

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2181/P1dn

ISR:.....

February 18, 1999

Representative Albers:

Please note that this draft does not grant a municipality absolute immunity from claims for damages sustained as a result of the negligent repair or maintenance of a highway. The effect of this draft is to provide a municipality with immunity from suits arising out of negligent repair or maintenance of a highway if the duty to repair or maintain a highway is a discretionary duty. Wisconsin courts define a discretionary duty as a duty that involves a choice or judgment on the part of the government.

Section 893.40 (4) of the statutes grants immunity to government entities for discretionary acts. Striking the language in section 81.15 that allows claims for damages against a municipality for "insufficiency or want of repairs of any highway" does not guarantee absolute immunity from liability. If the repair and maintenance of the highway is not a discretionary duty, then the municipality may be held liable. If, however, repair and maintenance is a discretionary duty, section 893.80 (4) ensures that a municipality will not face liability.

At this time, it is difficult to determine to what extent highway maintenance and repair is a discretionary duty. The Wisconsin Supreme Court in Morris declined to decide whether Juneau County's duty to keep the highway in good repair constituted a discretionary duty. If your intent is to ensure that municipalities are immune from all claims for damages arising from an "insufficiency or want of repairs of any highway," it might be best to amend the section to include language that affirmatively states that a municipality may not be held liable for damages resulting from an insufficiency or lack of repairs of any highway.

Finally, repealing section 81.17