50A-10

Chapter Trans 233

DIVISION OF LAND ABUTTING A STATE TRUNK HIGHWAY OR CONNECTING HIGHWAY

Note: Chapter Hy 33 was renumbered chapter Trans 233, under s. 13.93 (2m) (b) 1., Stats., Register, August, 1996, No. 488. Chapter Trans 233 as it existed on January 31, 1999, was repealed and a new Chapter Trans 233 was created effective February 1, 1999.

Trans 233.01 Purpose. Dividing or developing lands, or both, affects highways by generating traffic, increasing parking requirements, reducing sight distances, increasing the need for driveways and other highway access points and, in general, impairing highway safety and impeding traffic movements. This chapter specifies the department's minimum standards for the division of land that abuts a state trunk highway or connecting highway, in order to provide for the safety of entrance upon and departure from those highways and for the preservation of public interest and investment in those highways. The authority to impose minimum standards for subdivisions is s. 236.13(1) (e), Stats. The authority to impose minimum standards for land divisions under ss. 236.34, 236.45 and 703.11, Stats., is s. 86.07 (2), Stats.

Note: A "state trunk highway" is a highway that is part of the State Trunk Highway System. It includes State numbered routes, federal numbered highways, the Great River Road and the Interstate System. A listing of state trunk highways with geographic end points is available in the Department's "Official State Trunk Highway System and the Connecting Highways" booklet that is published annually as of December 31. The County Maps published by the Wisconsin Department of Transportation also show the breakdown county by county. As of January 1, 1997, there were 11,813 miles of state trunk highways.

A "connecting highway" is not a state trunk highway. It is a marked route of the State Trunk Highway System over the streets and highways in municipalities which the Department has designated as connecting highways. Municipalities are responsible for their maintenance and traffic control. The Department is generally responsible for construction and reconstruction of the through lanes of connecting highways, but costs for parking lanes and related municipal facilities and other desired local improvements are local responsibilities. The Department reimburses municipalities for the maintenance of connecting highways in accordance with a lane mile formula. See ss. 84.02 (11), 84.03 (10), 86.32 (1) and (4), and 340.01 (60), Stats. A listing of connecting highways with geographic end points is also available in the Department's "Official State Trunk Highway System and the Connecting Highways" booklet that is published annually as of December 31. As of January 1, 1997, there were 520 miles of connecting highways.

A "business route" is an alternate highway route marked to guide motorists to the central or business portion of a city, village or town. The word "BUSINESS" will appear at the top of the highway numbering maker. A business route branches off from the regular numbered route, passes through the business portion of a city and rejoins the regularly numbered route beyond that area. Business routes are not state trunk highways or connecting highways. The authorizing statute is s. 84.02(6), Stats. This rule does not apply to business routes.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.012 Applicability. In accordance with ss. 86.07(2), 236.12, 236.34 and 236.45, Stats., this chapter applies to all land division maps reviewed by a city, village, town or county, the department of administration and the department of transportation. This chapter applies to any land division that is created by plat or map under s. 236.12 or 236.45, Stats., by certified survey map under s. 236.34, Stats., or by condominium plat under s. 703.11, Stats., or other means not provided by statute, and that abuts a state trunk highway, connecting highway or service road.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.015 Definitions. Words and phrases used in this chapter have the meanings given in s. 340.01, Stats., unless a different definition is specifically provided. In this chapter:

(1) "Certified survey map" or "CSM" means a map that complies with the requirements of s. 236.34, Stats.

(2) "Improvement" means any permanent addition to or betterment of real property that involves the expenditure of labor or money to make the property more useful or valuable. "Improvement" includes parking lots, driveways, loading docks, in–ground swimming pools, wells, septic systems, retaining walls, signs, buildings, building appendages such as porches, and drainage facilities. "Improvement" does not include sidewalks, terraces, patios, landscaping and open fences.

(3) "Land divider" means the owner of land that is the subject of a land division or the land owner's agent for purposes of creating a land division.

(4) "Land division" means a division under s. 236.12, 236.34, 236.45 or 703.11, Stats., or other means not provided by statute, of a lot, parcel or tract of land by the owner or the owner's agent for the purposes of sale or of building development.

(5) "Land division map" means an official map of a land division, including all certificates required as a condition of recording the map.

(6) "Public utility" means any corporation, company, individual or association that furnishes products or services to the public, and that is regulated under ch. 195 or 196, Stats., including railroads, telecommunications or telegraph companies, and any company furnishing or producing heat, light, power, cable television service or water, or a rural electrical cooperative, as described in s. 32.02 (10), Stats.

(7) "Structure" includes a temporary or non–permanent addition to or betterment of real property that is portable in nature, but that adversely affects the safety of entrance upon or departure from state trunk or connecting highways or the preservation of public interest and investment in those highways, as determined by the department. "Structure" does not include portable swing sets, movable lawn sheds without pads or footings, and above ground swimming pools without decks.

(8) "Unplatted" means not legally described by a plat, land division map, certified survey map or condominium plat.

(9) "Utility facility" means any pipe, pipeline, duct, wire line, conduit, pole, tower, equipment or other structure used for transmission or distribution of electrical power or light or for the transmission, distribution or delivery of heat, water, gas, sewer, telegraph or telecommunication service, cable television service or broadcast service, as defined in s. 196.01(1m), Stats.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.017 Other abuttals. For purposes of this chapter, land shall be considered to abut a state trunk highway or connecting highway if the land is any of the following:

(1) Land that contains any portion of a highway that is laid out or dedicated as part of a land division if the highway intersects with a state trunk highway or connecting highway.

(2) Separated from a state trunk highway or connecting highway by only unplatted lands that abut a state trunk highway or connecting highway if the unplatted lands are owned by, leased to or under option, whether formal or informal, or under contract or lease to the owner.

(3) Separated from a state trunk highway or connecting highway by only a service road.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.02 Basic principles. To control the effects of land divisions on state trunk and connecting highways and to carry out the purposes of ch. 236, Stats., the department promulgates the following basic requirements:

(1) Local traffic from a land division or development abutting a state trunk highway or connecting highway shall be served by an internal highway system of adequate capacity, intersecting with state trunk highways or connecting highways at the least practicable number of points and in a manner that is safe, convenient and economical.

(2) A land division shall be so laid out that its individual lots or parcels do not require direct vehicular access to a state trunk highway or connecting highway.

(3) The department, in order to integrate and coordinate traffic on a highway or on a private road or driveway with traffic on any affected state trunk highway or connecting highway, shall do both of the following:

(a) Consider, particularly in the absence of a local comprehensive general or master plan, or local land use plan, that plat or map's relationship to the access requirements of adjacent and contiguous land divisions and unplatted lands.

(b) Apply this chapter to all lands that are owned by, or are under option, whether formal or informal, or under contract or lease to the land divider and that are adjacent to or contiguous to the land division. Contiguous lands include those lands that abut the opposite side of the highway right–of–way.

(4) Setbacks from a state trunk highway or connecting highway shall be provided as specified in s. Trans 233.08.

(5) A land division map shall include provision for the handling of surface drainage in such a manner as specified in s. Trans 233.105(3).

(6) A land division map shall include provisions for the mitigation of noise if the noise level exceeds noise standards in s. Trans 405.04, Table I.

(7) A land division shall provide vision corners at intersections and driveways per department standards.

Note: Guide dimensions for vision corners are formally adopted in the Department's Facilities Development Manual, Chapter 11, pursuant to s. 227.01 (13) (e), Stats. Rules governing construction of driveways and other connections with highways are found in ch. Trans 231. Detailed specifications may be obtained at the department's district offices.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.03 Procedures for review. The following procedures apply to review by the department of proposed certified survey maps, condominium plats and other land divisions:

(1) CONCEPTUAL REVIEW. (a) Before the lots are surveyed and staked out, the land divider shall submit a sketch to the department's district office for review. The sketch shall indicate roughly the layout of lots and the approximate location of streets, and include other information required in this chapter.

(b) Unless the land divider submits a preliminary plat under s. 236.12 (2) (a), Stats., the land divider shall have the district office review the sketch described in par. (a).

(c) There is no penalty for failing to obtain conceptual review; the conceptual review procedure is encouraged to avoid waste that results from subsequent required changes.

(2) PRELIMINARY AND FINAL PLAT REVIEW. Preliminary and final subdivision plat review under s. 236.12, Stats., shall occur by the department when the land divider or approving authority submits through the department of administration's plat review office, a formal request for departmental review of the plat for certification of non–objection as it relates to the requirements of this chapter. The request shall be accompanied with the land division map and the departmental review fee. No submittal may be considered complete unless it is accompanied by the fee.

(3) PRELIMINARY AND FINAL REVIEW FOR LAND DIVISIONS OCCURRING UNDER S. 236.45 AND S. 703.11, STATS. Review of preliminary and final land division maps occurring under ss. 236.45 and 703.11, Stats., by the department shall occur when the approving authority, or the land divider, when there is no approving authority, submits a formal request for departmental review for certification of non–objection as it relates to the requirements of this chapter. The request shall be accompanied with the land division map and the departmental review fee. No submittal may be considered complete unless it is accompanied by the fee. Additional information required is the name and address of the register of deeds, any approving agency, the land division map preparer and the land divider. This information is to be submitted to the department.

Note: The appropriate department address is Access Management Coordinator, Bureau of Highway Development, 4802 Sheboygan Avenue, Room 651, P. O. Box 7916, Madison, WI 53707–7916.

(4) PRELIMINARY AND FINAL REVIEW FOR LAND DIVISIONS OCCURRING UNDER S. 236.34 AND BY OTHER MEANS NOT PRESCRIBED BY STATUTES. Preliminary and final review of land division maps, occurring under s. 236.34, Stats., or by any other means not prescribed by statutes, by the department shall occur when the land divider submits a formal request for departmental review for certification of non–objection as it relates to the requirements of this chapter of the submitted land division. The request shall be accompanied with the land division map and the departmental review fee. No submittal may be considered complete unless it is accompanied by the fee. Additional information required is the name and address of the register of deeds, any approving agency, the land division map preparer and the land divider. This information shall be submitted to the regional transportation district office or to the department.

Note: The appropriate department address is Access Management Coordinator, Bureau of Highway Development, 4802 Sheboygan Avenue, Room 651, P. O. Box 7916, Madison, WI 53707–7916.

(5) TIME TO COMPLETE REVIEW. The department shall complete the review by either objecting or certifying non–objection to the land division map within 20 calendar days from the date that a complete request is submitted to the required office of the department.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.04 Required information. The land divider shall show on the face of the preliminary or final land division map or on a separate sketch, at a scale of not more than 1,000 feet to the inch, the approximate distances and relationships between the following, and shall show the information in subs. (1) to (8) about the following:

(1) The geographical relationship between the proposed land division and of any unplatted lands that abut any state trunk highway or connecting highway and that abut the proposed land division, and the ownership rights in and the land divider's interest, if any, in these unplatted lands.

(2) The locations of all existing and proposed highways within the land division and of all private roads or driveways within the land division that intersect with a state trunk highway or connecting highway.

(3) The location, and identification of each highway and private road or driveway, leading to or from the land division.

(4) The principal use, as agricultural, commercial, industrial or residential, of each private road or driveway that leads to or from the land division.

(5) The locations of all easements for accessing real property within the land division.

(6) The location of the highway nearest each side of the land division.

(7) The location of any highway or private road or driveway that connects with a state trunk highway or connecting highway that abuts the land division, if the connection is any of the following:

(a) Within 300 feet of the land division, if any portion of the land division lies within a city or village.

(b) Within 1,000 feet of the land division, if no part of the land division lies within a city or village.

(8) All information required to be shown on a land division map shall be shown in its proper location

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.05 Direct access to state trunk highway or connecting highway. (1) No land divider may divide land in such a manner that a private road or driveway connects with a state trunk highway or connecting highway or any service road lying partially within the right–of–way of a state trunk highway or connecting highway, unless the land divider has received a variance for that purpose approved by the department under s. Trans 233.11. The following restriction shall be placed on the face of the land division map, or as part of the owner's certificate required under s. 236.21 (2) (a), Stats., and shall be executed in the manner specified for a conveyance:

> "As owner I hereby restrict all lots and blocks so that no owner, possessor, user, licensee or other person may have any right of direct vehicular ingress from or egress to any highway lying within the right–of–way of (U.S.H.)(S.T.H.) _____ or _____ Street, as shown on the land division map; it is expressly intended that this restriction constitute a restriction for the benefit of the public as provided in s. 236.293, Stats., and shall be enforceable by the department or its assigns."

(2) The department may require a desirable traffic access pattern between a state trunk highway or connecting highway and unplatted lands that abut the proposed land division and that are owned by or under option, whether formal or informal, contract or lease to the owner. The department may require a recordable covenant running with the land with respect to those unplatted lands.

(3) No person may connect a highway or a private road or driveway with a state trunk highway, connecting highway, or with a service road lying partially within the right–of–way of a state trunk highway or connecting highway, without first obtaining a permit under s. 86.07, Stats. The department may not issue a permit authorizing the connection of a highway with a state trunk highway or connecting highway to any person other than a municipality or county. The department may not issue any permit under s. 86.07, Stats., prior to favorable department review of the preliminary or final land division map or, for a subdivision plat, prior to the department's certification of no objection.

Note: The authority maintaining the highway is the one that issues, denies or places conditions on any permit issued under s. 86.07(2), Stats. Cities and villages are responsible for the maintenance of connecting highways under s. 86.32(1), Stats. Cities and villages must condition any permit issued with respect to a connecting highway upon compliance with all requirements imposed pursuant to this chapter.

(4) Whenever the department finds that existing and planned highways provide the land division with reasonable and adequate access to a highway, the department shall prohibit the connection to a state trunk highway or connecting highway of any highway and private road or driveway from within the land division.

Note: Rules governing construction of driveways and other connections with a state trunk highway are found in ch. Trans 231. Detailed specifications may be obtained at the Department's district offices.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.06 Frequency of connections with a state trunk highway or connecting highway.

(1) The land division shall be laid out with the least practicable number of highways and private roads or driveways connecting with abutting state trunk highways or connecting highways.

(2) The department shall determine a minimum allowable distance between connections with the state trunk highway or connecting highway, between any 2 highways within the land division and between a highway within the land division and any existing or planned highway. To the extent practicable, the department shall require a distance of at least 1,000 feet between connections with a state trunk highway or connecting highway.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.07 Temporary connections. (1) The department may issue temporary connection permits, which authorize the connection of a highway or a private road or driveway with a state trunk highway or connecting highway. The department may issue temporary connection permits in the case of:

(a) A land division which at the time of review cannot provide direct traffic access complying with the provisions of s. Trans 233.06 (2).

(b) A land division layout which might necessitate a point or pattern of traffic access for a future adjacent land division, not in accordance with s. Trans 233.06 (2).

(2) The department may require that such temporary connections be altered or closed by the permit holder at a later date in order to achieve a desirable traffic access pattern. The permit may require the permit holder to alter or close the temporary connection by a specified date or upon the completion of a specified activity. The permit holder is responsible for the expense of closing or altering the temporary connection.

(2m) A temporary connection shall be prominently labeled "Temporary Connection" on the land division map, and the following restriction shall be lettered on the land division map:

> "The temporary connection(s) shown on this plat shall be used under a temporary connection permit which may be canceled at such time as a feasible alternate means of access to a highway is provided."

(3) When such a temporary connection is granted, the owner shall dedicate a service road or a satisfactory alternative, to provide for a present or future pattern of access that complies with s. Trans 233.06 (2).

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.08 Setback requirements and restrictions. (1) Except as provided in this section or in s. Trans 233.11 or, with respect to connecting highways, as provided in s. 86.16 (1), Stats., no person may erect, install or maintain any structure or improvement within a setback area determined under sub. (2) or (3).

(2) (a) Except as provided in par. (b), the setback area is the area within 110 feet of the centerline of a state trunk highway or connecting highway or within 50 feet of the nearer right–of–way line of a state trunk highway or connecting highway, whichever is furthest from the centerline.

(b) If an applicable ordinance allows structures or improvements to be located closer to the right–of–way of a state trunk highway or connecting highway than is provided under par. (a), the setback area is the area between the right–of–way and the more restrictive of the following:

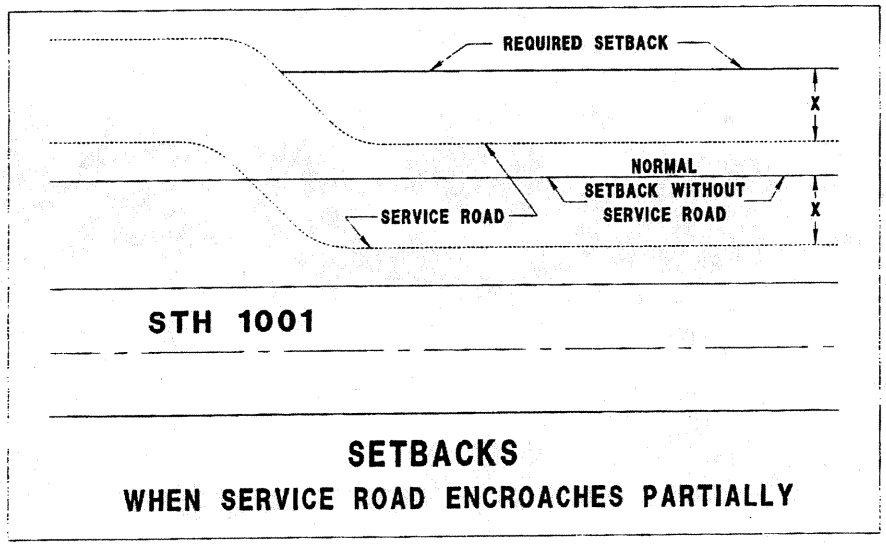
1. The distance allowed under the ordinance.
2. 42 feet from the nearer right–of–way line.
3. 100 feet from the centerline.

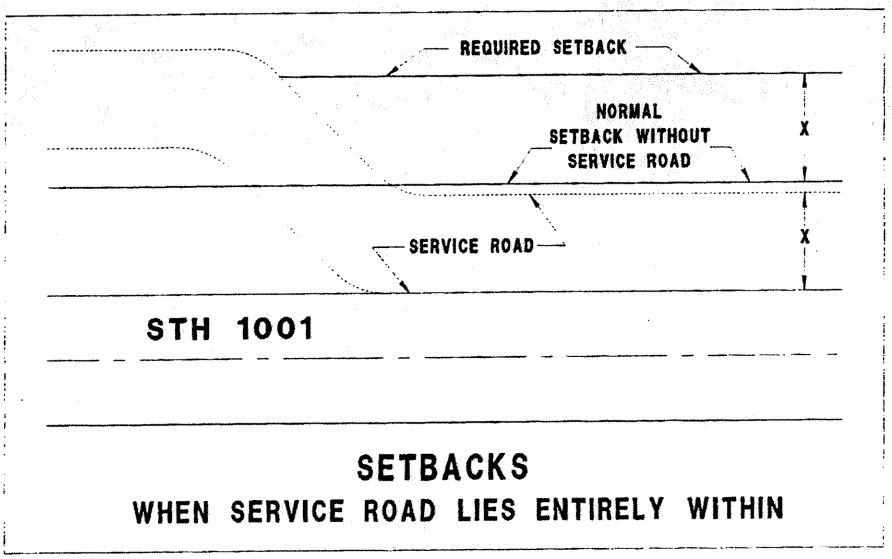
(3) If any portion of a service road right–of–way lies within the setback area determined under sub. (2), the setback area shall be increased by the lesser of the following:

(a) The width of the service road right–of–way, if the entire service road right–of–way lies within the setback area. Any increase under this paragraph shall be measured from the boundary of the setback area determined under sub. (2).

(b) The distance by which the service road right–of–way lies within the setback area, if the entire service road right–of–way does not lie within the setback area. Any increase under this paragraph shall be measured from the nearer right–of–way line of the service road.

Note: For example, if a service road ROW extends 15 feet (measured perpendicularly to the setback) into the setback determined under sub. (2), and runs for a distance of 100 feet, the setback determined under sub. (2) shall be pushed 15 feet further from the centerline, running for a distance of 100 feet. See Graphic.





(3m) (a) Notwithstanding sub. (1), a public utility may erect, install or maintain a utility facility within a setback area.

(b) If the department acquires land that is within a setback area for a state trunk highway, as provided by this chapter, and on which a utility facility is located, the department is not required to pay compensation or other damages relating to the utility facility, unless the utility facility is any of the following:

1. Erected or installed before the land division map is recorded.

2. Erected or installed on a recorded utility easement that was acquired prior to February 1, 1999.

3. Erected or installed after the land division map is recorded but with prior notice in writing, with a plan showing the nature and distance of the work from the nearest right–of–way line of the highway, to the department's appropriate district office within a normal time of 30 days, but no less than 5 days, before any routine, minor utility erection or installation work commences, nor less than 60 days, before any major utility erection or installation work commences, if any utility work is within the setback.

Note: For purposes of this section, "major utility erection or installation work" includes, but is not limited to, work involving transmission towers, communication towers, water towers, pumping stations, lift stations, regulator pits, remote switching cabinets, pipelines, electrical substations, wells, gas substations, antennae, satellite dishes, treatment facilities, electrical transmission lines and facilities of similar magnitude. "Routine minor utility erection or installation work" refers to single residential distribution facilities and similar inexpensive work of less magnitude. The concept behind the flexible, "normal time of 30 days" standard for utility submission of notice and plans to the department is to encourage and require at least 60 days notice from utilities for larger, complex or expensive installations, but not for routine, minor utility work that has traditionally involved only a few days notice for coordination and issuance of utility permits by the department for which a minimum of 5 days notice is mandatory. However, the normal time for submission and review is 30 days. This notice and plan requirement does not apply to maintenance work on existing utilities.

4. Erected or installed before the land division map is recorded but modified after that date in a manner that increases the cost to remove or relocate the utility facility. In such a case, the department shall pay compensation or other damages related to the utility facility as it existed on the date the land division map was recorded, except that if the modification was made with prior notice in writing, with a plan showing the nature and distance of the work from the nearest right–of–way line of the highway, to the department's appropriate district office within a normal time of 30 days, but no less than 5 days, before any routine, minor utility erection or installation work commences, nor less than 60 days, before any major utility erection or installation work commences, if any utility work is within the setback, then the department shall pay compensation or other damages related to the utility facility as modified.

(c) If a local unit of government or the department acquires land that is within a setback area for a connecting highway as provided by this chapter and on which a utility facility is located, the department is not required to pay compensation or other damages relating to the utility facility, unless the utility facility is compensable under the applicable local setbacks and the utility facility is in any of the categories described in sub. (b)1. to 4.

Note: A "connecting highway" is not a state trunk highway. It is a marked route of the state trunk highway system over the streets and highways in municipalities which the Department has designated as connecting highways. Municipalities have jurisdiction over connecting highways and are responsible for their maintenance and traffic control. The Department is generally responsible for construction and reconstruction of the through lanes of connecting highways, but costs for parking lanes and related municipal facilities and other desired local improvements are local responsibilities. See ss. 84.02 (11), 84.03 (10), 86.32 (1) and (4), and 340.01 (60), Stats. A listing of connecting highways and geographic end points are available in the department's "Official State Trunk Highway System and the Connecting Highways" booklet that is published annually as of December 31.

(d) The department shall review the notice and plan to determine whether a planned highway project within a 6–year improvement program under s. 84.01 (17), Stats., or a planned major highway project enumerated under s. 84.013 (3), Stats., will conflict with the planned utility facility work. If the department determines a conflict exists, it will notify the utility in writing within a normal time of 30 days, but no more than 5 days, after receiving the written notice and plan for any routine, minor utility erection or installation work, nor more than 60 days, after receiving the written notice and plan for any major utility erection or installation work, and request the utility to consider alternative locations that will not conflict with the planned highway work. The department and utility may also enter into a cooperative agreement to jointly acquire, develop and maintain rights of way to be used jointly by WISDOT and the public utility in the future as authorized by s. 84.093, Stats. If the department and utility are not able to make arrangements to avoid or mitigate the conflict, the utility may proceed with the utility work, but notwithstanding pars. (b) and (c), the department may not pay compensation or other damages relating to the utility facility if it conflicts with the planned highway project. In order to avoid payment of compensation or other damages to the utility, the department is required to record a copy of its written notice to the utility of the conflict, that adequately describes the property and utility work involved, with the register of deeds in the county in which the utility work or any part of it is located.

(4) The land division map shall show the boundary of a setback area on the face of the land division map and shall clearly label the boundary as a highway setback line and shall clearly show existing structures and improvements lying within the setback area.

(5) The owner shall place the following restriction upon the same sheet of the land division map that shows the highway setback line:

> "No improvements or structures are allowed between the right–of–way line and the highway setback line. Improvements and structures include, but are not limited to, signs, parking areas, driveways, wells, septic systems, drainage facilities, buildings and retaining walls. It is expressly intended that this restriction is for the benefit of the public as provided in section 236.293, Wisconsin Statutes, and shall be enforceable by the Wisconsin Department of Transportation or its assigns. Contact the Wisconsin Department of Transportation for more information. The phone number may be obtained by contacting the County Highway Department."

If on a CSM there is limited space for the above restriction on the same sheet that shows the setback line, then the following abbreviated restriction may be used with the standard restriction placed on a subsequent page: "Caution – Highway Setback Restrictions Prohibit Improvements. See sheet _____."

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.105 Noise, vision corners and drainage.

(1) NOISE. When noise barriers are warranted under the criteria specified in ch. Trans 405, the land divider shall be responsible for any noise barriers for noise abatement from existing state trunk highways or connecting highways. In addition, the owner shall include the following notation on the land division map:

> "The lots of this land division may experience noise at levels exceeding the levels in s. Trans 405.04, Table I. These levels are based on federal standards. Owners of these lots are responsible for abating noise sufficient to protect these lots."

Note: Noise barriers are designed to provide noise protection only to the ground floor of abutting buildings and not other parts of the building. Noise levels may increase over time. Therefore, it is important to have the caution placed on the land division map to warn owners that they are responsible for further noise abatement.

(2) VISION CORNERS. The department may require the owner to dedicate land or grant an easement for vision corners at the intersection of a highway with a state trunk highway or connecting highway to provide for the unobstructed view of the intersection

by approaching vehicles. If the department requires such a dedication or grant, the owner shall include the following notation on the land division map:

"No structure or improvement of any kind is permitted within the vision corner. No vegetation within the vision corner may exceed 30 inches in height."

Note: Guide dimensions for vision corners are formally adopted in the Department's Facilities Development Manual, Chapter 11, pursuant to s. 227.01(13)(e), Stats.

(3) DRAINAGE. The owner of land that directly or indirectly discharges stormwater upon a state trunk highway or connecting highway shall submit to the department a drainage analysis and drainage plan that ensures that the anticipated discharge of stormwater upon a state trunk highway or connecting highway following the development of the land is less than or equal to the discharge preceding the development and that the anticipated discharge will not endanger or harm the traveling public, downstream properties or transportation facilities.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.11 Variances. (1) No municipality or county may issue a variance from this chapter without the prior written consent of the department.

(2) The department may not authorize variances from this chapter except in appropriate cases in which the literal application of this chapter would result in practical difficulty or unnecessary hardship, or would defeat an orderly overall development plan of a local unit of government. A variance may not be contrary to the public interest and shall be in harmony with the general purposes and intent of ch. 236, Stats., and of this chapter. The department may not grant a variance authorizing the erection or installation of any structure or improvement within a setback area unless the owner executes an agreement providing that, should the department need to acquire lands within the setback area, the department is not required to pay compensation, relocation costs or damages relating to any structure or improvement authorized by the variance. The department may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.12 Performance bond. The department may, in appropriate cases, require that a performance bond be posted, or that other financial assurance be provided, to ensure the construction of any improvements in connection with the land division which may affect a state trunk highway.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

Trans 233.13 Fees. The department shall charge a fee of $110 for reviewing a land division map that is submitted under s. 236.10, 236.12, 236.34, 236.45 or 703.11, Stats., or other means not provided by statute, on or after the first day of the first month beginning after February 1, 1999. The fee is payable prior to the department's review of the land division map. The department may change the fee each year effective July 1 at the annual rate of inflation, as determined by movement in the consumer price index for all urban consumers (CPI–U), published the preceding January in the CPI detailed report by the U.S. department of labor's bureau of labor statistics, rounded down to the nearest multiple of $5.

History: Cr. Register, January, 1999, No. 517, eff. 2–1–99.

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701–2536
Telephone: (608) 266–1304
Fax: (608) 266–3830
Email: leg.council@legis.state.wi.us

DATE: February 18, 2000

TO: REPRESENTATIVE DAVID BRANDEMUEHL

FROM: William Ford, Senior Staff Attorney

SUBJECT: Agreements Reached to Amend Ch. Trans 233

1. Introduction

This memorandum describes agreements to amend Wis. Adm. Code ch. Trans 233 reached between the Coalition to Reform Trans Ch. 233 ("the Coalition") and the Department of Transportation (DOT) at the February 17, 2000 meeting of the Subcommittee on Review of Ch. Trans 233 of the Assembly Committee on Transportation. It is the intent of the subcommittee that the DOT, the Coalition and other interested parties will cooperate in developing draft administrative rules to implement the agreements described in this memorandum and that DOT will promulgate these as amendments to ch. Trans 233. It is also the intent of the subcommittee that the DOT, the Coalition and other interested parties will continue to work together to develop amendments to s. Trans 233.08, relating to setback requirements and restrictions.

A more detailed description of the issues discussed by the subcommittee is contained in a memorandum I provided to you, dated January 1, 2000, entitled *Issues Raised With Respect to Chapter Trans 233.*

2. Process for Approving Land Divisions

a. DOT will transfer the authority to review land divisions under ch. Trans 233 from the state office to its district offices by a date that is no later than February 14, 2001.

b. DOT will provide an appeal process under which persons not satisfied with a district decision with respect to a land division may appeal to DOT's central office.

c. DOT will develop implementing procedures at the district level to assure consistency and will provide uniform guidance in DOT's facility development manuals and in other manuals specified and cross-referenced in ch. Trans 233.

d. A request for review of a land division will receive an automatic certificate of nonobjection if DOT does not act on the request within 20 days of its submission, unless an extension of the 20-day time period is mutually agreed to.

e. DOT shall request any additional information it determines is necessary to review a proposed land division within five working days after receiving a request for a review. Upon receipt of the additional information, the 20-day time period will again begin running. The 20-day review procedure shall be specified in ch. Trans 233.

f. DOT's central office will not, on its own initiative, reverse a certificate of nonobjection provided by a DOT district office with respect to a proposed land division. However, if an affected third party objects to a certificate of nonobjection provided by a DOT district office, DOT's central office may reverse the district office's decision if it finds the objection by a third party to be meritorious.

3. Explicit Approval of Plats Approved Prior to the Effective Date of Ch. Trans 233 and of Improvements and Structures Placed Prior to the Effective Date of Ch. Trans 233

a. DOT will revise ch. Trans 233 to give explicit approval to structures and improvements legally placed in a setback area prior to February 1, 1999. (Chapter Trans 233 took effect on February 1, 1999.)

b. DOT will revise ch. Trans 233 to explicitly state that plats that have received preliminary or final approval prior to February 1, 1999 will not be subject to the new standards under ch. Trans 233 as promulgated effective February 1, 1999.

4. Exclude Condominium Developments From Ch. Trans 233

DOT agrees to revise ch. Trans 233 to state that condominium conversion plats on existing developed property are exempt from ch. Trans 233 and are not subject to fees under s. Trans 233.13 if the existing development has been in existence five years and if the condominium development has traffic impacts similar to the existing development.

5. DOT Guidelines for Administering Ch. Trans 233

DOT agrees that its drafted guidelines for interpreting ch. Trans 233 will be incorporated by reference into ch. Trans 233. Furthermore, DOT states that these incorporated guidelines will be referenced by date such that future revisions to the guidelines will only become effective if ch. Trans 233 is amended, which requires legislative review.

Please contact me at the Legislative Council Staff offices if I can be of further assistance.

WF:jal:wu;ksm;rv

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701–2536
Telephone: (608) 266–1304
Fax: (608) 266–3830
Email: leg.council@legis.state.wi.us

DATE: February 18, 2000

TO: REPRESENTATIVE DAVID BRANDEMUEHL

FROM: William Ford, Senior Staff Attorney

SUBJECT: Agreements Reached to Amend Ch. Trans 233

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Please contact me at the Legislative Council Staff offices if I can be of further assistance.

WF:jal:wu;ksm;rv

MEMORANDUM

TO: Charles H. Thompson, Secretary

FROM: James S. Thiel, General Counsel, State Bar #1012582
John Haverberg, Director, Bureau of Highway Development

DATE: February 14, 2000

RE: Trans 233 Agreement with Wisconsin Realtors, Coalition and Others

BACKGROUND. On July 13, 1999, you responded to the initial concerns of the Wisconsin Realtors Association (Realtors) with revised Trans 233, Wis. Admin. Code, regarding land divisions abutting state trunk and connecting highways. The Realtors expressed a number of initial concerns shortly after these revisions went into effect on February 1, 1999. Your July 13, 1999 letter expressed your gratitude for the Realtors' willingness to cooperatively refine the implementation of the new provisions of Trans 233 for mutual private and public benefit. You also pledged a four step approach to address the Wisconsin Realtors' concerns on a continuing basis. In brief:

1. **Education, Training, and Meetings with Interested Groups.**
2. **Specific Responses to Specific Questions.**
3. **Uniform Implementation.**
4. **Then, Refine Rule As Necessary.**

Your letter also included a memorandum from WISDOT responding to specific legal and operational concerns expressed by the Realtors in Tom Larson's 12-page memo of February 19, 1999. William Malkasian, Executive Vice President of the Realtors, sent us a copy of this memo on March 30, 1999. A copy of your letter with the accompanying memorandum is attached.

On January 24, 2000, as a follow-up to this continuing cooperative process, you reached further agreement with the Realtors. Tom Larson of the Realtors has summarized our progress, discussions and the Realtors' understanding of our mutual conceptual solutions. The purpose of this memorandum to you is to confirm this agreement with the Realtors, with comments and corrections for clarification, as requested by the Realtors. This memorandum also represents what WISDOT agreed at committee and subcommittee meetings, e.g. January 27, 2000, and discussions with Legislators, the Coalition and other interested groups participating in this process. It also serves as a response to the Coalition's memo of November 22, 1999 and the Realtors' memo by Tom Larson of November 24, 1999. The following page summarizes all the agreements in principle on all the general issues to date:

February 14, 2000

Agreement in Principle on TRANS 233 Issues
General issues

Following is the "agreement in principle" on a list of issues reached by the Department, the Realtors, and several organizations/groups:

Issue	"Agreement in Principle"
Lack of certainty provided by conceptual review process	• The department will develop implementing procedures at District level to assure the desired consistency, while still providing for an appeal process to the department's central office. • Uniform guidance will be published in the department's Facilities Development Manual and other manuals as appropriate and expressly cross-referenced in the Rule.
Inclusion of "condominium plats" in definition of "land division"	• Rule will be clarified to say that condominium plats on existing developed properties are exempt from the Rule, with set minimum period of existence and similar traffic impact.
Noise barrier requirements place excessive burden on land dividers	• Rule will be clarified to say that responsibility to construct or finance needed noise barriers for new land divisions next to existing highways applies to owner rather than land divider. • Rule will also be clarified to say that that noise resulting from expansion of the highway (more lanes) is not responsibility of the land divider or owner.
Land dedication requirements for vision corners are unreasonable	• Rule will be clarified to say that permanent easements for vision corners may be allowed in lieu of dedication if the dedication creates a problem for the land divider in complying with local ordinances.
Drainage provisions expose land dividers to excessive liability	• The Rule will be revised to make it clear that land dividers are not required to accept legal responsibility for all unforeseen acts of nature or forces beyond their control. • The Rule will be clarified to inform land dividers of their responsibilities for providing the drainage computations and information under state statutes. Various methods may be used for estimating runoff.
Lack of criteria for determining "desirable traffic access pattern"	• Technical guidance is available in the department's Facilities Development Manual and other manuals and will be expressly cross-referenced in the Rule. For any given site, several patterns may work.
Variance process is too restrictive	• Rule will be changed to allow exceptions in some instances based on defined criteria, e.g. existing community ordinances and development patterns. • Rule will be changed to provide a different name ("special exception"?) and criteria for variances to avoid the strict legal standards applied by courts when reviewing the granting of variances.

The following is a specific response to each point in the Realtors' (Tom Larson's) summary of agreements of January 24, 2000:

SETBACK REQUIREMENT

In addition to the agreements outlined above [i.e. variance name, criteria and legal standard, conceptual review, uniform guidelines, and the appeal process], WISDOT is continuing negotiations regarding various options and criteria relating to the scope and applicability of setbacks to various highway situations.

CONCEPTUAL REVIEW PROCESS

WISDOT Agreement in bold:

1. Transferring the authority to review land divisions from the state office to its district offices by a yet-to-be-determined date (not to exceed 12 months from the date of this memo). This will allow the entire review process to occur at the local level by those who are most familiar with the specific land-division proposal **[WISDOT AGREES]**.

EXISTING IMPROVEMENTS AND PLATS

WISDOT Agreement in bold:

1. Grandfather existing improvements and structures **[WISDOT AGREES]**, and clarify that WISDOT may not request the removal or movement of these items as part of the land-division process **[DIFFICULT TO GENERALIZE]**;

2. Modify current variance process to avoid the strict legal standard for variances **[WISDOT AGREES]**; and

3. Clarify that existing plats (plats that have received either preliminary or final approval prior to February 1, 1999) will not be subject to the standards under the new rule **[WISDOT AGREES, CAVEAT – NO SUBSTANTIAL CHANGE BETWEEN PRELIMINARY AND FINAL]**.

CONDOMINIUM PLATS

WISDOT Agreement in bold:

1. Exempt from Trans. 233 existing buildings that are later converted into condominiums **[WISDOT AGREES, BUT BUILDING MUST EXIST FOR SPECIFIED PERIOD OF TIME AND HAVE TRAFFIC IMPACT CHARACTERISTICS SIMILAR TO CONDOMINIUM]**; and

2. As discussed above, grandfather condominium plats in existence prior to February 1, 1999 **[WISDOT AGREES]**.

20-DAY REVIEW PERIOD

WISDOT Agreement in bold:

1. State that a request for review will be entitled to a certificate of non objection if WISDOT fails to act within the 20-day time period for reviewing land divisions **[WISDOT AGREES UNLESS EXTENSION MUTUALLY AGREED]**.

NOISE BARRIERS

WISDOT Agreement in bold:

1. Revising the section to state that WISDOT is not responsible (rather than making the land divider responsible) for any noise barriers to abate excessive noise from existing state trunk highways or connecting highways **[WISDOT AGREES - OWNER RESPONSIBILITY]**; and

2. Clarifying that WISDOT is responsible, not the land divider, for abatement of excessive noise resulting from WISDOT's expansion of an existing highway, in accordance with Wis. Admin. Code sec. Trans. 405 (?) **[WISDOT AGREES – TRANS 405 IS CORRECT]**.

VISION CORNERS

WISDOT Agreement in bold:

1. Deleting the dedication requirement from the rule (WISDOT is able to achieve the same level of public safety through easements) **[WISDOT AGREES THAT ALTERNATIVES ACHIEVE SAME PURPOSE.]**

DRAINAGE PROVISIONS

WISDOT Agreement in bold:

1. Clarifying that the land divider will NOT be asked to guarantee that anticipated discharge ("estimate") is correct. (The intent is to eliminate any liability resulting from an incorrect estimate that was made in good faith.) **[WISDOT AGREES THAT "GUARANTEE" IS WRONG WORD.]**

"DESIRABLE TRAFFIC ACCESS PATTERN"

WISDOT Agreement in bold:

1. Reference to the multi-volume set of standards WISDOT uses to determine whether a particular traffic access pattern is "desirable." **[WISDOT AGREES.]**

Attachments:

July 13, 1999 Letter and Memorandum from Secretary to Realtors
January 24, 2000 Memorandum from Tom Larson of Realtors

WISDOT MAY 26 TRANS 233 SETBACK PROPOSAL

This is the revision to the May 23 draft that resulted from our meeting in Madison with interested persons the afternoon of May 23. I am sending this on Friday, May 26 to all the persons who were in attendance at that meeting. It is my understanding that I will receive any comments or suggestions back [by E-Mail would be my preference] by no later than Monday, **June 5**. We have to stick to this deadline to keep the rulemaking process on track for a draft rule to be submitted to Legislative Council about June 12, for public hearing in July, and the other steps thereafter for the final rule to be effective late this year [November 1 earliest – December 1 more likely.]

Trans 233.08 (1) Setback requirements and restrictions.

[The following is the current general restriction within the setback area and my statement of the current ways to be relieved from the restriction.]

"(1) Except as provided in this section[1] or in s. Trans 233.11[2] or, with respect to connecting highways, as provided in s. 86.16 (1)[3], Stats., no person may erect, install or maintain any structure[4] or improvement[5] within a setback area determined under sub. (2) or (3). "

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[1] Trans 233.08(3m) – This refers to the special procedure in this section, i.e. Trans 233.08, for utilities.

[2] Trans 233.11 – This is the procedure for granting variances – to be renamed Special Exceptions.

[3] Section 86.16(1), Stats. – This is the state law that allows utilities within highway right of way subject to written approval of WISDOT with respect to State Trunk Highway and local authorities with respect to connecting highways.

> "(1) Any person, firm or corporation, including any foreign corporation authorized to transact business in this state may, subject to ss. 30.44 (3m), 30.45 and 196.491 (3) (d) 3m., **with the written consent** of the department with respect to state trunk highways, and with the written consent of local authorities with respect to highways under their jurisdiction, including connecting highways, construct and operate **telegraph, telephone or electric lines, or pipes or pipelines for the purpose of transmitting messages, water, heat, light or power along, across or within the limits of the highway.**"

[4] Trans 233.015 (7) defines "structure" as follows:

> "(7) "Structure" includes a temporary or non-permanent addition to or betterment of real property that is portable in nature, but that adversely affects the safety of entrance upon or departure from state trunk or connecting highways or the preservation of public interest and investment in those highways, as determined by the department. "Structure" does not include portable swing sets, movable lawn sheds without pads or footings, and above ground swimming pools without decks."

[So this sentence means there are four ways to erect something within a setback area.

1. For utilities, follow the procedures set forth.
2. Obtain a variance.
3. For utilities within highway, get local approval on connecting highways or WISDOT approval on state trunk highways. [This is a "technical" exception.]
4. Don't fall within definition of "structure" or within definition of "improvement."

[The following sentence in the current rule means that existing structures or improvements within a setback at the time of a land division are grandfathered and allowed to continue to exist.]

Trans 200.08 (4)

"(4) The land division map shall show the boundary of a setback area on the face of the land division map and shall clearly label the boundary as a highway setback line and **shall clearly show existing structures and improvements lying within the setback area.**"

[It is my understanding from our May 23 meeting that this is sufficiently clear and no changes are needed to address the concern for clarify that existing structures or improvements within a setback at the time of a land division are grandfathered and allowed to continue to exist.]

Trans 233.11 Variances.

[This is the ordinary means by which WISDOT currently allows **new** structures or **new** improvements to be placed within the setback area in conjunction with a **new** land division. WISDOT proposes the following changes to this procedure to address the concerns of the Coalition and other interested persons at the May 23 meeting:]

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[5] Trans 233.015 (2) defines "improvement" as follows:

"Improvement" means any permanent addition to or betterment of real property that involves the expenditure of labor or money to make the property more useful or valuable. "Improvement" includes parking lots, driveways, loading docks, in-ground swimming pools, wells, septic systems, retaining walls, signs, buildings, building appendages such as porches, and drainage facilities. "Improvement" does not include sidewalks, terraces, patios, landscaping and open fences."

Trans 233.11 (title) and 233.11 are amended to read as follows:

Trans 233.11 (title) ~~Variances~~ Special Exceptions.

(1) Department consent. No municipality or county may issue a variance or special exception from this chapter without the prior written consent of the department.

(2) Municipal delegation. At the request of a city or village the department may delegate review and approval of land divisions abutting state trunk highways or connecting highways to cities and villages within which the highways lie. The department shall develop a uniform delegation agreement in cooperation with cities and villages. The delegation agreement may also grant a city or village authority to grant special exceptions. Land division approvals and special exceptions granted by cities or village that have been delegated this authority by the department are subject to the internal appeal procedure applicable to land division approvals or special exceptions granted by the department.

~~(2)~~ (3) Special exceptions allowed. The department may ~~not~~ authorize ~~variances~~ special exceptions from this chapter ~~except~~ in appropriate cases ~~in which the literal application of this chapter would result in practical difficulty or unnecessary hardship, or would~~ when warranted by specific analysis of the setback needs as determined by the department ~~defeat an orderly overall development plan of a local unit of government~~. A ~~variance~~ special exception may not be contrary to the public interest and shall be in harmony with the general purposes and intent of ch. 236, Stats., and of this chapter. The department may ~~not~~ grant a ~~variance~~ special exception that adjusts the setback area or authorizes ~~authorizing~~ the erection or installation of any structure or improvement within a setback area as follows:

> [NOTE: I eliminated the phrase "impractical difficulty or unnecessary hardship" to avoid the same adverse legal consequences that could result from the existing use of the word "variance." The Wisconsin Supreme Court has interpreted "variance" and this seemingly innocuous phrase to make it extremely difficult, if not impossible, to grant variances and in so doing has invited third party legal challenges to any "variances" reasonably granted. See **State v. Kenosha County Bd. of Adjust.**, 218 Wis.2d 396, 577 N.W.2d 813 (1998). Our Supreme Court defined "unnecessary hardship" in as an owner having "no reasonable use of the property without a variance." **Id**. at 413. The WISDOT rule is **not** intended to be so restrictive and has **not** been administered in so restrictive a fashion. In its first year of operation, WISDOT granted the vast majority of variances requested in a site and neighborhood-sensitive context based on specific analysis. I moved the phrase "defeat an orderly overall development plan of a local unit of government" to the specific analysis criteria in paragraph (a) below.]

(a) Specific analysis. Upon request for a special exception, the department shall make a specific analysis of the setback needs. The analysis of the department may consider:

1. The structure or improvement proposed and its location,
2. The area in the vicinity of the proposed land division and its existing development pattern,
3. Land use and transportation plans and the effect on orderly overall development plans of local units of government,
4. Existing and future traffic volumes, any traffic impact analysis, access issues, and engineering guidelines as published in the department's Facilities Development Manual, Chapter 11, Design, as amended through March 13, 2000,
5. The objectives of the community, developer and owner,
6. The effect on other property or improvements in the area,
7. The impact of potential highway or other transportation improvements on the continued existence of the proposed structure or improvement,
8. The impact of removal of all or part of the structure or improvement on the continuing viability or conforming use of the business, activity, or use associated with the proposed structure or improvement,
9. Emerging congestion and level of service projections,
10. Transportation safety,
11. Preservation of the public interest and investment in the highway,
12. Other criteria deemed appropriate by the department.

"Level of service" as used in this paragraph means the ability of the facility to satisfy both existing and future travel demand. Six levels of service are defined for each type of highway facility ranging from A to F, with level of service A representing the best operating conditions and level of service F the worst.

[NOTE: I have restructured this paragraph to make it more readable by breaking out and grouping related criteria for consideration. I have inserted a reference to the specific Chapter of the Facilities Development Manual and its date. I have included here the language that used to be in the preamble to this section relating to the "orderly overall development plan of a local unit of government." I've inserted the phrase "existing development pattern" to clarify an exiting criteria and as suggested in our meeting of May 23. I've new criteria: "The effect on other property or improvements in the area," "Preservation of the public interest and investment in the highway," and "Emerging congestion and level of service projections." I believe it is important to retain the express flexibility to consider "other criteria deemed appropriate by the department." The department needs to be able to consider other impacts its special exception decisions may have without giving them undue weight in this list of criteria. For example, will special exceptions reduce the availability of land for pedestrian and bicycle facilities or to accommodate other modes of transportation, have a disproportionate adverse and prohibited disparate effect on low income and minority populations, or have an adverse effect on the environment by requiring future expansions in sensitive areas? I believe the list of criteria should

be illustrative and not prescriptive or excessively legalistic. What we are seeking is a reasoned decision based on sound judgment based on facts developed through a specific analysis. I have also included the definition of "level of service" that is used by WISDOT and that is already contained in TRANS 210.03(4), Wis. Admin. Code.]

(b) Adjust setback. If the department determines that it may grant the special exception by adjusting the setback area, the department assumes the risk and shall pay just compensation for future department required removal of a structure or improvement that the department has allowed outside of the approved reduced setback area on land that the department acquires in the future for a transportation improvement.

(c) Allow in setback – removal does not affect viability. If the department determines that it may grant the special exception within the existing setback area and future removal of the structure or improvement, in whole or in part, will not:

1. Affect the continuing viability or conforming use of the business, activity, or use associated with the proposed structure or improvement, or
2. Adversely affect the community in which it is located,

then the land divider assumes the risk of future department required removal of the structure or improvement and waives any right to compensation or relocation assistance associated with the acquisition of land the department acquires in the future for a transportation improvement. ~~unless the owner~~ As a condition of granting the special exception, the land divider shall executes an agreement or other appropriate document as determined by the department, binding on successors and assigns of the property, providing that, should the department need to acquire lands within the setback area, the department is not required to pay compensation, relocation costs or damages relating to any structure or improvement authorized by the ~~variance~~ special exception. The department may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter.

[NOTE: I have restructured this paragraph to make it more readable.]

(d) Blanket or area special exceptions. Based on its experience granting special exceptions on similar land divisions, similar structures or improvements, or the same area and development pattern, the department may grant blanket or area special exceptions that are generally applicable. The department will record these special exceptions with the register of deeds in the areas affected or by other means that the department determines to be appropriate to inform the public.

[NOTE: I added the phrase "and development pattern" to clarify the general focus of an area factor that is considered.]

(4) Horizon of analysis. For purposes of its analysis, the department will consider a period of no more than 20 years.[6]

[NOTE: There was some discussion that this period was too short or that, as phrased, it might be construed to limit the use of common sense if it was generally well known that the setback was needed regardless of the time frame because there would be no reasonable alternatives other than the setback area at any time. In fact, WISDOT will use the best information it has available to make a rational decision. I believe the existing wording is flexible enough allow such consideration within the 20-year analysis period, regardless of whether the setback is currently programmed for physical acquisition and occupation by the Department or other governmental entity during the 20-year period.]

(5) Procedure. Land division reviews and approvals and special exceptions shall be granted by department district offices or by municipalities that have requested and been formally delegated the authority. Any district or municipal approval or denial of a land division or special exception may be appealed to the secretary of the department or designee, who may reverse, modify or affirm the decision of the district or municipality. A land divider, governmental officer or entity, or member of the general public may appeal a decision of the district or municipal authority to the secretary of the department or designee. The department will not unilaterally initiate a review a decision of a district approving a land division or special exception, but the department may unilaterally review a municipal decision to require conformity with the delegation agreement.

[NOTE: I have added the phrase "but the department may unilaterally review a municipal decision to require conformity with the delegation agreement" in order to make more explicit what we intended by the original language, as discussed at our May 23 meeting.]

(6) Time limits.

(a) Initial decision. In the absence of any request for a special exception, the district or municipality shall complete the review by either objecting or certifying non-objection to the land division map within 20 calendar days from the date that a complete request is submitted to the required office of the department or municipality that has been delegated the review authority. If a special exception is requested, the district or municipality shall inform the land divider of its decision in writing granting or denying a special exception within a period of no more 60 calendar days from receipt of the land divider's specific written request for a special exception. If the district or municipality fails to act within the 60-day limit, the district or municipality shall be deemed to have no objection to the special exception.

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[6] Federal law requires a **minimum** 20-year forecast period for transportation planning for **all areas of the State**. 23 USC 134(g)(2)(A) and 135(e)(1)

(b) Appeal. Any final decision of a district or municipality regarding a special exception, or consequence of failure to act within the time limits provided, may be appealed to the secretary or designee within 20 days of that final decision or failure to act. The secretary or designee shall inform the land divider of its decision on appeal in writing granting or denying or modifying a special exception within a period of no more 60 days from receipt of the appeal. If the secretary or designee fails to act within the 60-day limit, the department shall be deemed to have no objection to the special exception.

[NOTE: The 20-day time limit for action on a review without any special exception or variance is already established in TRANS 233.03(5). That subsection will also be amended to make it clear that if the district or municipality fails to act within the time limits, there shall be deemed to be no objection to the land division.]

(c) Intent of 60-day provision. It is the intent of this 60-day special exception provision to allow land dividers and the district, municipality or department sufficient time to explore alternative locations or plans to avoid or minimize conflicts and facilitate mutual resolution. It is intended that decisions will be made sooner if practicable.

[NOTE: I have restructured this subsection for clarity and to set specific special exception time limits for initial decisions, appeals, and decisions on appeal.

(7) Treatment of land divisions involving changes in use of existing structures and improvements. If a land division involves changes in the type of ownership of structures or improvements that existed for 5 years prior to the land division, the department will approve the land division if there is no substantial change to the safety of entrance to or departure from the highway or public investment in the highway. Example of this type of land division would be the conversion of an existing apartment building to condominium ownership or the conversion of leased commercial spaces in a shopping mall to owned spaces. When the department, district, or authorized municipality makes a determination that a land division fits this category, the land division will be deemed a technical land division only and the department, district, or authorized municipality shall certify approval or declare the land division exempt from this chapter, and shall refund any fee paid.

[NOTE: I have added the idea that this type of technical land division will be handled as exempt or will be appropriately certified without charge after appropriate review to determine it fits this category and time limits so that it does not create a loophole to evade the safety and public investment purposes of the law on which this rule is based.] __

OAAW
OUTDOOR ADVERTISING ASSOCIATION OF WISCONSIN
44 EAST MIFFLIN STREET, SUITE 101
MADISON, WISCONSIN 53703
608-286-0764

Testimony

Presented to the
Joint Committee for Review of Administrative Rules
regarding

Trans. 233

offered by

Janet R. Swandby
Executive Director and Lobbyist

June 21, 2000

The Outdoor Advertising Association of Wisconsin (OAAW) is a statewide trade association of the more than 20 companies which own and offer advertising space on billboards across the State. OAAW members have a large investment in land and improvements along all classes of highways.

OAAW has been an active member of the Coalition to Reform Trans. 233. I have been part of the negotiating team which has worked with the Department of Transportation (DOT) to revise the rule. The Coalition and DOT have made some progress by agreeing on changes to some procedural matters outlined in the rule. The most crucial aspect of Trans. 233 for OAAW, and most of the other Coalition members, is the rule's setback requirement.

With regard to the setback requirement, the Coalition and the DOT have reached an impasse. We are looking to the members of the Joint Committee for the Review of Administrative Rules to aid the Coalition in seeing that property owners along state highways are treated fairly by the DOT.

Trans. 233, as it stands today, essentially prohibits a landowner from using the first 50 feet along the right-of-way of a state highway. If a landowner chooses to do something with the first 50 feet, he has to waive his constitutionally guaranteed right to just compensation from the government for his property.

OAAW is not convinced that DOT has the authority to violate a landowner's right to just compensation, but, in the spirit of cooperation, OAAW members may concede that it might be in the best interests of both the State and the landowner not to add improvements within the setback area if that land will be needed for highway improvement in the near future. In all likelihood, the landowner would benefit by knowing the DOT's plans and may be able to adjust his development

plans accordingly.

This is why OAAW could support a "variance" or "special exception" provision in Trans. 233 which is based on the DOT's 6-year highway plan. If highway improvements are planned within 6 years, the landowner could adjust his plans and work around the setback area, or could build in the setback area but waive his compensation rights.

But a landowner or business owner should not have to grant the State DOT these kinds of powers based on the 20-year highway plan as the DOT has proposed.

A landowner should not have to give up the use of his land for 20 or more years based on the State's speculation that the strip of land may be needed and the State does not want to have to compensate the landowner for any improvements.

Highway expansion in Wisconsin has been possible throughout history. The State has condemnation powers and the State has had to purchase land and compensate business owners when improvements need to be relocated or has paid business owners fair market value for their businesses when the business cannot be relocated. The DOT does not need Trans. 233 to improve our highways. DOT only needs Trans. 233 in order to improve highways at a lower cost. And the lowered pricetag is at the expense of landowners who have been prohibited from getting full use of their property.

The OAAW is not comfortable with DOT's draft rule changes regarding setbacks because the criteria for "special exception" or "variance" are far too nebulous. The DOT's power to grant or deny a request for "special exception" from the setback requirement needs to be tied to something as specific and concrete as the Department's 6-year highway plan. This currently works for DOT and the utilities in Trans. 233. OAAW believes that the 6-year plan as a basis for granting "special exceptions" can work for all landowners.

OAAW appreciates the opportunity to offer its position on this rule, and asks the Committee to consider a directive to DOT to craft a rule change which would grant all landowners in Wisconsin the same consideration as Trans. 233 currently grants utilities.

JRS/

Wisconsin Builders Association

Preserving and Promoting The American Dream

MEMORANDUM

TO: Members of the Joint Committee for Review of Administrative Rules

FROM: Jerry Deschane, Deputy Executive Vice-President

DATE: June 21, 2000

RE: Trans 233

Thank you for holding this hearing to review Trans 233 and concerns regarding that rule. The Wisconsin Builders Association includes businesses involved in land development. As such, our members come in frequent contact with Trans 233.

After several months of negotiations with the department, we are coming close to agreement on a number of procedural changes to the rule. However, our organization has been unable to find consensus with the department in a number of key areas:

- The rule goes too far and prohibits too much. Certain improvements on the land owner's property within the setback should be allowed.
- Why should all subdividing land owners along all state trunk highways be deprived of all of the use of 50 feet of their property, even if it is extremely unlikely that property will be needed for highway expansion?
- Currently, the department issues a variance in one out of 4 applications. Even with the department's proposed revisions, many exceptions to the rule will be issued. This is an unreasonable waste of property owners' time and money.
- The original authority for this rule comes from the subdivision statutes. It is questionable whether the department has the legal power to review any other type of boundary adjustments.

This rule change represents a dramatic policy shift. For forty years, the state imposed modest restrictions on the use of private property adjoining state highways, and the state assumed the cost of purchasing that land if it was needed for highway expansion. Trans 233 has shifted that burden to individual landowners by assuming the state will need the land and denying landowners virtually all use of their land adjoining state highways without any compensation.

A rule such as Trans 233 is needed. Reasonable restrictions need to be placed on adjoining land to facilitate future highway expansion. However, as currently drafted, Trans 233 is heavily tilted toward the state's investment, and ignores the individual's investment.

We believe the department should move forward with its revised rules, and we encourage this committee and the two Legislative standing committees to exercise aggressive oversight authority so that a fair balance is reached between property owners and the public.

NAHB

4868 High Crossing Boulevard • Madison, Wisconsin 53704-7403
(608) 242-5151 • (800) 362-9066 • Fax (608) 242-5150

Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

Phone • (608) 257-9521
Fax • (608) 283-1709

Gary L. Antoniewicz
Direct Dial Number • (608) 283-1759
gantoni@boardmanlawfirm.com

BOARDMAN LLP
LAW • FIRM

June 21, 2000

Joint Committee for Review of Administrative Rules
Wisconsin Legislature
State Capitol
Madison, WI

Re: Opposition to TRANS 233 in present form by
Midwest Equipment Dealers Association, Inc.

Dear JCRAR Members:

The Midwest Equipment Dealers Association ("MEDA") opposes TRANS 233 in its present form as promulgated in early 1999. As a member of the Coalition to Reform TRANS 233, MEDA has participated in negotiations concerning TRANS 233 with the Department of Transportation over the past several months. While progress has been made on several issues, there has been little progress on our primary concerns which deal with the setback provisions.

Many equipment dealers own land on state highways and some are buying newly subdivided land for their businesses. Our members have been directly affected by TRANS 233. TRANS 233 essentially prohibits any use of land within setback areas including parking lots, signs or other structures. This is far more restrictive than under the prior code. To the extent a variance to the restrictions is granted, the landowner must waive any rights to compensation for the structures should the state decide to later acquire the land for highway expansion.

The sole purpose for the new restrictions is to reduce highway acquisition costs by prohibiting landowners from building or using setback areas in their businesses. We strongly object to the Department of Transportation using its rule making power to devalue land to make it less costly to exercise eminent domain in the future.

I have had several opportunities to discuss this rule with Department of Transportation personnel including personnel in the real estate acquisition area. They have uniformly praised TRANS 233 because it will make future acquisitions by the Department of Transportation less costly. MEDA, however, believes this is not a proper purpose for the rule.

MEDA has no objections to zoning restrictions which are for the purpose of public safety and welfare. We do object to zoning solely for the purpose of devaluing land the state may want in the future.

We support the Coalition to Reform TRANS 233 and ask that the Department of Transportation be required to revise TRANS 233 consistent with the true purposes of such a law.

Sincerely,

Boardman, Suhr, Curry & Field LLP
By

Gary L. Antoniewicz

GLA/jh
cc: Mr. Gary Manke
::ODMA\WORLDOX\F:\DOCS\WD\25160\0\JH33158.WPD

VILLAGE OF JACKSON

"The Village With A Future"

June 21, 2000

Representative Grothman/Senator Robson, Co-Chairs
Administrative Rules Committee, State of Wisconsin
State Capitol

Dear Representative Grothman and Senator Robson:

I am the Village Administrator for the Village of Jackson, a fast growing community in Washington County.

I am testifying before your committee as a practitioner.

I have dealt with two situations regarding the enforcement/waiving of Trans 233 to date and understand if left unamended, will deal with it in a third situation.

In the first instance, to my mind was correctly handled by waiving the enforcement as it related to the Tillie Lake Business Park at the northwest corner of Hwy 45 and Hwy 60. Since the corner building was constructed (prior to the move to strictly enforce Trans 233), WisDOT District II did not enforce the stricter 50' "clear zone".

The second instance was as a result of a Title Company making a determination that a property fronting on a minor collector, located between Hwy 60 (a minor arterial), and Sherman Road, another minor collector, was subject to Trans 233. The builder was forced to search for a Title Company which would give him a clear Title to the property because of the confusion and interpretation of Trans 233.

The third instance which will demand attention is located on the east side of the Village, which lies within the 2015 Boundary, agreed upon between the Village and the Town of Jackson. The speed limit is 35 mph, and there is 120' of existing right of way. To ask for an additional 50' of "clear zone" beyond the right-of-way is egregious. You can see by the schematic we have prepared that if and when the State determines that a 4 lane Hwy 60 is to be constructed in this location, it can, without acquiring any other property. I will admit, a 6 lane divided highway would be a squeeze.

I am sure you have wrestled with the "takings" issue. The Village's opinion is: If you need the land show us your plans. If you want to speculate on its need, then buy it. Please don't ask property owners to restrict the development opportunities on their property without due compensation.

Mailing Address
P.O. Box 147

N168 W20733 Main Street
Jackson, Wisconsin 53037

Telephone
OFFICE 414-677-9001
FAX 414-677-1710

The Village has made, and will continue to make the effort to consolidate access points to Hwy 60. We have as much an interest as does the State of Wisconsin to make the streets within our jurisdiction safe, through the restriction of access, zoning setbacks for structures, and intergovernmental agreements.

Please do not look at Trans 233 as a broad brush administrative rule application. Please have the rule rewritten to address areas of justifiable need, instead applying the rule as a "one size fits all" requirement.

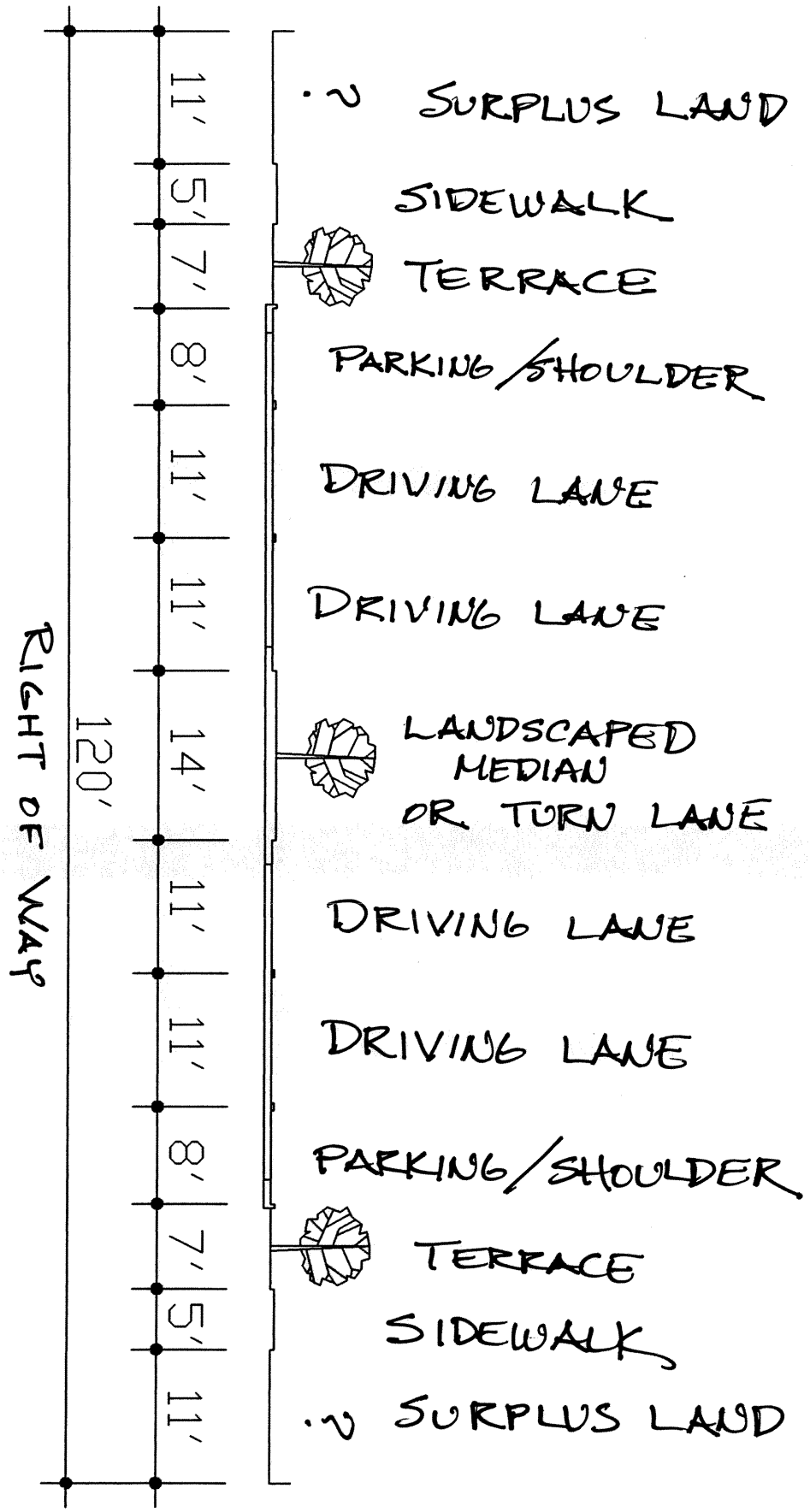
It makes no sense to ask for an additional 50' "clear zone" adjacent to access/exit ramps on controlled access highways, because they will not be obstructed by parking lots, signs, detention basins, or structures.

Thank you for your consideration.

Sincerely,

Delmore A. Beaver, Administrator

cc: Jackson Village Board
Village/Town Joint Planning Group
Mid-Moraine Municipal Association - Legislative Committee


11'
5'
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RIGHT OF WAY
SURPLUS LAND
SIDEWALK
TERRACE
PARKING/SHOULDER
DRIVING LANE
DRIVING LANE
LANDSCAPED MEDIAN OR TURN LANE
DRIVING LANE
DRIVING LANE
PARKING/SHOULDER
TERRACE
SIDEWALK
SURPLUS LAND

CAROW LAND SURVEYING
COMPANY, INCORPORATED

1837 West Wisconsin Ave.
P.O. Box 1297
Appleton, Wisconsin 54912-1297
Phone (920) 731-4168
Fax (920) 731-5673

June 14, 2000

Representative Grothman
Attention Maggie
15 North
Wisconsin State Capital
Madison, Wisconsin 53708

RE: Trans 233

To whom it may concern,

Being a registered land surveyor in the State of Wisconsin, I have to deal with Trans 233 on a regular basis. It is my opinion and most of my clients that the Department of Transportation went too far with Trans 233. It would be very difficult to list all of the situations where we have run into Trans 233, but I have listed a few of the typical problems.

The first situation involves a property along U.S.H. "10" in the Town of Weyauwega, Waupaca County, Wisconsin. Our client purchased the property from a previous owner whom had negotiated with D.O.T. for the sale of the additional right-of-way and access rights related to the upgrade of the highway. The right-of-way was deeded and the property in question was permitted one access drive. The present owner proceeded to rezone the property along the highway to commercial in anticipation of creating lots along the highway and using the one access point allowed. The highway was reconstructed and median crossover and driveway to this property have been installed and paved. I submitted a sketch to the Wisconsin Rapids D.O.T. office for a residential development of the property prior to Trans 233 and the D.O.T. review said nothing of losing the access to U.S.H. "10". Now after Trans 233, the D.O.T. demands that the property owner give up the access point, which the D.O.T. permitted, and the present owner bought from the previous owner. Talk about taking something from some one without paying a dime.

The second situation involves a property along the South frontage road on W. College Avenue (S.T.H. "125") in the City of Appleton, Outagamie County, Wisconsin. Two adjoining property owners want to transfer a small strip of one property to the other property. The property owner who wants to add the small strip to his existing parcel already has an approved site plan from the City of Appleton which allows him to develop up to the right-of-way line of the frontage road. Without the transfer of the small strip D.O.T. does not get a shot at either property. But with the transfer of the small strip, D.O.T. gets to review the division of the properties. All of the properties along the frontage road are developed up to the right-of-way line. D.O.T. initial review was to either hold the 50 foot highway setback line or have the property owners sign a waiver if a variance from the setback were to be permitted. The waiver would state that the property owner would not get paid for their business if D.O.T. had to widen the right-of-way. The present right-of-way is 330 feet in width. The D.O.T. is presently reviewing their position on this issue, but it should have never come to this point.

CAROW LAND SURVEYING COMPANY, INC.

The third and final situation involves a property in the Town of Bovina, Outagamie County, Wisconsin along S.T.H. "76". The property owner is selling two small pieces to adjoining property owners and dividing the rest of his property into three lots. I submitted a request for a variance to allow the five existing driveways to remain. Two were for the existing residences, which were simply adding land to their existing lots. A third driveway went to a parcel which only has frontage on "76" and which was created when the highway severed the property. The remaining two driveways are presently used for agricultural purposes. D.O.T. stated that five driveways were too many and the variance would not be approved. The client is not asking for anything more than what he has now. The highway is a very low volume highway in an undeveloped area. The D.O.T. in Madison is presently reviewing their position on this matter.

Please give us the chance to review any changes, which are proposed to make sure some of these issues are resolved. Thank you for the opportunity to relate some of my experiences with Trans 233. Based on conversations with the other surveyors in the area, it would appear as though everyone is having similar problems.

Respectfully,

Robt F. Reid

Robert F. Reider, PLS

June 6, 2000

Mr. James S. Thiel, General Counsel
Wisconsin Department of Transportation
P.O. Box 7910
Madison, WI 53707-7910

RE: Trans 233

Dear Mr. Thiel:

Thank you for continuing to work with our coalition on the setback provisions of Trans 233 and providing us with the opportunity to respond to the May 26 revision of these provisions. While it is clear the Department has put a significant amount of thought and hard work into the development of a more balanced Trans 233, we feel that our concerns have not been adequately addressed by the proposed changes. In hopes of developing a rule the Coalition, the Department and other interested parties can all support, we offer the following comments and suggested changes for your review.

General Comments

As we have repeatedly expressed to the Department of Transportation for the past 9 months, the setback provisions in the current version of Trans. 233 need to be amended to strike a more even balance between the interests of the Department in protecting the state's investment in current and future infrastructure and the interests of landowners to enjoy the reasonable use of their property. The current rules, which allow the Department to reserve a 50-foot buffer area along all existing state trunk and connecting highways for possible future expansion of such highways, effectively denies landowners almost all economic use of this property without providing them any compensation. Accordingly, we believe that the setback provisions in current version of Trans. 233 considers only the interests of the Department for possible future expansion of highways without considering the economic impacts on affected landowners.

To better strike a balance between these interests, the Coalition provided the Department with a written proposal last November (this proposal was again presented to the Department in letter dated April 11, 2000) that contained several specific proposals that we believed would address the concerns of both the Department and affected landowners. Rather than prohibiting structures and improvements in setbacks of every highway into perpetuity as mandated by the current version of Trans. 233, the objective of this proposal was to restrict improvements and structures within the setback of those highways that would likely be expanded within a reasonable amount of time. Accordingly, our proposal requested that the Department revise the setback provisions to parallel the process created for improvements of utility companies. We believed that this proposal would provide both landowners and the Department with reasonable certainty as to when it was proper to place improvements within the setback area. To date, the Department has not responded in writing to our proposal.

Despite our requests, the Department's proposed revision (dated May 26) again fails to adequately consider the interests of landowners or provide landowners with reasonable certainty as to when they may utilize their property. Until the Department amends the rule to adequately address these concerns, we will be unable to support Trans 233 in its current form or the changes to the setback provisions as currently proposed by the Department.

Specific Comments

The remainder of this letter addresses specific points within the May 26 redraft. These comments are listed in the order they occur in the draft.

Introduction

The introduction of the May 26 redraft indicates that it is the product of comments received at our May 23 meeting. It should be noted, however, that the proposed changes to the rule were presented to the Coalition for the first time at this meeting and, thus, any comments were, for the most part, simply reactions to rule in concept.

Trans 200.08(4)
Rather than require someone to infer what is meant by this provision, the text should specifically state that existing structures and improvements are grandfathered and therefore not subject to Trans 233. Contrary to your related note, our coalition does not believe the language is "sufficiently clear."

Trans 233.11 [bracketed note]
The Coalition disagrees with the statement that the "following changes to this procedure (to) address the concerns of the Coalition." First, as we previously indicated, the concerns raised at the May 23rd meeting were preliminary in nature due to the fact that we did not have time to adequately review the rule. Additionally, many of the changes address concerns raised by the representative of the Transportation Builders Association or the Citizens for a Better Environment. These two organizations are not members of the "Coalition," and their concerns cannot be construed as concerns of the Coalition.

Trans 233.11 (2)
We are unclear as to what may be addressed in a "uniform delegation agreement." For example, does this agreement provide cities and villages with the authority to develop their own, more restrictive criteria for evaluation land-division applications? We would like to see the "uniform delegation agreement" that will govern municipal delegation to assure that it conforms with agreements between the department and the Coalition.

Trans 233.11(3)
What is the meaning and purpose of the phrase ". . . and shall be in harmony with the general purposes and intent of ch. 236?"

Trans 233.11(3)(a)

To provide landowners with greater certainty as to what they must demonstrate in order to receive a special exception, the Coalition requested (and the Department appeared to agree) that the Department include within the rule the specific criteria that it uses in granting special exceptions. Due to the ambiguous nature of the criteria, this list fails to provide landowners with any reasonable certainty as to what they must demonstrate in order to receive a special exception. For example, what is the meaning of "emerging congestion and level of service projection?" What are the SPECIFIC standards used to determine this? How does this criterion differ from "existing and future traffic volumes, any traffic impact analysis, access issues, and engineering guidelines as published in the department's Facilities Development Manual, Chapter 11, Design, as amended through March 13, 2000?" What is the "Facilities Development Manual" and what does it say? What do criteria #1 and #7 mean and how do they differ? What about #4 and #9? What exactly is NOT included under criteria #10 (transportation safety), #11 (preservation of the public interest and investment in the highway), and #12 (other criteria deemed appropriate by the Department)?

As an alternative to the list of ambiguous criteria, we, again, suggest that this list of criteria be replaced with the following language:

> If a land divider wishes to erect, install or maintain any improvement within a setback area determined under Trans. 233.08(2) or (3), the land divider shall provide written notice and a plat map showing the nature and the distance of the proposed improvement from the nearest right-of-way line of the highway to the department's district office in which the land division or any part of it is located. The department's district office shall receive this notice and plat map at least 30 days prior to any work related to the erection, installation, or maintenance of such proposed improvement.
>
> The department's district office shall review the notice and plat map to determine whether a planned highway project within a 6-year improvement program under s. 84.01(17), Stats. will conflict with the proposed improvement. If the department's district office determines a conflict exists, it will notify the land divider in writing within 30 days after receiving the written notice and plat map for the proposed improvement, and request that the land divider consider alternative locations that will not conflict with the planned highway work. If the department's district office and the land divider are unable to agree upon an alternative location to avoid or minimize the conflict, the land divider may erect, install, or maintain the improvement, but, notwithstanding pars. (b) and (c), the department may not pay compensation or other damages relating to the improvement that conflicts with the planned highway project. In order to avoid payment of compensation or other damages to the land divider or subsequent owner of the improvement, the department is required to record a copy of its written notice to the land divider of the conflict, that adequately describes the property, with the register of deeds in the county in which the improvement or any part of it is located.

[The 6-year plan seems to be a more reasonable "measuring stick" than the 20-year plan under the following rationale. The 6 year plan is referenced in the statutes under the powers and duties of the department at s. 84.01 (17). Every two years, (odd numbered years) DOT compiles a comprehensive 6 year program for major highway development and rehabilitation. The 6 year plan provides a listing of all anticipated projects, the type of project, location, estimated cost and scheduled construction date. First two years are based on funding levels provided in the most recent budget --- other years assume cost to continue. Statutes require DOT to notify county clerks, DNR and DATCP of the improvements anticipated under the plan. All major highway projects must be enumerated in the statutes prior to beginning construction.]

Trans 233.11(3)(b)
To facilitate the language proposed above, we request that the first sentence of this subparagraph be revised as follows: "If the department determines that there is a conflict between the proposed land division and a planned highway project as indicated in its 6-year improvement program under s. 84.01(17), Stats., it may grant the special exception by adjusting the setback area..."

Trans 233.11(3)(c)
To facilitate the language proposed in (3)(a), we proposed that this provision be revised as follows: "(c) Allow in setback ~~-removal does not affect viability~~. If the department determines that there is a conflict between the proposed land division and a planned highway project as indicated in its 6-year improvement program under s. 84.01(17), Stats., it may grant the special exception within the existing setback area ~~and future removal of the structure or improvement in whole or in part, will not:~~

~~1. Affect the continuing viability or conforming use of the business, activity or use associated with the proposed structure or improvement, or~~
~~2. Adversely affect the community in which it is located,~~

~~then the land divider~~, provided that the land divider assumes the risk of future department-required removal

Trans 233.11(3)(d)
Because the determination of whether to grant a blanket or area special exception should be based on the physical characteristics of the area surrounding the subject property irrespective of whether the Department granted a special exception in those cases, we suggest replacing the proposed provision with the following: If the Department determines that the request for a blanket or area special exception is consistent with similar land divisions, similar structures or improvements, or the same area and development patterns, the Department shall grant the blanket or area special exceptions that are generally applicable.

Trans 233.11(4)
See comments to Trans. 233.11(3)(a)

Trans 233.11(5)
In the first two sentences, change the term "approvals" to "certified non objections." In the last sentence, add "of" after "The department will not unilaterally initiate a review. . .."

Trans 233.11(5)(b)
Does the failure to act in the provision apply only to applications for a special exception? Your note suggests this, but we would like clarification.

Trans 233.11(7)
These provisions should apply whether the change in ownership has existed for 5 years or not. Accordingly, we request that the phrase "that existed for 5 years" be deleted.

Again, thank you for the opportunity to provide these comments:

Sincerely,

Bob Bartlett
PMAW/WACS

Jerry Deschane
WBA

Chris Dodge
MEDA

James Hough
WEDA

Pat Osborne
MAP

Janet Swandby
OAAW

CALEDONIA

TOWN OF CALEDONIA
6922 Nicholson Road
Caledonia, Wisconsin 53108
262-835-4451
Fax 262-835-2388

June 20, 2000

Via Facsimile & U.S. Mail

Joint Committee for Review
Of Administrative Rules
Offices of Sen. Judith B. Robson
& Rep. Glenn Grothman, Co-Chairs
Attn: David Austin, Committee Clerk
P.O. Box 7882
Madison, WI 53707-7882

RE: Proposed Amendments to Trans 233

Dear Sen. Robson and Rep. Grothman:

The Town of Caledonia is very interested in the proposed revisions to Trans 233. It was unable to be present for the public hearing on the proposed rule scheduled for June 21, 2000, and is taking this opportunity to submit the following comments to your Committee.

First, the Town of Caledonia is concerned about the setback requirements as set forth in Trans 233.078. It is concerned that they will adversely affect the ability to properly develop lands along state trunk and connecting highways. As the Town interprets Trans. 233.078, usually there will be imposed setbacks of at least fifty feet from the highway rights-of-way and no "structures or improvements" will be permitted within the setback areas. "Improvements" as defined to include parking lots, drainage facilities, driveways, loading docks, etc., but not sidewalks, terraces, patios, landscaping and open fences. This will mean that in many instances there will be insufficient depth to properly develop the lands, particularly for commercial uses. This is especially true when also considering local building and zoning requirements, such as local setbacks, parking, open space, screening, and drainage requirements.

The Town's concern is that the rule will prevent proper development of substantial areas within the Town, resulting in losses to its tax base and adding to sprawled development. As far as the property owners are concerned, this will be viewed as essentially a taking of their properties without just compensation, and perhaps rightly so. There is also the matter of non-conforming use. While the rule would allow exceptions for buildings or structures erected or installed prior to February 1, 1999, this status could be lost as a result of a significant fire or other disaster. Then, the only recourse appears to be to seek a "special exception" under Trans 233.11.

Second, the Town has a problem with the language in Trans 233.105(3) relating to drainage. It essentially requires that "the anticipated discharge of storm water upon a state trunk highway or connecting highway" following the development be less than or

equal to the discharge preceding the development. The Town does not have a problem with the basic concept. Its questions have to do with the consideration of drainage facilities installed by the Town as a part of a highway development to which the adjoining property owners contribute as taxpayers of the Town or as a result of special assessments levied by the Town for such drainage improvements. Will such improvements be considered although installed prior to the development of the adjoining property? If the storm water drains toward catchbasins along the right-of-way that were installed as part of the drainage improvements, will the drainage be considered as being discharged "upon" the state trunk or connecting highway? If so, would it not almost by definition be greater than before the development and be prohibited by the rule? Would not this be unfair to the property owner who was charged for the prior drainage improvement?

This latter concern is not merely theoretical in nature. A recent proposed development along S.T.H. "32" would basically fit into the situation. Essentially, a property owner was to be charged special assessments for drainage improvements to handle water draining from his property, but then could be denied the right to use it by Trans 233. Inquiries as to that situation of DOT officials by our Town Attorney failed to produce any real answer. Therefore, the Town must assume the most negative result under the rule.

Third, the Town understands that it is the position of the DOT that condominium plats constitute "subdivisions" under the rules. The Town is in support of that position.

We request that these comments be included within the records of the joint hearing.

Thank you for your consideration.

Very truly yours,

TOWN OF CALEDONIA

Dennis Kornwolf
Town Chairman

cc: Rep. Bonnie Ladwig
Sen. Kimberly Plache

COALITION TO REFORM TRANS 233

MEMORANDUM

DATE: June 21, 2000

TO: Senator Robson, Co-Chair, Joint Committee for Review of Administrative Rules
Rep. Grothman, Co-Chair, Joint Committee for Review of Administrative Rules
Members, Joint Committee for Review of Administrative Rules

FROM: Coalition to Reform Trans 233 --- [Lake States Lumber Association (LSLA), Midwest Equipment Dealers Association (MEDA), Midwest Hardware Association, National Federation of Independent Business, WI. (NFIB), Outdoor Advertising Association of Wisconsin (OAAW), Petroleum Marketers Association of Wisconsin / Wisconsin Association of Convenience Stores (PMAW/WACS), Marathon Ashland Petroleum (MAP), Tavern League of Wisconsin, Timber Producers Association of Michigan & Wisconsin, Wisconsin Association of Truck Stop Operators, Wisconsin Auto & Truck Dealers Association (WATDA), Wisconsin Automotive Trades Association, Wisconsin Builders Association (WBA), Wisconsin Economic Development Association (WEDA), Wisconsin Federation of Cooperatives, Wisconsin Fireworks Association, Wisconsin Manufacturers and Commerce (WMC), Wisconsin Merchants Federation, Wisconsin Petroleum Council, Wisconsin Restaurant Association (WRA)]

RE: Public Hearing Comments on Ch. Trans 233

Thank you for the opportunity to provide comments on Ch. Trans 233, Wisconsin Administrative Code.

As you know, we have been working with the Senate and Assembly Transportation Committees and the Department of Transportation over the past several months in an attempt to resolve issues of concern. Under the direction and guidance of the Assembly Transportation Subcommittee on Trans 233, we have been able to reach conceptual agreement with the Department of Transportation on a number of issues. Attached is a Memorandum from the Coalition to the Assembly Committee on Transportation, dated February 8, 2000, which describes the Coalition's remaining concerns with Ch. Trans 233 as well as our understanding of the changes WisDOT agreed to make to the rule. Also attached is a February 18, 2000 Legislative Council Staff Memorandum from William Ford to Representative David Brandemuehl, which summarizes agreements reached to-date to amend Ch. Trans 233.

While progress has been made on certain issues, and despite concerted effort by both the department and the coalition, it is increasingly clear that we have reached impasse with the department on the core issue of setbacks and related provisions. Attached is a document entitled "WISDOT MAY 26 TRANS 233 SETBACK PROPOSAL", which represents the department's latest proposed revisions to the setback provisions of current Ch. Trans 233. Also attached is a letter to James Thiel, dated June 6, 2000, which represents the coalition response to WisDOT's proposal.

We maintain that a clearly understood principle of existing law is that the property of no person shall be taken for public use without just compensation. Ch. Trans 233 in its current form, as well as the department's latest, proposed revisions, violates that principle and constitutes an unfair taking of property without compensation. We also recognize the need to strike a balance between the interests of the department in protecting the state's investment in current and future infrastructure and the interests of landowners to enjoy the reasonable use of their property. Accordingly, we have presented the department with setback proposals we believe would establish a reasonable balance between competing interests.

At this point, it is clear to us that additional legislative oversight and guidance will be necessary to resolve the core issues relating to the setback provisions. Consequently, we feel the department should move forward with proposed rules so that issues can be debated, and ultimately resolved by the Legislature, through the rulemaking process.

We appreciate the JCRAR's willingness to hear our concerns with regard to CH. Trans 233 and request that you continue to use your oversight authority to ensure that revisions to Ch. Trans 233 be submitted to the Legislature without delay.

(End)

MEMORANDUM

TO: ASSEMBLY COMMITTEE ON TRANSPORTATION
FROM: THE COALITION TO REFORM TRANS 233
DATE: FEBRUARY 8, 2000

RE: ISSUES RAISED AND AGREEMENTS REACHED DURING THE JANUARY 27TH ASSEMBLY TRANSPORTATION SUBCOMMITTEE MEETING

This memorandum describes the Coalition's remaining concerns with Wisconsin Administrative Code Trans 233 as well as our understanding of changes WisDOT agreed to make to the rule. It is our further understanding that we will be given draft revision language from WisDOT before the department begins promulgation of a revised Trans 233. However, it is our strong preference that once a final agreement is reached, the department be directed to revise Trans 233 as an Emergency Rule.

COALITION'S REMAINING CONCERNS WITH TRANS 233

1) **DOT's Statutory Authority.** WisDOT cites two primary sources of enabling authority for the promulgation of the revised Trans 233. The first source is Chapter 236, Wis. Stats., and the second Sec. 86.07(2), Wis. Stats. Neither, however, supplies sufficient authorization for such a rule change.

Chapter 236, Wis. Stats., specifically limits its application to subdivision. Sec. 236.03(1), Wis. Stats. The term subdivision is further defined at Sec. 236.02(12), Wis. Stats., and limited by the legislature to the following:

> **"Subdivision"** is a division of a lot, parcel or tract of land by the owner thereof or the owner's agent for the purpose of sale or of building development, where;
>
> (a) The act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area; or
>
> (b) Five or more parcels or building sites of 1 ½ acres each or less in area are created by successive divisions within a period of 5 years.

Therefore, this particular legislation offers little to WisDOT beyond subdivisions under Chapter 236, and fails to cover land divisions by Certified Survey Map, condominium plat or "other means not provided by statute".

Similarly, WisDOT's reliance on Sec. 86.07(2), Wis. Stats., is inappropriate. Sec. 86.07 reads as follows:

> **86.07 Digging in highways or using bridges for advertising.**
>
> (1) Any person who draws, paints, prints or pastes upon any culvert, bridge or guard rail on any highway shall be fined not less than $10 nor more than $200 or imprisoned for not more than 30 days or both.
>
> (2) No person shall make any excavation or fill or install any culvert or make any other alteration in any highway or in any manner disturb any highway or bridge without a permit therefore from the highway authority maintaining the highway. Such permit shall contain the statement and be subject to the condition that the work shall be constructed subject to such rules and regulations as may be prescribed by said authority and be performed and completed to its satisfaction, and in the case of temporary alterations that the highway or bridge shall be restored to its former condition, and that the permittee shall be liable to the town or county or state, as the case may be, for all damages which occur during the progress of said work or as a result thereof. Nothing herein shall abridge the right of the department or the county board or its highway committee to make such additional rules, regulations and conditions not inconsistent herewith as may be deemed necessary and proper for the preservation of highways, or for the safety of the public, and to make the granting of any such permit conditional thereon. If any culvert is installed or any excavation or fill or any other alteration is made in violation of the provisions of this subsection, the highway may be restored to its former condition by the highway authority in charge of the maintenance thereof; and any person who violates this subsection shall be punished by a fine of not less than $5 nor more than $100, or by imprisonment not exceeding 6 months, or both.

The subject of Trans 233, has nothing to do with digging or excavating in a highway, nor are we dealing with the disturbance of a highway or bridge. We are dealing with the property rights of individuals and businesses who happen to own property near state highways, connecting highways or service roads. WisDOT's reliance on this statutory provision is tenuous, at best.

WisDOT's "leap" from old Trans 233 to new 233, has the effect of drastically expanding its authority. However, WisDOT has shown no authority for such an expansion, nor for its redefinition of what can be permitted in setback areas. WisDOT also lacks any authority to support its creation of a procedure which completely abrogates property rights. What authority, for example, can WisDOT cite for its requirement that property owners "trade" their rights to taking compensation for a variance.

2) Setbacks. As stated above, the Coalition does not believe WisDOT has the broad power over setbacks that it now asserts under Trans 233. Specifically, we do not believe WisDOT has the power to regulate setbacks on land divisions other than subdivisions that meet the Chapter 236 definition. Specifically, WisDOT lacks any authority to regulate condominium plats, and developments that do not abut STHs and do not directly access STHs.

Further, even when the department does have legitimate authority to regulate a setback area, private property is being taken! In other words, although there is a public benefit to rational setback regulations, it must be balanced against the private property rights of the land owner. It is a clearly understood principal of our existing laws that the property of no person shall be taken for public use without just compensation. See Zealy v. City of Waukesha, 20 Wis. 2d 365, 548 N.W.2d 528 (1996).

Yet, Trans 233.105 (2) states *"The department may not grant a variance authorizing the erection or installation of any structure or improvement within a setback area unless the owner executes an agreement providing that, should the department need to acquire the lands within the setback area, the department is not required to pay compensation, relocation costs or damages relating to any structure or improvement authorized by the variance."*

We disagree with this position and urge the department to return to its pre-February 1, 1999 policy regarding setbacks. Prior to then, Trans 233 was interpreted to limit "structures" and "improvements" within the setback area. And, this term was commonly understood to mean buildings. Now, under the revised Trans 233, WisDOT broadly defines the term "structures and improvements" and strictly prohibits both unless the property owner agrees to waive any rights for compensation in the event of a WisDOT condemnation.

The Coalition asks that WisDOT return to its previous policy; pre-February 1, 1999. Specifically, the following should be allowed within setbacks: air pumps, catch ponds, drainage facilities, driveways, parking lots, pay phones, septic systems, signs, storm water systems, retaining walls, and vacuum stations.

But, perhaps the better solution for regulation of setbacks, would be to require WisDOT to follow already established procedures for the expansions of state trunk highways. These procedures are found at Wisconsin Statutes 84.295(10), ESTABLISHING LOCATIONS AND RIGHT-OF-WAY WIDTHS FOR FUTURE FREEWAYS OR EXPRESSWAYS. Under this law, the department is directed to conduct investigations and studies as to the future development needs of a state trunk highway. If the department finds that an expansion is warranted, it must then provide *abundant* notice and adequate opportunity for public input.

Specifically, under section 84.295(10), Wis. Stats., the department shall hold a public hearing regarding the proposed STH expansion. If the department conducts a survey of the proposed expansion, that survey map must be placed in the register of deeds office. Notice of this map shall be published as a class 1 notice. And most importantly, notice of the recording shall be served, by registered mail, to the affected property owners.

The statute goes on to state that after such adequate notice, a property owner can place an improvement or structure in the setback area *only* if he first gives WisDOT at least 60 days prior notice. This gives WisDOT the opportunity to acquire the right of way.

Section 84.295(10), Wis. Stats., concludes by stating, "***When the right of way is acquired, no damages shall be allowed for any construction, alterations or additions in violation of this paragraph.***" We read that to mean WisDOT must affirmatively take the right of way before it can completely regulate setback areas, and before it can refuse to compensate for taking property in this area.

The existence of this statute means that the legislature has already addressed the conflict between expansion of state trunk highways and private property rights. Presumably much discussion was involved in enacting this statute. We certainly believe the legislature carefully balanced the conflicting interests involved. Therefore, WisDOT should be directed to follow these statutory procedures rather than those it unilaterally developed as part of Trans 233.

3) **Condominium Plats.** As discussed more generally above, WisDOT lacks any statutory authority to review condominium plats, other than those addressed in Ch. 236, Wis. Stats. However, Chapter 236 Wis. Stats., is very limited in application, and only involves "subdivisions" which are defined as "a division of a lot, parcel or tract of land by the owner thereof or the owner's agent for the purpose of sale or of building development, where (a) the act or division creates five (5) or more parcels or building sites of 1 ½ acres or less in area; or (b) five or more parcels of building sites on 1 ½ acres each or less in area are created by recessive divisions within a period of five (5) years," Sec. 236.02(12), Wis. Stats. No other valid authority has been cited by WisDOT to review condominium plats. WisDOT's expansion of authority clearly requires legislative action.

4) **Retroactive Impact of Rule Change.** In the event TRANS. 233 is altered by the legislature as a result of this process, we will need to consider the impact such alteration will have on those properties which have been forced to comply with the post-February 1, 1999, version of TRANS. 233. At the most recent Subcommittee meeting, WisDOT indicated that more than 250 variances have already been granted under the new TRANS. 233. In the event the impact of TRANS. 233 is lessened, the legislature will need to address those individuals and businesses that have already been harmed by the rule, particularly any of those who have signed away compensation rights in exchange for variance.

WISDOT'S AGREEMENTS TO REVISE TRANS 233

1) **WisDOT's Approval Process for Land Divisions.** The department agreed to make several changes to its process for approving land divisions. First, the department agreed to revise Trans 233 so that district offices will be given authority to review and approve land divisions.

Second, the property owner will be given a right to appeal this decision to the central office and that appeal process will be clarified in the rule.

Third, if WisDOT does not review the requested division within 20 days of submittal, it is deemed non-objectionable. The department shall, within three (to five) days of receiving the application, review it for completeness, and shall at that time request any additional information needed . Upon receipt of that additional information, the 20-day clock will again start ticking. This timeline must be clarified in the revised rule rather than in the department's guidelines to Trans 233.

Fourth and finally, it is understood that WisDOT has valid reason to periodically review district decisions. However, if the central office disagrees with district decisions, land division approvals made by the district will not be rescinded. Rather, the department's recourse is to better educate the district office as to appropriate decision making criteria and, when necessary, temporally assume control of district level decision making authority.

2) **Grandfather Structures and Improvements, as well as Approved Plats, Existing prior to February 1, 1999 (the effective date of Trans 233.)** WisDOT agreed to revise Trans 233, explicitly stating that existing structures and improvements, as well as those having received final plat approval prior to February 1, 1999, are grandfathered and deemed approved under the new rule.

3) **Exclude Condominium Developments from Trans. 233.** As discussed above, we dispute WisDOT's authority to review condominium plats. In addition, recall that, at the meeting, WisDOT suggested an automatic approval process for new condominium developments whereby no review fee would be charged.

4) **Finalize and Reference Departmental Guidelines.** WisDOT has drafted guidelines for Trans 233, entitled *Implementing Procedures*. These guidelines are to be used as further clarification of the rule and as a procedural manual for district offices. WisDOT agreed to reference and include these guidelines in the revised Trans 233. Further, it is understood that these guidelines can not be subsequently revised without legislative approval.

5) **Agreements with the Wisconsin Realtors Association.** WisDOT stated that agreements it made with the Wisconsin Realtors Association (in previous meetings) would be incorporated into their revision of Trans 233. These include: **a) Noise Barriers** – clarifying that the landowner, and not the land divider, is responsible for erecting noise barriers. However, if WisDOT expands an existing highway, then the department is responsible for erecting necessary noise barriers; **b) Vision Corners** – changing Trans 233 so that land owners will only be required to grant an easement for a vision corner. WisDOT will NOT require the land owner to dedicate land for this purpose; **c) Drainage** – clarify that the land divider will NOT be asked to guarantee that anticipated discharge ("estimate") is correct. The intent being that the land divider can not be held liable for incorrect estimates; and **d) Desirable Access Management Drainage** – reference in Trans 233 the *Transportation Facilities Development Manual*, as the standard WisDOT can use to reject a land division proposal if it finds a "desirable traffic access pattern" does not exist.

COALTION TO REFORM TRANS 233

LSLA – Lake States Lumber Association · MEDA – Midwest Equipment Dealers Association · NFIB – National Federation of Independent Businesses · OAAW – Outdoor Advertising Association of Wisconsin · PMAW – Petroleum Marketers Association of Wisconsin · TLW – Tavern League of Wisconsin · TPA – Timber Producers Association of Michigan & Wisconsin · WACS – Wisconsin Association of Convenience Stores · WACTAL – Wisconsin Auto Collision Technicians Association · WATA – Wisconsin Automotive Trades Association · WATDA – Wisconsin Automobile & Truck Dealers Association · WATSO – Wisconsin Association of Truck Stop Operators · WBA – Wisconsin Builders Association · WEDA – Wisconsin Economic Development Association · WFA – Wisconsin Fireworks Association · WFC – Wisconsin Federation of Cooperatives · WGA – Wisconsin Grocers Association · WMC – Wisconsin Manufacturers & Commerce · WMF – Wisconsin Merchants Federation · WRA – Wisconsin Restaurant Association

WISDOT MAY 26 TRANS 233 SETBACK PROPOSAL

This is the revision to the May 23 draft that resulted from our meeting in Madison with interested persons the afternoon of May 23. I am sending this on Friday, May 26 to all the persons who were in attendance at that meeting. It is my understanding that I will receive any comments or suggestions back [by E-Mail would be my preference] by no later than Monday, **June 5**. We have to stick to this deadline to keep the rulemaking process on track for a draft rule to be submitted to Legislative Council about June 12, for public hearing in July, and the other steps thereafter for the final rule to be effective late this year [November 1 earliest – December 1 more likely.]

Trans 233.08 (1) Setback requirements and restrictions.

> [The following is the current general restriction within the setback area and my statement of the current ways to be relieved from the restriction.]

"(1) Except as provided in this section[1] or in s. Trans 233.11[2] or, with respect to connecting highways, as provided in s. 86.16 (1)[3], Stats., no person may erect, install or maintain any structure[4] or improvement[5] within a setback area determined under sub. (2) or (3). "

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[1] Trans 233.08(3m) – This refers to the special procedure in this section, i.e. Trans 233.08, for utilities.

[2] Trans 233.11 – This is the procedure for granting variances – to be renamed Special Exceptions.

[3] Section 86.16(1), Stats. – This is the state law that allows utilities within highway right of way subject to written approval of WISDOT with respect to State Trunk Highway and local authorities with respect to connecting highways.

> "(1) Any person, firm or corporation, including any foreign corporation authorized to transact business in this state may, subject to ss. 30.44 (3m), 30.45 and 196.491 (3) (d) 3m., **with the written consent** of the department with respect to state trunk highways, and with the written consent of local authorities with respect to highways under their jurisdiction, including connecting highways, construct and operate **telegraph, telephone or electric lines, or pipes or pipelines for the purpose of transmitting messages, water, heat, light or power along, across or within the limits of the highway**."

[4] Trans 233.015 (7) defines "structure" as follows:

> "(7) "Structure" includes a temporary or non-permanent addition to or betterment of real property that is portable in nature, but that adversely affects the safety of entrance upon or departure from state trunk or connecting highways or the preservation of public interest and investment in those highways, as determined by the department. "Structure" does not include portable swing sets, movable lawn sheds without pads or footings, and above ground swimming pools without decks."

[So this sentence means there are four ways to erect something within a setback area.

1. For utilities, follow the procedures set forth.
2. Obtain a variance.
3. For utilities within highway, get local approval on connecting highways or WISDOT approval on state trunk highways. [This is a "technical" exception.]
4. Don't fall within definition of "structure" or within definition of "improvement."

[The following sentence in the current rule means that existing structures or improvements within a setback at the time of a land division are grandfathered and allowed to continue to exist.]

Trans 200.08 (4)

"(4) The land division map shall show the boundary of a setback area on the face of the land division map and shall clearly label the boundary as a highway setback line and **shall clearly show existing structures and improvements lying within the setback area**."

[It is my understanding from our May 23 meeting that this is sufficiently clear and no changes are needed to address the concern for clarify that existing structures or improvements within a setback at the time of a land division are grandfathered and allowed to continue to exist.]

Trans 233.11 Variances.

[This is the ordinary means by which WISDOT currently allows **new** structures or **new** improvements to be placed within the setback area in conjunction with a **new** land division. WISDOT proposes the following changes to this procedure to address the concerns of the Coalition and other interested persons at the May 23 meeting:]

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[5] Trans 233.015 (2) defines "improvement" as follows:

"Improvement" means any permanent addition to or betterment of real property that involves the expenditure of labor or money to make the property more useful or valuable. "Improvement" includes parking lots, driveways, loading docks, in-ground swimming pools, wells, septic systems, retaining walls, signs, buildings, building appendages such as porches, and drainage facilities. "Improvement" does not include sidewalks, terraces, patios, landscaping and open fences."

Trans 233.11 (title) and 233.11 are amended to read as follows:

Trans 233.11 (title) ~~Variances~~ Special Exceptions.

(1) Department consent. No municipality or county may issue a variance or special exception from this chapter without the prior written consent of the department.

(2) Municipal delegation. At the request of a city or village the department may delegate review and approval of land divisions abutting state trunk highways or connecting highways to cities and villages within which the highways lie. The department shall develop a uniform delegation agreement in cooperation with cities and villages. The delegation agreement may also grant a city or village authority to grant special exceptions. Land division approvals and special exceptions granted by cities or village that have been delegated this authority by the department are subject to the internal appeal procedure applicable to land division approvals or special exceptions granted by the department.

~~(2)~~ (3) Special exceptions allowed. The department may ~~not~~ authorize ~~variances~~ special exceptions from this chapter ~~except~~ in appropriate cases ~~in which the literal application of this chapter would result in practical difficulty or unnecessary hardship, or would~~ when warranted by specific analysis of the setback needs as determined by the department ~~defeat an orderly overall development plan of a local unit of government~~. A ~~variance~~ special exception may not be contrary to the public interest and shall be in harmony with the general purposes and intent of ch. 236, Stats., and of this chapter. The department may ~~not~~ grant a ~~variance~~ special exception that adjusts the setback area or authorizes ~~authorizing~~ the erection or installation of any structure or improvement within a setback area as follows:

> [NOTE: I eliminated the phrase "impractical difficulty or unnecessary hardship" to avoid the same adverse legal consequences that could result from the existing use of the word "variance." The Wisconsin Supreme Court has interpreted "variance" and this seemingly innocuous phrase to make it extremely difficult, if not impossible, to grant variances and in so doing has invited third party legal challenges to any "variances" reasonably granted. See **State v. Kenosha County Bd. of Adjust.**, 218 Wis.2d 396, 577 N.W.2d 813 (1998). Our Supreme Court defined "unnecessary hardship" in as an owner having "no reasonable use of the property without a variance." **Id**. at 413. The WISDOT rule is **not** intended to be so restrictive and has **not** been administered in so restrictive a fashion. In its first year of operation, WISDOT granted the vast majority of variances requested in a site and neighborhood-sensitive context based on specific analysis. I moved the phrase "defeat an orderly overall development plan of a local unit of government" to the specific analysis criteria in paragraph (a) below.]

(a) Specific analysis. Upon request for a special exception, the department shall make a specific analysis of the setback needs. The analysis of the department may consider:

1. The structure or improvement proposed and its location,
2. The area in the vicinity of the proposed land division and its existing development pattern,
3. Land use and transportation plans and the effect on orderly overall development plans of local units of government,
4. Existing and future traffic volumes, any traffic impact analysis, access issues, and engineering guidelines as published in the department's Facilities Development Manual, Chapter 11, Design, as amended through March 13, 2000,
5. The objectives of the community, developer and owner,
6. The effect on other property or improvements in the area,
7. The impact of potential highway or other transportation improvements on the continued existence of the proposed structure or improvement,
8. The impact of removal of all or part of the structure or improvement on the continuing viability or conforming use of the business, activity, or use associated with the proposed structure or improvement,
9. Emerging congestion and level of service projections,
10. Transportation safety,
11. Preservation of the public interest and investment in the highway,
12. Other criteria deemed appropriate by the department.

"Level of service" as used in this paragraph means the ability of the facility to satisfy both existing and future travel demand. Six levels of service are defined for each type of highway facility ranging from A to F, with level of service A representing the best operating conditions and level of service F the worst.

[NOTE: I have restructured this paragraph to make it more readable by breaking out and grouping related criteria for consideration. I have inserted a reference to the specific Chapter of the Facilities Development Manual and its date. I have included here the language that used to be in the preamble to this section relating to the "orderly overall development plan of a local unit of government." I've inserted the phrase "existing development pattern" to clarify an exiting criteria and as suggested in our meeting of May 23. I've new criteria: "The effect on other property or improvements in the area," "Preservation of the public interest and investment in the highway," and "Emerging congestion and level of service projections." I believe it is important to retain the express flexibility to consider "other criteria deemed appropriate by the department." The department needs to be able to consider other impacts its special exception decisions may have without giving them undue weight in this list of criteria. For example, will special exceptions reduce the availability of land for pedestrian and bicycle facilities or to accommodate other modes of transportation, have a disproportionate adverse and prohibited disparate effect on low income and minority populations, or have an adverse effect on the environment by requiring future expansions in sensitive areas? I believe the list of criteria should be illustrative and not prescriptive or excessively legalistic. What we are seeking is a reasoned decision based on sound judgment based on facts developed through a