (court’s emphasis added). The court held:
It is difficult to imagine language which would more definitely express the legislature’s intent to create a statute that is applicable retroactively. Paraphrased, the language states that any covenant which prohibits community living arrangements is void. The Association’s covenant, although created in the 1960’s, currently prohibits such living arrangements. According to the plain language of the statute, it is therefore void.

Id., at 494-94 (emphasis added). There simply is no similar language in §59.70(25) from which legislative intent regarding retroactivity can be inferred.

The Petitioner can only prevail on its retroactivity argument if §59.70(25) is found to be remedial or procedural\(^2\) rather than substantive. The Court of Appeals stated in City of Madison v. Town of Madison, 127 Wis.2d 96, 102, 377 N.W.2d 221 (Ct. App. 1985) that the distinction between substantive and procedural laws is “relatively clear.” A remedial or procedural law “simply prescribes the method – the ‘legal machinery’ – used in enforcing a right or a remedy.”

Id., citing State ex rel. Turner v. Limbrecht, 246 N.W.2d 330, 332 (Iowa 1976). See also, Schulz, 155 Wis.2d at 597. On the other hand, a substantive law “creates, defines, or regulates rights or obligations,” it is “a change in the substantive law of the state.” Id, citing Guste v. Burris, 417 So.2d 445, 450 (La. App. 1982). In Trinity Petroleum, Inc. v. Scott Oil Co., Inc., 302 Wis.2d 299, 317-318, 735 N.W.2d 1 (2007), the Supreme Court provided the clearest definition of a procedural statute:

“If a statute prescribes the method, that is, the legal machinery, used in enforcing a right or remedy, it is procedural.” “Procedural statutes have as their primary purpose the provision of expeditious means whereby someone who has a claim against someone else may apply for the assistance of the government to enforce it, and the means whereby the other party, against whom the claim is made, may interpose his defenses.” In other words, “a procedural law is that which concerns suits or the mode of proceeding to enforce legal rights and the substantive law is one that establishes the rights and duties of a party.

\(^2\) The case law appears to use the terms remedial and procedural interchangeably.

Therefore, a substantive law is one that affects “a change in the law of the state,” by creating, defining, or regulating a right or obligation. A procedural law prescribes the “legal machinery” or method of enforcing a right or remedy. Applying those definitions, §59.70(25) is clearly substantive and can only be applied prospectively.

Section 59.70(25) does not create any “legal machinery”, procedure, process, and does not concern suits or mode of proceedings to enforce legal rights. What is does do is expressly change the substantive law of the state. Prior to its enactment, there was nothing in the law of Wisconsin prohibiting a county from requiring the operator of a pipeline in its jurisdiction to obtain insurance. Section 59.70(25) specifically limits the ability of a county to require such insurance. It creates no procedure or process by which either the pipeline operator or county can enforce a right or remedy. It places a specific prohibition on the actions of the county, which is clearly substantive. The Petitioners’ retroactivity argument is simply without merit.

II.

THE DECISION OF THE ZLR AND COUNTY BOARD IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT ARBITRARY OR CAPRICIOUS

Although they cite no legal authority for the proposition, the Petitioners argue that the County’s decision was arbitrary, oppressive, unreasonable and represented its will and not its authorized judgment. To the contrary the decision of the ZLR has a rational basis and is based on substantial evidence.
When reviewing the county’s decision regarding a conditional use permit, the court applies the common law certiorari standards and affords a presumption of correctness and validity to the administrative decisions. *Keen v. Dane County Board of Supervisors*, 269 Wis.2d 488, 492-93, 676 N.W.2d 154 (Ct. App. 2003). Under that standard the court’s review is limited to: “(1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.” *Id.*, at 493.

“On certiorari review, the petitioner bears the burden to overcome the presumption of correctness.” *Otto v. Town of Primrose*, 332 Wis.2d 3, 28, 796 N.W.2d 411 (2011). A decision of a board is arbitrary or capricious if it is unreasonable or without a rational basis. *Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis.2d 468, 476, 247 N.W.2d 98 (1976). “A certiorari court may not substitute its view of the evidence for that of the municipality.” Therefore, a court should “sustain a municipality’s findings of fact if any reasonable view of the evidence supports them.” *Otto*, 332 Wis.2d at 29-30, citing *Kapischke v. Cnty of Walworth*, 226 Wis.2d 320, 328, 595 N.W.2d 42 (Ct. App. 1999).

The court must apply the substantial evidence test to determine whether the evidence is sufficient to support the board’s findings. *Clark v. Waupaca County Board of Adjustment*, 186 Wis.2d 300, 304 (Ct. App. 1994), citing *Stacy v. Ashland County Dept. of Public Welfare*, 39 Wis.2d 595, 602 (1968). The court in *Clark* explained the substantial evidence rule:

> Substantial evidence is evidence of such convincing power that a reasonable person could reach the same decision as the board. As the substantial evidence test is highly deferential to the board’s findings, we may not substitute our view of the evidence for that of the board when reviewing the sufficiency of the evidence on certiorari. If any reasonable view of the evidence would sustain the board’s findings, they are conclusive. Even if we would not have made the same
decision, in the absence of statutory authorization, we cannot substitute our judgment for that of the zoning authority. No such statutory authorization exists.

Id., at 304-305, citing, Stacy, 39 Wis.2d at 603; Van Ermen v. DHSS, 84 Wis.2d 57, 64 (1978); Nufer v. Village Bd., 92 Wis.2d 289, 301 (1979) and Buhler v. Racine County, 33 Wis.2d 137, 146-47 (1966). See also ALLEnergy Corporation and ALLEnergy Silica, Arcadia, LLC v. Trempealeau County Environment & Land Use Committee, No. 2015AP491, 2016 WL 2637504, ¶ 8 & 9 (Ct App. May 10, 2016) for a recent discussion of the substantial evidence rule as applied to a county conditional use permit decision.

The Petitioners argue that the inclusion of the Insurance Requirements was done clearly for political reasons, yet they provide no evidence for that argument and ignore the substantial evidence in the record. They further have the audacity to argue that “No legitimate evidence supported the imposition of the Insurance Requirements as conditions to the April 21, 2015 CUP.” (Petitioner Brief p. 17) Like it did in its Statement of Facts, the Petitioners totally ignore the Report and testimony of David Dybdahl, a nationally recognized expert in the field of environmental risk management. Mr. Dybdahl gave an extensive explanation as to why the Petitioners existing insurance and existing governmental trust funds are not sufficient. He further specifically recommended Conditions 7 & 8 based on his findings and conclusions.

Based upon the evidence, a reasonable person could clearly reach the same decision as the ZLR. That’s all that’s required to sustain the decision. The Petitioners may not agree with Mr. Dybdahl’s opinion and recommendation, but any claim that it does not provide a reasonable basis for the ZLR’s decision is simply disingenuous. The ZLR decision is supported by substantial evidence and therefore, is not arbitrary, capricious and unreasonable.
III.

A NEW CUP WAS NOT ISSUED BY THE ZONING ADMINISTRATOR ON JULY 24, 2015

The CUP in this case was approved by the ZLR on April 14, 2015 and issued by the Zoning Administrator on April 21, 2015. Issuance of the CUP on April 21st was a ministerial duty of the Zoning Administrator as it had been approved by the ZLR. The Zoning Administrator had no authority to issue a “revised” CUP on July 24, 2015. The only CUP validly issued was the original on April 14th.

The Petitioners argue that the issuance of the “revised” CUP was a ministerial act of the Zoning Administrator. That argument is based upon a misconception of the Zoning Administrator’s authority. “Ministerial acts are, by definition, non-discretionary. *Northern Air Services, Inc. v. Link*, 336 Wis.2d 157, 804 N.W.2d 458 (2011) A ministerial act “involves a duty that ‘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.’” *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 235 Wis.2d 409, 425, 611 N.W.2d 693 (2000), citing *C.L. v. Olson*, 143 Wis.2d 701, 711-12, 422 N.W.2d 614 (1988) (*quoting Lister v. Board of Regents*, 72 Wis.2d 282, 301, 240 N.W.2d 610 (1976)).

To prevail on this argument, the Petitioners must show that the Zoning Administrator had no discretion and was required by law to remove the insurance conditions from the CUP. To the contrary, the Zoning Administrator had no authority to revise the CUP. The duties of the Zoning Administrator are defined by Dane County Code of Ordinances (DCO) §10.25(1)(b). That subsection 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*: ...to take such action as may be necessary for the enforcement of the regulations provided herein; ...and to perform such other duties as the zoning committee...may direct.

(emphasis added). The powers of the ZLR (zoning committee) are set forth in DCO §10.255(1)(a) and (b). Sub (a) states “[t]he zoning committee shall be created and constituted by the county board and have the duties as prescribed by subsection (b). Sub (b) states that among other things the zoning committee shall “perform such other duties in connection with zoning as may be delegated to it by the county board.” The county board delegated authority over CUPs to the zoning committee in DCO §10.255(2)(b) which states: “the zoning committee, after a public hearing, shall, within a reasonable time grant or deny any application for conditional use.” Any power over the conditions of a CUP is expressly granted by DCO §10.255(2)(i) to the respective town board and zoning committee:

Prior to the granting of any conditional use, the town board and zoning committee may stipulate such conditions and restrictions upon the establishment, location, construction, maintenance and operation of the conditional use as deemed necessary to promote the public health, safety and general welfare of the community and to secure compliance with the standards and requirements specified in subsection (h) above...

Two things are clear from a review of the relevant portions of these ordinances. First, there is absolutely nothing that mandated that the Zoning Administrator had a nondiscretionary duty to remove the insurance conditions from the CUP. Certainly the requirement that he “take such action as may be necessary for the enforcement of the regulations provided herein” did not require this. What is even clearer is that the Zoning Administrator has absolutely no authority to amend or revise a CUP once it is approved by the ZLR.

The conditions of a CUP are the sole province of the ZLR and respective town. The Petitioners argument that the Zoning Administrator’s issuance of a “revised” CUP was a
ministerial act is without merit. Therefore, the issuance of the July 24, 2015 document was ultravires and it was without legal effect.

IV.

ZLR DID NOT REVOKE OR AMEND THE CUP

The Petitioners’ argument is based on the mistaken premise that on September 29, 2015 the ZLR revoked or amended the July 24, 2015 CUP. The ZLR did neither. Rather, they concluded that the Zoning Administrator had no authority to issue the July 24th document and restored the status quo by requiring Conditional Use Permit #2291 reflect the exact conditions of approval as approved by the Zoning and Land Regulation Committee on April 14, 2015.

The Petitioners have created a legal strawman which they then proceed to knock down. They claim that after the enactment of Wis. §§ 59.69(2)(bs) and 59.70(25), “the ZLR Committee had no authority to revoke or amend the July 24, 2015 CUP and issue the October 9, 2015 CUP with the unlawful insurance requirements. But, there was no July 24th or October 9th CUP. There is only one CUP and that is the one approved by the ZLR on April 14, 2015 and issued on April 21, 2015. There is no ambiguity about what the ZLR did on September 29, 2015. One only needs read the minutes from that meeting:

A motion was made by KOLAR, seconded by MATANO, 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 relevant portion of the 2015 Act 55 is Section 1923e: 59.70(25) of the statutes is created to read: 59.70(25) Interstate hazardous liquid pipelines. 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 for sudden and accidental pollution liability. The Zoning Administrator did not have the authority to revise the conditions of approval as noted in the Zoning Administrator’s letter dated 7/24/2015.
The Petitioners continue to beat up this strawman by advancing an argument that they have vested rights in the July 24, 2015 CUP which the ZLR could not revoke or amend. In support of that argument they refer to a letter from the undersigned to Supervisor Mary Kolar dated August 24, 2015, which they allege stated “Enbridge has substantial vested rights in the July 24, 2015 CUP.” (Petitioners’ Brief p. 20.) This is simply a misstatement of the record. The referenced letter makes no reference to a “July 24, 2015 CUP.” The letter was in reference to a petition submitted by the organization 350-Madison requesting that the ZLR rescind CUP #2291. The letter opined that the Petitioners had vested rights in the CUP, referring to the one and only April 21, 2015 CUP.\(^3\)

The Petitioners have no vested rights in the July 24\(^{th}\), 2015 document. There was no legal authority to issue it. The action of the ZLR on September 29, 2015 simply corrected the record and maintained the status quo. The only CUP in existence was approved on April 14, 2015 and issued on April 21, 2015. At that time, the ZLR had the authority to impose the insurance conditions.

CONCLUSION

On April 14, 2015 the ZLR had legal authority to impose the insurance conditions on CUP 2291. That decision was based upon substantial evidence, primarily the report and testimony of David Dybdahl, a recognized expert in environmental risk management. That is the only CUP for the Petitioners’ pumping station that was properly approved by ZLR. The “revised” CUP issued by the Zoning Administrator on July 24, 2015 was ultra vires and without legal effect. On September 29, 2015, the ZLR directed the Zoning Administrator to restore the

\(^3\) The undersigned was not aware of the July 24, 2015 document when the August 24, 2015 letter was written.
original conditions to the CUP, nothing more. The County Board then affirmed the ZLR’s approval of CUP 2291 in its original form.

The provisions of Wis. Stat. §§ 59.69(2)(bs) and 59.70(25) became effective on July 14, 2015. Although they prospectively prohibit Dane County from enforcing the insurance conditions, they have no retroactive effect. The legislature did not expressly or impliedly indicate an intent that they be applied retroactively. Furthermore, they are substantive in nature and thus fall under the presumption that legislation only applies prospectively.

Since the ZLR had legal authority to impose the insurance conditions, and that decision was supported by substantial evidence, the decision of the County Board affirming the ZLR decision should be upheld. Therefore this action should be dismissed.

Dated this 24th day of May 2016.

DANE COUNTY CORPORATION COUNSEL

By: [Signature]
David R. Gault
Assistant Corporation Counsel
State Bar No. 1016374

Rm. 419, City-County Building
210 Martin Luther King, Jr., Blvd.
Madison, WI 53703
(608) 266-4355
gault@countyofdane.com