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 Details: Complaint

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2003-04

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

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JUN 04 2003

4 June 2003

HAND-DELIVERED

Senator Joseph Leibham
State Capitol
SENATE, Room 409S
Madison, Wisconsin

Re: Wisconsin Builders Association, et al. v. WI Department of Transportation, et al.
Dane County Case No. 02-CV-3599

Dear Senator Leibham:

Enclosed please find a copy of the Second Amended Complaint, my transmittal letter to Judge DeChambeau, and an Admission of Service form regarding the above-referenced matter. Please sign and date the Admission of Service form, acknowledging receipt of the Second Amended Complaint on behalf of the Joint Committee for Administrative Rules.

Thank you.

Very truly yours,


John A. Kassner

JAK:mem
230462
Senator Leibham ltr
Enclosures

COPY

STATE OF WISCONSIN

**CIRCUIT COURT
BRANCH 1**

DANE COUNTY

WISCONSIN BUILDERS ASSOCIATION

4868 High Crossing Boulevard
Madison, WI 53704-7403,

Case No. 02-CV-3599

WISCONSIN REALTORS ASSOCIATION

4801 Forest Run Road, Suite 201
Madison, WI 53704-7337

Civil Action:

Declaratory Judgment 30701

LAKE STATES LUMBER ASSOCIATION OF WISCONSIN & MICHIGAN

500 S. Stephenson Avenue, Suite 301
Iron Mountain, MI 49801

**NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
WISCONSIN CHAPTER**

10 East Doty Street, Suite 201
Madison, WI 53703

OUTDOOR ADVERTISING ASSOCIATION OF WISCONSIN

44 East Mifflin Street, Suite 101
Madison, WI 53703

TIMBER PRODUCERS ASSOCIATION OF WISCONSIN & MICHIGAN

6343 Highway 8 West
P.O. Box 1278
Rhinelander, WI 54501

WISCONSIN FARM BUREAU FEDERATION, COOPERATIVE

1212 Deming Way
P.O. Box 5550
Madison, WI 53705-0550

WISCONSIN FIREWORKS ASSOCIATION

1240 Sherman Avenue, Suite 201
Madison, WI 53703

WISCONSIN GROCERS ASSOCIATION

1 South Pinckney Street, Suite 504
Madison, WI 53703

WISCONSIN MANUFACTURERS AND COMMERCE

501 East Washington Avenue [53703]
P.O. Box 352
Madison, WI 53701

and

WISCONSIN MERCHANTS FEDERATION

1 East Main Street, Suite 305

Madison, WI 53703

vs.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

and

THOMAS CARLSON, FORMER SECRETARY OF THE

WISCONSIN DEPARTMENT OF TRANSPORTATION

and

FRANK J. BUSALACCHI, CURRENT SECRETARY OF THE

WISCONSIN DEPARTMENT OF TRANSPORTATION

State of Wisconsin

Office of the Secretary of the Wisconsin Department of Transportation

4802 Sheboygan Avenue, Room 120B

P.O. Box 7910

Madison, WI 53707-7910,

Defendants.

ADMISSION OF SERVICE

On the below-mentioned date, I accepted service of the Second Amended Complaint, signed by Attorney John A. Kassner on May 1, 2003, for the above-referenced matter.

Dated this _____ day of _____, 2003.

SIGNED BY: _____

[Please print name]

Joint Committee for Administrative Rules

c/o Senator Joseph Leibham

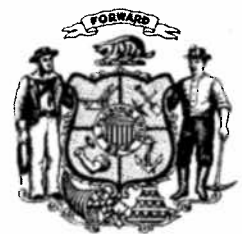
State Capitol

SENATE, Room 409S

Madison, WI



WISCONSIN STATE LEGISLATURE



MURPHY DESMOND ^{PC}

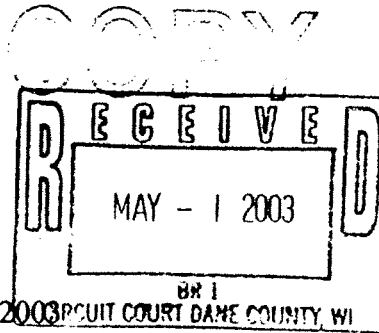
L A W Y E R S

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VIA HAND DELIVERY

Hon. Robert A. DeChambeau
Circuit Court, Branch 1
City-County Building
210 Martin Luther King, Jr., Boulevard
Madison, WI 53703

Re: Wisconsin Builders Association, et al.
vs. Wisconsin Department of Transportation, et al.
Dane County Case No. 02-CV-3599

Dear Judge DeChambeau:

Pursuant to the Scheduling Order of March 7, 2003, I am filing a Second Amended Complaint in this matter. While the principal purpose in filing this pleading was to add a number of additional plaintiffs to the proceeding, I should point out that some changes have been made to the text of individual paragraphs within the Complaint.

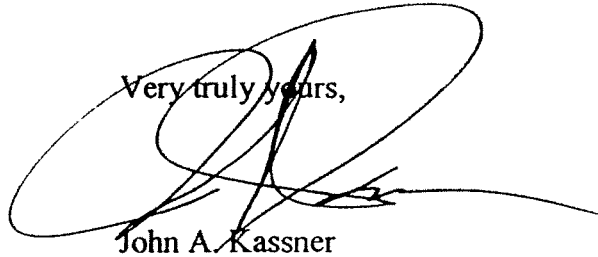
This Second Amended Complaint is intended to entirely supercede the original Complaint and the First Amended Complaint, both of which should be disregarded from this point forward.

As you know, with the change in Governors on January 6, 2003, new cabinet officials are being named by Governor Doyle. Of interest in this case, Thomas Carlson has been replaced as the Secretary of the Department of Transportation by Frank J. Busalacchi. I have amended the caption to reflect this change, but have not deleted Mr. Carlson as a party to the suit. I am open to suggestions as to a more appropriate way of handling this, however.

Hon. Robert A. DeChambeau
1 May 2003
Page 2

I am serving a copy of this pleading upon opposing counsel, Assistant Attorney General Frank D. Remington, by copy of this letter. Thank, you, as always, for the Court's attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "John A. Kassner", is written over the closing "Very truly yours,". The signature is fluid and cursive, with a large loop at the top.

John A. Kassner

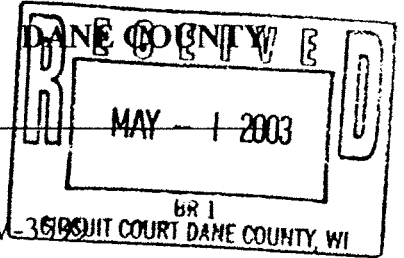
JAK:mem
230462
Court5 let
Enclosure

cc: Attorney Frank D. Remington, Assistant Attorney General (w/enc.)
Wisconsin Builders Association (w/enc.)
Wisconsin REALTORS Association (w/enc.)
Lake States Lumber Association of Wisconsin & Michigan (w/enc.)
National Federation of Independent Business, Wisconsin Chapter (w/enc.)
Outdoor Advertising Association of Wisconsin (w/enc.)
Timber Producers Association of Wisconsin & Michigan (w/enc.)
Wisconsin Farm Bureau Federation, Cooperative (w/enc.)
Wisconsin Fireworks Association (w/enc.)
Wisconsin Grocers Association (w/enc.)
Wisconsin Manufacturers and Commerce (w/enc.)
Wisconsin Merchants Federation (w/enc.)

COPY

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 1



WISCONSIN BUILDERS ASSOCIATION
4868 High Crossing Boulevard
Madison, WI 53704-7403,

Case No. 02-CV-3695

WISCONSIN REALTORS ASSOCIATION
4801 Forest Run Road, Suite 201
Madison, WI 53704-7337

Civil Action:
Declaratory Judgment 30701

LAKE STATES LUMBER ASSOCIATION OF WISCONSIN & MICHIGAN
500 S. Stephenson Avenue, Suite 301
Iron Mountain, MI 49801

**NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
WISCONSIN CHAPTER**
10 East Doty Street, Suite 201
Madison, WI 53703

OUTDOOR ADVERTISING ASSOCIATION OF WISCONSIN
44 East Mifflin Street, Suite 101
Madison, WI 53703

TIMBER PRODUCERS ASSOCIATION OF WISCONSIN & MICHIGAN
6343 Highway 8 West
P.O. Box 1278
Rhineland, WI 54501

WISCONSIN FARM BUREAU FEDERATION, COOPERATIVE
1212 Deming Way
P.O. Box 5550
Madison, WI 53705-0550

WISCONSIN FIREWORKS ASSOCIATION
1240 Sherman Avenue, Suite 201
Madison, WI 53703

WISCONSIN GROCERS ASSOCIATION
1 South Pinckney Street, Suite 504
Madison, WI 53703

WISCONSIN MANUFACTURERS AND COMMERCE

501 East Washington Avenue [53703]

P.O. Box 352

Madison, WI 53701

and

WISCONSIN MERCHANTS FEDERATION

1 East Main Street, Suite 305

Madison, WI 53703

vs.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

and

**THOMAS CARLSON, FORMER SECRETARY OF THE
WISCONSIN DEPARTMENT OF TRANSPORTATION**

and

**FRANK J. BUSALACCHI, CURRENT SECRETARY OF THE
WISCONSIN DEPARTMENT OF TRANSPORTATION**

State of Wisconsin

Office of the Secretary of the Wisconsin Department of Transportation

4802 Sheboygan Avenue, Room 120B

P.O. Box 7910

Madison, WI 53707-7910,

Defendants.

SECOND AMENDED COMPLAINT

COMES NOW the Plaintiffs, Wisconsin Builders Association, Wisconsin Realtors Association, Lake States Lumber Association of Wisconsin & Michigan, National Federation of Independent Business/Wisconsin Chapter, Outdoor Advertising Association of Wisconsin, Timber Producers Association of Wisconsin & Michigan, Wisconsin Farm Bureau Federation/Cooperative, Wisconsin Fireworks Association, Wisconsin Grocers Association,

Wisconsin Manufacturers and Commerce, and Wisconsin Merchants Federation, by Murphy Desmond S.C., their attorneys, by John A. Kassner, and as and for a complaint, allege as follows:

1. Plaintiff, Wisconsin Builders Association (hereinafter "WBA"), is a Wisconsin not for profit corporation, organized in the State of Wisconsin, with its offices located at 4868 High Crossing Boulevard, Madison, Wisconsin 53704-7403. It is, by occupation, a trade association.
2. Plaintiff, Wisconsin REALTORS Association (hereinafter "WRA"), is a non-profit, professional trade association organized under the laws of the State of Wisconsin, with its principal place of business located at 4801 Forest Run Road, Suite 201, Madison, Wisconsin 53704-7337.
3. Plaintiff, Lake States Lumber Association of Wisconsin & Michigan (hereinafter "LSLA"), is a Wisconsin trade association, with its office located at 500 S. Stephenson Avenue, Suite 301, Iron Mountain, Michigan 49801.
4. Plaintiff, National Federation of Independent Business, Wisconsin Chapter (hereinafter "NFIB/Wisconsin Chapter"), is a non profit membership organization, with its offices located at 10 East Doty Street, Suite 201, Madison, Wisconsin 53703.
5. Plaintiff, Outdoor Advertising Association of Wisconsin (hereinafter "OAAW"), is a Wisconsin non-profit trade association, with its offices located at 44 East Mifflin Street, Suite 101, Madison, Wisconsin 53703.
6. Plaintiff, Timber Producers Association of Wisconsin & Michigan (hereinafter "TPA"), is an organization serving professional landowners, resource managers,

loggers, trucker, and converting facilities, with its offices located at 6343 Highway 8 West, mailing address P.O. Box 1278, Rhinelander, Wisconsin 54501.

7. Plaintiff, Wisconsin Farm Bureau Federation, Cooperative (hereinafter "WFBF"), is a Wisconsin cooperative organized under Chapter 185, Wis. Stats. It is a tax exempt organization under §501(c)(5) I.R.C. WFBF's principal place of business is located at 1212 Deming Way, mailing address P. O. Box 5550, Madison, Wisconsin 53705-0550
8. Plaintiff, Wisconsin Fireworks Association (hereinafter "WFA"), is a Wisconsin trade association, with its office located at 1240 Sherman Avenue, Suite 201, Madison, Wisconsin 53703.
9. Plaintiff, Wisconsin Grocers Association (hereinafter "WGA"), is a statewide trade association, with its office located at 1 South Pinckney Street, Suite 504, Madison, Wisconsin 53703.
10. Plaintiff, Wisconsin Manufacturers and Commerce (hereinafter "WMC"), is a nonstock, not-for-profit corporation organized under Wisconsin law, with its principal office located at 501 E. Washington Avenue, mailing address P.O. Box 352, Madison, Wisconsin 53701.
11. Plaintiff, Wisconsin Merchants Federation (hereinafter "WMF"), is a Wisconsin 501(c)6, non-profit trade association, with its offices located at 1 East Main Street, Suite 305, Madison, Wisconsin 53703.
12. Defendant, State of Wisconsin Department of Transportation, has its principal offices at 4802 Sheboygan Avenue, Madison, Wisconsin 53707-7910.

13. Defendant Thomas Carlson was the Secretary of the Wisconsin Department of Transportation at the time of the filing of this action on November 15, 2002, whose office was located at 4802 Sheboygan Avenue, Room 120B, Madison, Wisconsin 53707-7910. Defendant Frank J. Busalacchi is the current Secretary of Transportation, whose office is located at 4802 Sheboygan Avenue, Room 120B, Madison, Wisconsin 53707-7910.

NATURE OF ACTION

14. This is an action for a declaratory judgment pursuant to §806.04 and §227.40, Wis. Stats.
15. The purpose of this action is to obtain a judicial declaration that the Department of Transportation, and former Secretary of Transportation Thomas Carlson and current Secretary of Transportation Frank J. Busalacchi, unlawfully exceeded their authority in enacting and continuing to enforce amendments to TRANS 233; that they violated constitutional provisions in enacting amendments to TRANS 233; and, that the Defendants did not comply with statutory rule-making procedures in amending TRANS 233.

STANDING OF PLAINTIFFS

PLAINTIFF WISCONSIN BUILDERS ASSOCIATION (WBA)

16. The Wisconsin Builders Association is a non-profit trade association comprised of more than 6,500 separate businesses across the State of Wisconsin engaged in residential and light commercial construction, remodeling and related industries.

17. Collectively, WBA's members employ more than 250,000 persons in the State of Wisconsin.
18. One of WBA's principal policy goals is the promotion of legal and public policies that lead to greater availability, quality and affordability of housing and commercial property for the people and businesses of Wisconsin.
19. The ownership, development, and division of parcels of land, and the creation of condominiums are fundamental parts of the housing and residential construction industry in Wisconsin.
20. TRANS 233.02(1) states that TRANS 233 is applicable:

“ . . . 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.”
21. It is a routine part of the business of the members of the Plaintiff Wisconsin Builders Association to own, develop and divide land into parcels, and to create condominiums on land that abuts state trunk highways, connecting highways, or service roads within the State of Wisconsin. Consequently, compliance with the provisions of TRANS 233 is a routine part of doing business in the State of Wisconsin for the members of the Association.

22. The provisions of TRANS 233, as currently drafted, interfere with and impair the legal rights and privileges of, and are causing injury to, the property interests of the members of the Wisconsin Builders Association who own such lands.
23. The provisions of TRANS 233, as currently drafted, interfere with and impair the legal rights and privileges of, and are causing injury to, the achievement of the stated goals, objectives and interests of the Wisconsin Builders.
24. Clarification of the laws applicable to the ownership, development and division of land and to the creation of condominiums on such land is needed to prevent confusion and harm to the interests of the Plaintiff Wisconsin Builders Association and of its members.

PLAINTIFF WISCONSIN REALTORS ASSOCIATION (WRA)

25. The Wisconsin REALTORS Association is a non-profit, professional trade association organized under the laws of the State of Wisconsin. The WRA membership consists of approximately 13,000 real estate agents, brokers, developers, and other real estate professionals throughout Wisconsin.
26. The WRA participates, through its Legal Action program, in litigation that furthers the policies of the WRA and benefits the WRA membership, the real estate industry, and property owners as a whole.
27. One of the WRA's primary public policy objectives is to represent and protect the interests of property owners in transactional, public policy, and legal matters. A property owner's abilities to use, develop and divide land are fundamental rights of

property ownership that are important to all private property owners and to our members.

28. While complying with governmental regulations is a necessary part of property ownership, compliance with Wisconsin Administrative Code Ch. Trans. 233 ("Trans. 233") has an unreasonable and significant impact on the ability of property owners and members of the WRA to use, develop, and divide land located adjacent to state trunk highways by: (a) denying all economically viable use of land within the setback area adjacent to state trunk highways; and (b) increasing the amount of land and costs necessary to situate improvements on land adjacent to state trunk highways.
29. As a result, Trans 233 has a negative impact on the costs of owning, developing, and dividing land adjacent to state trunk highways.
30. The court's clarification of the Department of Transportation's authority to enact Trans 233 and enforce its provisions is necessary to prevent further harm and confusion for property owners in Wisconsin.

PLAINTIFF LAKE STATES LUMBER ASSOCIATION OF WI & MICHIGAN (LSLA)

31. Lake States Lumber Association of Wisconsin and Michigan is a Wisconsin trade association recognized as a responsible voice on forestry related issues throughout Wisconsin and Michigan.
32. It is an active participant in political and resource matters that have any bearing on its membership.
33. TRANS 233 has an adverse impact on property rights, which is of great interest to LSLA members who own forest land and land used in manufacturing.

34. LSLA has been active in property rights issues and opposes this rule as an unjust taking of property.

**PLAINTIFF NATIONAL FEDERATION OF INDEPENDENT BUSINESS (NFIB),
WISCONSIN CHAPTER**

35. Plaintiff National Federation of Independent Business, Wisconsin Chapter (NFIB/Wisconsin Chapter), is a non-profit membership organization with 13,000 member firms.
36. A majority of the members of NFIB/Wisconsin Chapter, employ fewer than twenty workers, and are located throughout Wisconsin.
37. These firms have a strong interest in public issues that interfere with their ability to freely and independently utilize their property.
38. The Trans 233 proposal clearly compromises the commercial interests of these small businesses, and as a result, severely compromises their economic viability.

PLAINTIFF OUTDOOR ADVERTISING ASSOCIATION OF WISCONSIN (OAAW)

39. The Outdoor Advertising Association of Wisconsin is a non-profit trade association comprised of businesses across the State of Wisconsin which own, and offer advertising opportunities on, outdoor advertising signs or billboards.
40. The members of the OAAW own signs which are used to advertise products and services offered by Wisconsin businesses.
41. Outdoor advertising signs are predominately used by tourism-related businesses in the State. As a result, the OAAW and its clients/customers contribute significantly to the economy of the State.

42. The ownership, leasehold interest, development, and division of parcels of land are fundamental parts of the outdoor advertising industry in Wisconsin. It is a routine part of the business of the members of the Outdoor Advertising Association of Wisconsin to own, lease, develop and divide into parcels land that abuts state trunk highways, connecting highways, or service roads within the State of Wisconsin. Consequently, compliance with the provisions of TRANS 233 is a routine part of doing business in the State of Wisconsin for the members of the Association.
43. Enforcement by the Defendants of the provisions of TRANS 233, as currently drafted, is interfering with and impairing the legal rights and privileges of, and is causing injury to, the property interests of the members of the Outdoor Advertising Association of Wisconsin who own and/or lease such lands.
44. Enforcement of the provisions of TRANS 233, as currently drafted, is interfering with and is causing injury to the achievement of the business goals and objectives of the Outdoor Advertising Association of Wisconsin.
45. All of this adversely affects the cost of providing advertising opportunities to those who do business in Wisconsin.
46. Clarification of the laws applicable to the ownership, development and division of land is needed to protect the interests of the OAAW and of its members.

PLAINTIFF TIMBER PRODUCERS ASSOCIATION OF WISCONSIN & MICHIGAN (TPA)

47. Timber Producers Association of Michigan & Wisconsin is an organization serving professional landowners, resource managers, loggers, truckers, and converting facilities.

48. It promotes public understanding that our Lake States forests are an important sustainable source of natural resources.
49. TPA keeps its membership informed of recent actions, both legislative and regulatory, on matters affecting property rights, forest product development and environmental matters.
50. Many TPA members are land tract owners who would be adversely effected by provisions of TRANS 233.
51. TPA views TRANS 233 as a taking of property rights without compensation.

PLAINTIFF WISCONSIN FARM BUREAU FEDERATION, COOPERATIVE (WFBF)

52. The Wisconsin Farm Bureau Federation, Cooperative is a Wisconsin cooperative organized under Chapter 185, Wis. Stats. It is a tax exempt organization under §501(c)(5) I.R.C. It was formed in 1920, for the purpose of improving the economic and educational position and political effectiveness of Wisconsin farmers.
53. The WFBF has over 46,000 members and represents 59 percent of Wisconsin farms with gross sales of \$25,000.00.
54. The WFBF serves as the voice of agriculture in Wisconsin, focusing primarily on educational and lobbying efforts for the benefit of its members and the general public in promoting Wisconsin's \$40 billion annual food and agricultural product industry.
55. Most of WFBF's members are landowners and many own property adjacent to state trunk highway, connecting highways and service roads within the State of Wisconsin, and are directly impacted by the provisions of TRANS 233.

PLAINTIFF WISCONSIN FIREWORKS ASSOCIATION (WFA)

56. Wisconsin Fireworks Association is a Wisconsin trade association which focuses on matters pertaining to the sale of consumer products.
57. WFA members own retail fireworks stores, gas stations and other stores which would be subject to uncompensated taking of property rights by the Wisconsin Department of Transportation under TRANS 233.

PLAINTIFF WISCONSIN GROCERS ASSOCIATION (WGA)

58. The Wisconsin Grocers Association, Inc., is a statewide trade association comprised of more than 1,200 members across the State of Wisconsin from the retail, wholesale, manufacturing and supplier grocery industry. The grocery industry employs more than 60,000 people and generates more than \$6 billion in sales in Wisconsin.
59. A major segment of the retail industry, retailers and their suppliers are totally dependent on the roadway infrastructure of the state, including local, county, state and interstate roadways. WGA's fleet of trucks operate 24/7 to develop and support wholesalers and retailers. Consequently, compliance with the provisions of TRANS 233 is a routine part of doing business in the State of Wisconsin for the members of the WGA.
60. Enforcement by the Defendants of the provisions of TRANS 233, as currently drafted, is interfering with and impairing the legal rights and privileges of, and is causing injury to, the property interests of the members of the WGA who own such lands.
61. Enforcement of the provisions of TRANS 233, as currently drafted, is interfering with and is causing injury to the achievement of the stated goals and objectives of the

WGA members by increasing the amount of lands necessary to provide commercial development in proximity to certain highways, resulting in sprawl and environmental waste, and substantially increasing the cost to the Plaintiff WGA's members of providing commercial development.

62. All of this adversely affects the cost of providing housing and commercial property to the consuming public in the State of Wisconsin.
63. Clarification of the laws applicable to the ownership, development and division of land, and to the creation of condominiums on such land is needed to prevent confusion and harm to the interests of the Plaintiff WGA and of its members.

PLAINTIFF WISCONSIN MANUFACTURERS AND COMMERCE (WMC)

64. Wisconsin Manufacturers and Commerce is a nonstock, not-for-profit corporation organized under Wisconsin law.
65. WMC is the largest representative of employer interest in the State of Wisconsin. Members of WMC presently include over 3,700 Wisconsin employers. The membership represents a broad cross-section of the state's economic activity.
66. In addition, WMC's membership includes roughly 75 trade associations and more than 100 local Chambers of Commerce.

PLAINTIFF WISCONSIN MERCHANTS FEDERATION (WMF)

67. The Wisconsin Merchants Federation is a non-profit trade association comprised of more than 6,000 main street businesses across the State of Wisconsin engaged in retail commerce. Collectively, WMF members employ more than 200,000 persons in the State of Wisconsin.

68. One of WMF's principle policy goals is to promote the benefits of market competition, and the benefits of lower prices and quality goods and services that flow from that.
69. Compliance with the provisions of TRANS 233 is a routine part of doing business in the State of Wisconsin for the members of WMF.
70. Enforcement by the Defendants of the provisions of TRANS 233, as currently drafted, is interfering with and impairing the legal rights and privileges of, and is causing injury to, the property interests of the members of WMF who own or otherwise conduct business on such lands.
71. Enforcement of the provisions of TRANS 233, as currently drafted, is interfering with and is causing injury to the achievement of the stated goals and objectives of the Wisconsin Merchants Federation by increasing the amount of lands necessary to conduct retail business in proximity to certain highways, resulting in sprawl, environmental waste, and impeding business retention and expansion, job creation and economic development generally.
72. It substantially increases the cost to WMF's members of providing goods and services to consumers.
73. Clarification of the laws applicable to the ownership, development, and division of land, and to commercial commerce on such land, is needed to prevent confusion and harm to the interests of the WMF and of its members.

FIRST CAUSE OF ACTION

74. Paragraphs 1 through 74 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

75. Land division law in Wisconsin is principally governed by the provisions of Chapter 236 of the Wisconsin Statutes.

76. Wisconsin Statute §236.12(2)(a) reads, in relevant part, as follows:

(2) Within 2 days after a preliminary or final plat is submitted for approval, legible **copies**, together with a list of the authorities to which the plat must be submitted for approval under s. 236.10 or objection under this subsection, furnished by the subdivider at the subdivider's expense, **shall be sent**, by the clerk or secretary of the approving authority to which the plat is submitted, **to the following agencies which have authority to object to the plat:**

(a) **Two copies for each of the state agencies required to review the plat to the department which shall examine the plat for compliance with ss. 236.15, 236.16, 236.20 and 236.21(1) and (2). If the subdivision abuts or adjoins a state trunk highway or connecting highway, the department shall transmit 2 copies to the department of transportation so that agency may determine whether it has any objection to the plat on the basis of its rules as provided in s. 236.13. . . .**
(Emphasis supplied.)

77. Wisconsin Statute §236.13 sets forth the Basis for Approval of a preliminary or final plat of a subdivision. Subsection (1)(e) of that section reads as follows:

(1) **Approval of the preliminary or final plat shall be conditioned upon compliance with:**

.....

(e) The rules of the department of transportation relating to provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways and for the preservation of the public interest in such highways.

78. Subsection (3) of that Section reads as follows:

(3) No approving authority or agency having the power to approve or object to plats shall condition approval upon compliance with, or base an objection upon, any requirement other than those specified in this section. (Emphasis supplied.)

79. TRANS 233, DIVISION OF LAND ABUTTING A STATE TRUNK HIGHWAY OR CONNECTING HIGHWAY, is a chapter of the Wisconsin Administrative Code enacted by the Defendant, State of Wisconsin Department of Transportation, under the direction of former Secretary of Transportation Thomas Carlson, and current Secretary of Transportation Frank J. Busalacchi, on February 1, 1999.

80. §TRANS 233.012(1) reads as follows:

233.012(1) 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.** (Emphasis supplied.)

81. By enacting this provision, the Defendants exceeded their statutory authority by attempting to regulate the division of lands by certified survey map, under §236.34, Wis. Stats.

82. By enacting this provision, the Defendants exceeded their statutory authority by attempting to regulate the creation of condominium plats under §703.11, Wis. Stats.

83. By enacting this provision, the Defendants exceeded their statutory authority by attempting to regulate the division of lands abutting service roads, if such service roads do not comprise state trunk highways or connecting highways.

SECOND CAUSE OF ACTION

84. Paragraphs 1 through 83 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

85. §TRANS 233.012(2) and (3) read as follows:

233.012(2) Structures and improvements lawfully placed in a setback area under ch. Trans 233 prior to February 1, 1999, or lawfully placed in a setback area before a land division, are explicitly allowed to continue to exist. Plats that have received preliminary approval prior to February 1, 1999, are not subject to the standards under this chapter as first promulgated effective February 1, 1999, if there is no substantial change between the preliminary and final plat, but are subject to ch. Trans 233 as it existed prior to February 1, 1999. Plats that have received final approval prior to February 1, 1999, are not subject to the standards under this chapter as first promulgated effective February 1, 1999, but are subject to ch. Trans 233 as it existed prior to February 1, 1999. Land divisions on which the department acted between February 1, 1999 and February 1, 2001 are subject to ch. Trans 233 as it existed February 1, 1999.

233.012(3) Any structure or improvement lawfully placed within a setback area under ch. Trans 233 prior to February 1, 1999, or lawfully placed within a setback area before a land division, may be kept in a state of repair, efficiency or validity in order to preserve from failure or decline, and if unintentionally or tortiously destroyed, may be replaced substantially in kind.

86. By enacting TRANS 233.012(2) and (3), the Defendants exceeded their statutory authority, by attempting to regulate the continuing use of lands which have previously been divided, and which are not now the subject of a proposal for land division.

THIRD CAUSE OF ACTION

87. Paragraphs 1 through 86 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

88. TRANS 233.017 reads as follows:

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.

89. By enacting TRANS 233.017, the Defendants exceeded their statutory authority, by attempting to regulate the division of lands which do not abut or adjoin either a state trunk highway or a connecting highway.

FOURTH CAUSE OF ACTION

90. Paragraphs 1 through 89 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

91. TRANS 233.05(1) reads, in relevant part, as follows:

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 special exception for that purpose approved by the department, district office or reviewing municipality under s. Trans 233.11.

Note: The denial of a special exception for access or connection purposes is not the functional equivalent of the denial of a permit under s. 86.07(2), Stats. Appeal of disapproval of a plat (and thus disapproval of a special exception) is available only by certiorari under s. 236.13(5), Stats. There is no right to a contested case hearing under ss. 227.42 or 227.51 (1) for the denial of a special exception.

92. By enacting TRANS 233.05, the Defendants exceeded their statutory authority, by attempting to regulate the division of lands which do not abut or adjoin either a state trunk highway or a connecting highway.
93. By enacting TRANS 233.05, the Defendants are attempting to deprive property owners of due process rights guaranteed to them under the State and Federal Constitutions.

FIFTH CAUSE OF ACTION

94. Paragraphs 1 through 93 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
95. TRANS 233.08(1) and (2) read, in relevant part, as follows:

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.

(c) At least once every 2 years, the department shall produce general reference maps that generally identify major intersections and the highways specified in pars. 1. to 5. The department may reduce or extend, by not more than 3 miles along the highway, the area subject to a setback established under par. (a) or (b) to establish logical continuity of a setback area or to terminate the setback area at a readily identifiable physical feature or legal boundary, including a highway or property boundary. Persons may seek special exceptions to the setback requirement applicable to these major intersections and highways, as provided in s. Trans 233.11 (3). The setback area established under par. (a) or (b) applies only to major intersections and to highways identified as:

1. State trunk highways and connecting highways that are part of the national highway system and approved by the federal government in accordance with 23 USC 103(b) and 23 CFR 470.107(b).
2. State trunk highways and connecting highways that are functionally classified as principal arterials in accordance with procedure 4-1-15 of the department's facilities development manual dated July 2, 1979.
3. State trunk highways and connecting highways within incorporated areas, within an unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or within an unincorporated area within 12 miles of a fourth class city or a village.

4. State trunk highways and connecting highways with average daily traffic of 5,000 or more.

5. State trunk highways and connecting highways with current and forecasted congestion projected to be worse than level of service "C," as determined under s. Trans 210.05(1), within the following 20 years. (Emphasis supplied.)

96. TRANS 233.015(2) reads as follows:

(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.

97. By enacting TRANS 233.08(1) and (2), the Defendants exceeded their statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.

98. By enacting TRANS 233.08(1), the Defendants exceeded their statutory authority, by attempting to absolve themselves of their duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.

99. By enacting TRANS 233.08(1) and (2), the Defendants attempt to violate constitutional rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Section 13 of the Wisconsin

Constitution to those they regulate by unlawfully taking a development easement without just compensation.

100. By enacting TRANS 233.08(1) and (2), the Defendants attempt to violate constitutional rights to equal protection of the laws guaranteed to those they regulate under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 1 of the Wisconsin Constitution.

SIXTH CAUSE OF ACTION

101. Paragraphs 1 through 100 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

102. TRANS 233.08(3) reads, in relevant part, as follows:

(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.

103. By enacting TRANS 233.08(3), the Defendants exceeded their statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting

highways, nor which relate to the preservation of the public interest and investment in such highways.

104. By enacting TRANS 233.08(3), the Defendants exceeded their statutory authority, by attempting to absolve themselves of their duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.
105. By enacting TRANS 233.08(3) the Defendants attempt to violate constitutional rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Section 13 of the Wisconsin Constitution to those they regulate by unlawfully taking a development easement without just compensation.
106. By enacting TRANS 233.08(3), the Defendants attempt to violate constitutional rights to equal protection of the laws guaranteed to those they regulate under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 1 of the Wisconsin Constitution.

SEVENTH CAUSE OF ACTION

107. Paragraphs 1 through 106 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
108. TRANS 233.08(3m) reads, in relevant part, as follows:

(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.
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. (Emphasis supplied.)

109. By enacting TRANS 233.08(3m), the Defendants exceeded their statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.
110. By enacting TRANS 233.08(3m), the Defendants exceeded their statutory authority, by attempting to absolve themselves of their duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.

EIGHTH CAUSE OF ACTION

111. Paragraphs 1 through 110 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
112. TRANS 233.08(5) reads, in relevant part, as follows:

(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 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----." (Emphasis supplied.)

113. By enacting TRANS 233.08(5), the Defendants exceeded their statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.
114. By enacting TRANS 233.08(5), the Defendants attempt to violate constitutional rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Section 13 of the Wisconsin Constitution to those they regulate by unlawfully taking a development easement without just compensation.
115. By enacting TRANS 233.08(5), the Defendants attempt to violate constitutional rights to equal protection of the laws guaranteed to those they regulate under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 1 of the Wisconsin Constitution.
116. By enacting TRANS 233.08(5), the Defendants exceeded their statutory authority, by attempting to absolve themselves of their duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.

NINTH CAUSE OF ACTION

117. Paragraphs 1 through 116 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

118. TRANS 233.11 reads, in relevant part, as follows:

Trans 233.11 Special exceptions.

...

(3) (a) Special exceptions for setbacks allowed. The department, district office or, if authorized by a delegation agreement under sub. (7), reviewing municipality may authorize special exceptions from this chapter only in appropriate cases when warranted by specific analysis of the setback needs, as determined by the department, district office or reviewing municipality. A 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, district office or reviewing municipality may grant a special exception that adjusts the setback area or authorizes the erection or installation of any structure or improvement within a setback area only as provided in this subsection. The department, district office or reviewing municipality may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter.

...

(d) Allow in setback - removal does not affect viability. The department, district office or reviewing municipality may authorize the erection of a structure or improvement within a setback area only if the department, district office or reviewing municipality determines that any required removal of the structure or improvement, in whole or in part, will not affect the continuing viability or conforming use of the business, activity, or use associated with the proposed structure or improvement, and will not adversely affect the community in which it is located. **Any owner or user who erects a structure or improvement under a special exception granted under this paragraph assumes the risk of future department-required removal of the structure or improvement and waives any right to compensation, relocation assistance or damages associated with the department's acquisition of that land for a transportation improvement, including any damage to property outside the setback caused by removal of the structure or improvement in the setback that was allowed by special exception. The department,**

district office or reviewing municipality may not grant a special exception within an existing setback area, unless the owner executes an agreement or other appropriate document required 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 special exception. The department, district office or reviewing municipality may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter. The department, district office or reviewing municipality shall require the executed agreement or other appropriate document to be recorded with the register of deeds under sub. (7) as part of the special exception. (Emphasis supplied.)

119. By enacting TRANS 233.11, the Defendants exceeded their statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.
120. By enacting TRANS 233.11, the Defendants attempt to violate constitutional rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Section 13 of the Wisconsin Constitution to those they regulate by unlawfully taking a development easement without just compensation.
121. By enacting TRANS 233.11, the Defendants attempt to violate constitutional rights to equal protection of the laws guaranteed to those they regulate under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 1 of the Wisconsin Constitution.

122. By enacting TRANS 233.11, the Defendants exceeded their statutory authority, by attempting to absolve themselves of their duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.

WHEREFORE, the Plaintiffs demand judgment against the Defendants:

- A. Declaring that those provisions of TRANS 233 which attempt to regulate the division of land by certified survey map are void and unenforceable.
- B. Declaring that those provisions of TRANS 233 which attempt to regulate the creation of condominium plats are void and unenforceable.
- C. Declaring that those provisions of TRANS 233 which attempt to regulate the division of land abutting service roads by virtue of that abutment are void and unenforceable.
- D. Declaring that those provisions of TRANS 233 which attempt to regulate the use of lands which are not currently the subject of a subdivision plat approval under §236.12, Wis. Stats., are void and unenforceable.
- E. Declaring that those provisions of TRANS 233 which deny a means of review to a property owner, whose request for a special exception permit to obtain access to a state trunk highway or connecting highway has been disapproved, are void and unenforceable.
- F. Declaring that those provisions of TRANS 233 which attempt to regulate activities which do not relate to the provision of a safe entrance upon and departure from abutting state trunk highways or connecting highways, nor which relate to the

preservation of the public interest and investment in such highways, are void and unenforceable.

- G. Declaring that those provisions of TRANS 233 which attempt to regulate the use of land adjacent to certain enumerated highways in order to reduce the cost of future exercises of eminent domain by the Defendants are void and unenforceable.
- H. Declaring that those provisions of TRANS 233 which attempt to limit the compensation payable by the Defendants under Chapter 32, Wisconsin Statutes, are void and unenforceable.
- I. Declaring that those provisions of TRANS 233 which attempt to preclude uses of land subject to regulation under TRANS 233 so as to limit the compensation that will be payable under Chapter 32, Wisconsin Statutes, are void and unenforceable.

Dated this 1st day of May, 2003.

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