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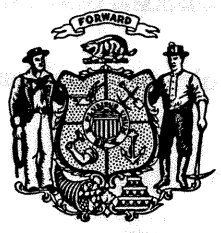
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FORM 2

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 00-109

AN ORDER to renumber Trans 233.012 and 233.12; to renumber and amend Trans 233.11 (2); to amend Trans 233.01, 233.05 (1) (intro.), 233.105 (1), (2) (intro.) and (3) and 233.11 (title) and (1); to repeal and recreate Trans 233.03 (5); and to create Trans 233.012 (2), 233.015 (1m) and (2m), 233.03 (6) to (8), 233.08 (2) (c) and (3n), 233.11 (3) (b) to (f), (4) and (5) and 233.13 (2), relating to division of land abutting a state trunk or connecting highway.

Submitted by **DEPARTMENT OF TRANSPORTATION**

06-30-00 RECEIVED BY LEGISLATIVE COUNCIL.
07-28-00 REPORT SENT TO AGENCY.

RS:WF:jal;tlu

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

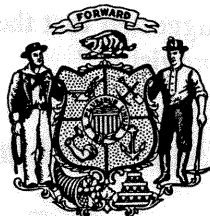
Comment Attached YES NO

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CLEARINGHOUSE RULE 00-109

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

a. It is suggested that the statutory sections cited as authority for Clearinghouse Rule 00-109 be listed in ascending numerical order. In addition, it is suggested that the phrase "and the federal laws and regulations thereby expressly endorsed and adopted by the Legislature, including 23 U.S.C. 109, 134, 135, 138 and 315, Stats.," be deleted. These federal statutes are already included in the statutory citations to ss. 84.015 and 84.03 (1), Stats., and, therefore, do not need to be cited as statutory authority for Clearinghouse Rule 00-109.

b. Section Trans 233.03 (5) (c) (except the last sentence) and (d) are explanatory and should be placed in a note to the rule rather than being drafted in the rule itself. [See s. 1.09 (1), Manual.]

c. It is suggested that the word "may" be substituted for the word "will" in the fourth sentence of s. Trans 233.03 (6).

d. It is suggested that the department indicate where copies of the Wisconsin Department of Transportation Facilities Development Manual, which is cited in s. Trans 233.08 (2) (c) 2., may be obtained.

e. The note to s. Trans 233.08 (2) (c) contains references to "the current rule." This reference will become ambiguous once Clearinghouse Rule 00-109 is promulgated and as the rule may be amended over future years. Therefore, it is suggested that the reference be made to

s. Trans 233.08 (1) immediately prior to the effective date of Clearinghouse Rule 00-109. [See s. 1.01 (9) (b), Manual.]

f. In s. Trans 233.105 (3), it is suggested that the word "subsection" be substituted for both occurrences of the phrase "drainage provision."

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. It is suggested that the last sentence of s. Trans 233.01 be either revised or deleted from Clearinghouse Rule 00-109. The two sentences of s. 233.01 prior to the last sentence cite explicit statutory authority to adopt minimum standards for land divisions. The statutes cited as statutory authority for minimum standards for land divisions in the last sentence do not explicitly give authority to the Department of Transportation to impose minimum standards for land divisions. Rather, these statutes relate to duties of the department with respect to the state trunk highway system that the department believes require it to impose minimum standards for land divisions in order to effectively implement the statutory duties. It is suggested that the last sentence of s. Trans 233.01 be revised to state this. Alternatively, the sentence could be deleted and the explanation could be provided more explicitly in the first paragraph of the note following s. Trans 233.01.

b. It is suggested that the definition of "in-ground swimming pool" in s. Trans 233.015 (2m) be redrafted. First, the rule would be more clear if the phrase "of a group or association" were placed after the word "members." Second, the second sentence of the definition implies that an above-ground swimming pool with a deck is an in-ground swimming pool as defined in s. Trans 233.015 (2m). This ambiguity should be clarified. Third, it is suggested that the defined term be "nonresidential in-ground swimming pool" because the definition does not apply to residential swimming pools, whether they are in-ground or not.

c. In s. Trans 233.03 (5), it is not clear why the introductory language states that the department, district or municipality shall complete the review when the remainder of the subsection provides that reviews are conducted by the district or municipality. The department should address this ambiguity.

d. Section Trans 233.03 (5) (a) does not provide that a request for a review of a land division will receive an automatic certificate of nonobjection if the Department of Transportation 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. This was an agreed-upon change by the department in negotiations with the Coalition to Reform ch. Trans 233, as is memorialized in the memorandum from William Ford, Senior Staff Attorney, to Representative David Brandemuehl, dated February 18, 2000, and which is referenced in the analysis to Clearinghouse Rule 00-109. In addition, it is suggested that the phrase "after the date that a request to review a land division is received by the department" be placed at the end of the second sentence of s. Trans 233.03 (5) (a).

e. In the first sentence of s. Trans 233.03 (6), the first comma should be replaced by the word "or."

f. In s. Trans 231.105 (1), language should be added after the phrase "owners or users" in order to specifically state what is being owned or used. Also, the second sentence of this subsection could be drafted in a more straightforward fashion; for example: "A landowner, user or land divider is not responsible for noise resulting from government expansion of the capacity of the highway when additional through lanes have been constructed."

g. Section Trans 233.11 (3) (c) would be more clear if the last sentence were drafted in a manner similar to the following: "The department may not adjust the 15 foot setback line for those highways identified under s. Trans 233.08 (3n) unless a comprehensive local setback ordinance that is applicable to property in the land division expressly sets a closer setback line."

The Wisconsin Department of Transportation proposes an order to renumber TRANS 233.012 and 233.12; renumber and amend TRANS 233.11(2); amend TRANS 233.01, 233.05(1)(intro.), 233.105(1), (2)(intro.) and (3), and 233.11(title) and (1); repeal and recreate TRANS 233.03(5); and create TRANS 233.012(2), 233.015(1m) and (2m), 233.03(6) to (8), 233.08(2)(c) and (3n), 233.11(3)(b) to (f), (4) and (5), and 233.13(2), relating to division of land abutting a state trunk or connecting highway.

**NOTICE OF HEARING
AND
TEXT OF PROPOSED RULE**

NOTICE IS HEREBY GIVEN that pursuant to ss. 15.04(1)(g), 85.16(1), 86.07(2), 85.025, 85.05, 84.01(15), 84.015, 84.03(1), 84.01(2), 85.02, 88.87(3), 20.395(9)(qx), 236.12(2)(a) and (7), 236.13(1)(e) and (3), 1.11(1), 1.12(2); 1.13(3), as created by 1999 Wis. Act 9; 114.31(1), 84.01(17), 66.30(2); and 86.31(6), Stats., as affected by 1999 Wis. Act 9; and interpreting ss. 1.13(2), 16.9651(2) and 66.0295(2)(c), Stats., all as created by 1999 Wis. Act 9; 15.04(1)(g), 1.11, 1.12, 32.035, 88.87, 703.11, Stats; 84.01(15), 84.015, 84.03(1), Stats., and the federal laws and regulations thereby expressly endorsed and adopted by the Legislature, including 23 USC 109, 134, 135, 138, and 315; and 236.12(2)(a), 236.34, 236.45 and 703.11, Stats., the Department of Transportation will hold a public hearing in **Room 421** of the Hill Farms State Transportation Building, 4802 Sheboygan Avenue, Madison, Wisconsin on the **4th** day of **August**, 2000, at **9:00 AM**, to consider the amendment of ch. Trans 233, Wisconsin

Administrative Code, relating to division of land abutting a state trunk or connecting highway.

An interpreter for the hearing impaired will be available on request for this hearing. Please make reservations for a hearing interpreter at least 10 days prior to the hearing.

The public record on this proposed rule making will be held open until close of business August 11, 2000, to permit the submission of written comments from persons unable to attend the public hearing or who wish to supplement testimony offered at the hearing. Any such comments should be submitted to Julie Johnson, Administrative Rules Coordinator, Department of Transportation, Office of General Counsel, Room 115-B, P. O. Box 7910, Madison, WI 53707-7910.

Parking for persons with disabilities and an accessible entrance are available on the north and south sides of the Hill Farms State Transportation Building.

Analysis Prepared by the Wisconsin Department of Transportation

STATUTORY AUTHORITY: ss. 15.04(1)(g), 85.16(1), 86.07(2), 85.025, 85.05, 84.01(15), 84.015, 84.03(1), 84.01(2), 85.02, 88.87(3), 20.395(9)(qx), 236.12(2)(a) and (7), 236.13(1)(e) and (3), 1.11(1), 1.12(2); 1.13(3), as created by 1999 Wis. Act 9; 114.31(1), 84.01(17), 66.30(2); and 86.31(6), Stats., as affected by 1999 Wis. Act 9

STATUTES INTERPRETED: ss. 1.13(2), 16.9651(2), 66.0295(2)(c), and 86.255, Stats., all as created by 1999 Wis. Act 9; 15.04(1)(g), 1.11, 1.12, 32.035, 88.87, Stats; 84.01(15), 84.015, 84.03(1), Stats., and the federal laws and regulations thereby expressly endorsed and adopted by the Legislature, including 23 USC 109, 134, 135, 138, and 315; and 236.12(2)(a), 236.34, 236.45 and 703.11, Stats.;

General Summary of Proposed Rule

THREE OBJECTIVES.

This proposed revision to ch. Trans 233 attempts to accomplish three objectives. **First**, it implements agreements reached through a broad-based, participative process for consideration of improvements to the 1999 rule, sponsored by the Subcommittee on Review of Ch. Trans 233 of the Assembly Committee on Transportation. **Second**, it attempts to strike a proper balance between individual and governmental highway

setback concerns through a combination of specific analysis and applicability of different setback provisions to defined portions of the state trunk and connecting highway system. The proposal reflects the testimony and discussion at the hearing before the Joint Committee for Review of Administrative Rules on June 21, 2000. **Third**, it recognizes and reflects recent changes in state and federal laws regarding land use that affect highway and transportation planning and development.

BRIEF HISTORY.

Trans 233, relating to land divisions abutting state trunk highways and connecting streets, was established in 1956 and required amendments for consistency with existing laws, new developments in land use and transportation planning principles, and for clarification and uniformity. Trans 233 was first revised effective February 1, 1999.

WISDOT has gained about a year and half experience with the revised rule and has been working cooperatively with many affected interests and legislators to refine the implementation of the new provisions of Trans 233 through a four step process, in brief:

- Education, Training, Meetings.
- Specific Responses to Questions.
- Uniform Implementation.
- Refine Rule As Necessary.

Through this process, WISDOT and others have reached numerous agreements to amend TRANS 233, Wis. Admin. Code, in conjunction with the Subcommittee on Review of Ch. Trans 233 of the Assembly Committee on Transportation. These agreements have been memorialized in the Wisconsin Legislative Council Staff Memorandum of William Ford to Representative David Brandemuehl dated **February 18, 2000** and an attached memo from James S. Thiel of **February 14, 2000** to former Secretary of Transportation Thompson.

1. IMPLEMENT AGREEMENTS.

The first purpose of this proposed rule revision is to implement these conceptual agreements for clarification or modification of the rule as part of this continuing cooperative process "for the safety of entrance and departure from the abutting [highways] and for the preservation of the public interest and investment in the [highways]." Further details of these improvements are provided in notes following each section of the proposed rule revision.

The legislative Subcommittee asked WISDOT and other interested parties to continue to work together to develop amendments to s. Trans 233.08, relating to **setback** requirements and restrictions. There has been a setback provision in the rule since 1956 that has always contained language limiting structures and improvements within the setback.

WISDOT followed-up with several conceptual meetings and discussions with affected interests and exchanges of various drafts and correspondence relating to **setbacks**. A hearing was held before the Joint Committee for Review of Administrative Rules (JCRAR) on June 21, 2000, at which further concepts and ideas were advanced or clarified.

2. ADDRESS SETBACK ISSUES.

The second purpose of this proposed rule revision is to address these competing **setback** and related issues that came forward at the JCRAR hearing on June 21, in a manner consistent with the Committee's continuing oversight.

The proposed resolution of these concerns is discussed in some detail in this general summary of the rule. There are about 11,800 miles of state trunk highways. There are about 520 miles of connecting highways in 112 cities and 4 villages.

The statutes and the **setback** provisions of the current rule apply in full to all state trunk highways and connecting highways in all 72 counties with one modification; in Milwaukee County, the City of Milwaukee is excluded.

The U.S. Supreme Court has determined that the constitutionality of highway setbacks is well-established. **Gorieb v. Fox**, 274 US 603, 608-610, 47 S. Ct. 675, 677, 71 L. Ed. 1228, 53 A.L.R. 1210 (1927); **Euclid v. Ambler**, 272 US 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926); See also "Validity of front setback provisions in zoning ordinance or regulation", 93 A.L.R.2d 1223; and 83 Am. Jur. 2d **Zoning and Planning**, sec. 191 (2000):

"Setback regulations are widely upheld as an appropriate use of zoning power, although, of course, such regulations must be reasonable and not confiscatory."

In a recent Wisconsin case upholding the validity of a highway setback requirement, the Wisconsin Court stated that setbacks:

"promote a variety of public purposes...provision for light and air, fire protection, traffic safety, prevention of overcrowding, rest and recreation, solving drainage problems, protecting the appearance and character of a neighborhood, conserving property values, and may, in particular cases, promote a variety of aesthetic and psychological values as well as ecological and environmental interests." (citing 3 The Law of Zoning and Planning sec. 34B.02[2] (1995). **Town of Portland v. WEPCO**, 198 Wis. 2d 775, 779, 543 N.W.2d 559, 560-61 (1996)

Not all traffic safety reasons for setbacks are apparent. Setbacks from freeways and expressways and other major through highways also serve to enhance traffic safety by making it possible for workers and equipment to access the many light, water, sewer,

power, communication and other public utilities in or across highways for maintenance and construction from the back of the highway right of way line. Without setbacks highway and law enforcement authorities would be required to allow access from the highway lanes themselves or close traffic lanes, or both, on these higher speed and higher traffic volume highways. By their very nature these actions would impede traffic, increase congestion and increase the crash and injury risk to the motorists on the highway, highway and law enforcement personnel, and the public utility workers.

A recent Wisconsin Legislative Council analysis of the law of regulatory takings generally concludes that the ongoing judicial goal is to find an appropriate balance between two conflicting principles: the property rights of individuals and the government's authority on behalf of all citizens to regulate an owner's use of the land.

The general rule is that a regulation is only a "taking" requiring compensation if it deprives the owner of "all or substantially all" of the value of a constitutionally protected property interest. It is not enough for the property owner to show that the regulation denies the owner of the expected use of the property. To make this determination, the courts have adopted an ad hoc, case-by-case, specific analysis of each situation, because there is no clear "set formula."

Requiring the dedication of property for public use, including the dedication of private property for public highway and transportation purposes, as part of a land division approval process is not a taking of private property for public use without just compensation. This issue was decided by the Wisconsin Supreme Court in Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442, 446-448 (1965) and confirmed recently in Hoepker v. City of Madison Plan Commission, 209 Wis. 2d 633, 649-650, par. 21, 563 N.W.2d 145, 152 (1997). Additionally, the Legislature has established a procedure for inverse condemnation through which an individual may seek compensation for a regulatory taking, sec. 32.10, Stats.

It is important to distinguish the above land division situations initiated by private owners from those where WISDOT does acquire property from one private property owner to provide to another private owner as a result of WISDOT's actions. For example, WISDOT has the authority to condemn lands of one property owner to provide a public access road to another property owner who would otherwise be landlocked by the highway construction actions initiated by WISDOT. Section 84.09, Stats; 61 OAG 36 (1972). Another example is where WISDOT's highway construction actions initiated by WISDOT require the taking of the parking lot of a small grocery store. If no relocation of the grocery store to serve the community is reasonably possible and the grocery store is critical to the community, WISDOT has authority to condemn lands of an adjacent private owner to provide a functional parking lot for the other private owner and thereby preserve the facility for the community. In all of these cases WISDOT pays compensation for an actual taking. Section 84.09, Stats; 61 OAG 36 (1972).

On May 26 WISDOT proposed to conduct a specific **setback** analysis when requested of land divisions abutting a state trunk of connecting highway to determine

whether WISDOT can responsibly adjust the setback line or allow a specific structure or improvement within the setback, in a timely manner, with a reasonable appeal process.

The May 26 WISDOT proposal had a 20-year horizon for analysis.

In response, one group of interests proposed that any setback analysis be tied to WISDOT's 6-year plan adopted under sec. 84.01(17), Stats. WISDOT and others rejected this suggestion because the 6-year plan is too short a period, is both under inclusive and over inclusive, is constrained by financial resources rather than public need, and is inconsistent with federal law.

Also in response, another group of interests generally indicated that WISDOT's 20-year specific analysis proposal had gone too far in striking the balance in favor of addressing private, individual concerns to the detriment of sound transportation planning in the interest of safety, convenience and investment of the public. WISDOT had been too short-sighted in its 20-year specific analysis proposal and ought to consider a broader set of criteria.

Finally, the hearing before the Joint Committee for Review of Administrative Rules on June 21 brought out further testimony and suggestions regarding setbacks from additional legislators, from the existing interest groups, and from new groups and individuals.

Therefore, WISDOT proposes a separate setback portion of this proposed rule revision to balance individual, private concerns while preserving the public interest as follows:

A. HIGHWAYS AND MAPS FOR "NORMAL" SETBACK. The normal setback associated with land divisions that has been in existence since 1956 is 110 feet from the center line of the highway or 50 feet from the nearest right of way line, whichever is greater. This normal setback provision will be made applicable to a reduced system of highways. This will consist of those state trunk and connecting highways identified as part of the National Highway System (NHS), [the NHS includes all of Wisconsin's Corridors 2020 as a subset], as well as all other principal arterials, and all other state trunk highways with current average daily traffic of 5,000 or more, and all other state trunk and connecting highways within incorporated areas and within one mile of those corporate boundaries, and those highways with current and forecasted congestion projected to be worse than Level of Service "C" within the following 20 years. [***INSERT MILEAGE NUMBERS***] The rule calls for updating reference maps that identify this system at least every two years. Persons may still seek special exceptions to this normal setback requirement through a specific analysis process.

B. OTHER HIGHWAYS. The remaining state trunk and connecting highways will have a reduced setback of 15 feet from the nearest right of way line, unless local ordinances require a greater setback. Persons may still seek special exceptions to this reduced setback requirement through a specific analysis process.

One or two maps generally showing these highways with the normal setback and with the 15 foot setback are attached to this proposed rule.

3. IMPLEMENT CHANGES IN STATE AND FEDERAL LAW.

The third purpose of this proposed rule provision is to recognize and reflect recent changes in state and federal laws and regulations regarding land use that affect highway and transportation planning and development.

Human Equality.

Section 15.04(1)(g), Stats., requires the head of each Wisconsin agency to examine and assess the statutes under which the head has powers or regulatory responsibilities, the procedures by which those statutes are administered and the rules promulgated under those statutes to determine whether they have any arbitrary discriminatory effect on the basis of race, religion, national origin, sex, marital status or sexual orientation. If WISDOT or agency head finds any such discrimination, he or she shall take remedial action, including making recommendations to the appropriate executive, legislative or administrative authority.

Similarly, Title VI of the Civil Rights Act of 1964 states that "no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 USC 2000d. It bars intentional discrimination as well as disparate impact on protected groups. The federal government has taken steps to require the implementation of these laws at the earliest possible time in the transportation planning process.

Highway building projects that require the destruction of downtown areas due to lack of corridor preservation and lack of adequate setbacks and lack of concern for the affected populace have allegedly had a disparate impact on low income and minority populations. WISDOT believes that it cannot fulfill the mandates of these laws without a comprehensive system of review of land divisions abutting state trunk and connecting highways.

examples

Environment.

Sections 1.11, 1.12, 32.035 and 1.13, 16.9651(2), and 66.0295(2)(c), Stats., as created by 1999 Wisconsin Act 9, direct, authorize, and encourage Wisconsin state agencies, including WISDOT, to the fullest extent possible, to consider the effect of their actions on the environment (air, water, noise, endangered plants and animals,

parklands, historic, scenic, etc.), the use of energy, the impact on agriculture and to balance the mission of the agency and local, comprehensive planning goals, including building of community identity by revitalizing main streets and enforcing design standards, encouragement of neighborhood designs that support a range of transportation options, and providing an integrated, efficient and economical transportation system that affords mobility, convenience and safety that meets the needs of all citizens, including transit dependent and disabled citizens, and implements transportation corridor plans.

Similarly, federal laws require WISDOT to abide by federal design and construction standards while also considering, for example, the impact of WISDOT's actions on air, noise, water pollution, man-made and natural resources, community cohesion and injurious displacement of people, businesses and farms, and implementing federal regulations that require a minimum 20-year transportation planning horizon. WISDOT is authorized and directed by Wisconsin law to carry out all of these federal mandates by secs. 84.01(15), 84.015, and 84.03(1), Stats.

In order to achieve these objectives, WISDOT must do specific analyses looking forward for at least 20 years as required by federal law. WISDOT believes that it cannot fulfill the mandates of these laws without a comprehensive system of review of land divisions abutting state trunk and connecting highways.

RESTRICTIONS REQUIRING USE OF EXISTING CORRIDORS.

The Wisconsin Supreme Court has determined that WISDOT cannot expand its authority to acquire property by agreeing to environmental and human impact mitigation demands of other state and federal authorities in order to get their concurrence to proceed with a project. Mitton v. Transportation Dept., 184 Wis. 2d 738, 516 N.W.2d 709 (1994). Subsequent to this decision, the Wisconsin Legislature enacted sec. 86.255, Stats., in 1999 Wis. Act 9, that places further restrictions on WISDOT's authority to acquire property. These judicial and legislative restrictions have made it necessary for WISDOT to rely on farther, long-range planning and corridor preservation. check

CONCLUSION.

Within the rigorous expectations placed upon and expected of WISDOT in providing a transportation system for the public, the ultimate objective of this proposed rule revision is to recognize state and local economic and land use goals, enhance the effectiveness of the rule "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 highway access permit conditional thereon," to provide reasonable flexibility and clarity that does not jeopardize public investments or safety now or in the future, and to provide 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 and investment in such highways." The rule is intended to ensure adequate setbacks and access controls, with sufficient flexibility to provide for locally planned traditional streetscapes

and setbacks in existing and planned urban areas, and to ensure the maximum practical use of existing highway facilities and rights of way to minimize the need for new alignments or expansion of lower function facilities. WISDOT believes that it cannot achieve these legal mandates and expectations without a comprehensive system of review of land divisions abutting state trunk and connecting highways.

Fiscal Effect. There will be an insubstantial reduction in revenues from the fee for the services provided by WISDOT in conjunction with review of land divisions. The change should not have an effect upon any county, city, village, town, school district, vocational, technical and adult education district and sewerage district liability unless they are assuming the role of developer. That situation occurs approximately five to ten times per year statewide. Developers will see a slight reduction in costs related to some condominium plat reviews. Surveyors who submit maps for review will pay less in total fees for the same reason, but those savings could be passed onto the developer. There will also be a slight reduction in costs of surveys passed on to developers or owners.

Several of WISDOT's transportation districts may use existing personnel to review more or less land divisions than in the past. There will be fewer reviews by WISDOT's Central Office staff, but there may be greater involvement with delegations of reviews to local units of government. It is expected that some of the District costs will be defrayed by WISDOT delegating the review for some developments of land abutting connecting highways to the local municipality as allowed in s. 236.12(2)(a), Stats. Since, in general, local officials do review these documents now, there would be no additional costs to any reviewing authority, except to the extent they may voluntarily wish to also review developments of land abutting state trunk highways within their geographic jurisdiction.

In the long-term, there will in all likelihood be state, local and private savings that can be attributed to better long-range transportation planning and less adverse and more positive effects upon communities, businesses, residents, and the environment. An efficient and safe transportation system will have a positive, but hard to quantify, fiscal effect.

Initial Regulatory Flexibility Analysis. Section 236.12(7), Stats., allows WISDOT to establish by rule the reasonable service fees for all or part of the costs of the activities and services provided by WISDOT under that chapter of the statutes. The rule revision eliminates fees to cover the costs of WISDOT for reviewing condominium plats where there is only a change from lease to ownership without a change in property use that affects transportation systems. There is also a delegation to district offices and municipalities that will provide greater access and flexibility in verifying and field reviewing documents. The setback requirements are also reduced on defined highways where consistent with safety and sound transportation planning. Finally, there is a provision for specific analysis and review of requests for special exceptions that does not have to meet the strict, restrictive legal standards for granting variances announced by the Wisconsin Court in State v. Kenosha County Bd. of Adjust., 218 Wis. 2d 396, 577 N.W.2d 813 (1998). The rule also makes new exceptions for locating residential swimming pools within the setback at the owner's option.

Copies of Proposed Rule. Copies of the rule may be obtained upon request, without cost, by writing to Julie Johnson, Administrative Rules Coordinator, Department of Transportation, Office of General Counsel, Room 115-B, P. O. Box 7910, Madison, WI 53707-7910, or by calling (608) 267-3703. Alternate formats of the proposed rule will be provided to individuals at their request.

TEXT OF PROPOSED RULE

Under the authority vested in the state of Wisconsin, department of transportation,
by ss. 15.04(1)(g), 85.16(1), 86.07(2), 85.025, 85.05, 84.01(15), 84.015, 84.03(1),
84.01(2), 85.02, 88.87(3), 20.395(9)(qx), 236.12(2)(a) and (7), 236.13(1)(e) and (3),
1.11(1), 1.12(2); 1.13(3), as created by 1999 Wis. Act 9; 114.31(1), 84.01(17), 66.30(2);
and 86.31(6), Stats., as affected by 1999 Wis. Act 9, the department of transportation
hereby proposes to amend a rule interpreting ss. 1.13(2), 16.9651(2), 66.0295(2)(c), and
86.255, Stats., all as created by 1999 Wis. Act 9; 15.04(1)(g), 1.11, 1.12, 32.035, 88.87,
703.11, Stats; 84.01(15), 84.015, 84.03(1), Stats., and the federal laws and regulations
thereby expressly endorsed and adopted by the Legislature, including 23 USC 109,
134, 135, 138, and 315, Stats., relating to division of land abutting a state trunk or
connecting highway.

SECTION 1. Trans 233.01 is amended to read:

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. The ability of state trunk and
connecting highways to serve as an efficient part of an integrated intermodal
transportation system meeting interstate, statewide, regional and local needs is
jeopardized by failure to consider and accommodate long-range transportation plans

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during land division processes. 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, to help maintain speed limits, and to provide for the development and implementation of an intermodal transportation system to serve the mobility needs of people and freight and foster economic growth and development, while minimizing transportation-related fuel consumption, air pollution, and adverse effects on the environment. Preservation of the public investment in an integrated transportation system also assures no person, on the grounds of race, color, or national origin, is excluded from participation in, denied the benefits, or subjected to discrimination under any transportation program or activity.

How so?

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. The authority to impose minimum standards for land divisions to consider and accommodate long-range transportation plans is ss. 15.014(1)(g), 85.16(1), 85.025, 85.05, 84.01(15), 84.015, 84.03(1), 84.01(2), 85.02, 88.87(3), 20.305(9)(qx), 1.11(1), 1.12(2), 1.13(3), as created by 1999 Wisconsin Act 9; 114.31(1), 84.01(17), 66.30(2), and 86.31(6), as affected by 1999 Wisconsin Act 9.

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NOTE: The Department is authorized and required by ss. 84.01(15), 84.015, 84.03(1) and 20.395(9)(qx), to plan, select, lay out, add to, decrease, revise, construct, reconstruct, improve and maintain highways and related projects, as required by federal law, Title 23, USC and all acts of Congress amendatory or supplementary thereto, and the federal regulations issued under the federal code; and to expend funds in accordance with the requirements of acts of Congress making such funds available. Among these federal laws that the Department is authorized and required to follow are 23 USC 109 establishing highway design standards; 23 USC 134, requiring development and compliance with long-range (minimum of 20 years) metropolitan area transportation plans; and 23 USC 135, requiring development and compliance with long-range (minimum of 20 years) statewide transportation plans. Similarly, the Department is authorized and required by the state statutes cited and other federal law to assure that it does not

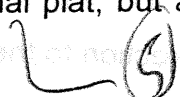
unintentionally exclude or deny persons equal benefits or participation in transportation programs or activities on the basis of race, color, national origin and other factors, and to give appropriate consideration to the effects of transportation facilities on the environment and communities. A "state 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 and 519.97 center-line miles of connecting highways. Out of about 116 municipalities in which there are connecting highways; 112 are cities and 4 or more are villages.

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 marker. 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.

SECTION 2. Trans 233.012 is renumbered Trans 233.012(1).

SECTION 3. Trans 233.012(2) is created to read:

Trans 233.012(2) Structures and improvements legally placed in a setback area under ch. Trans 233 prior to February 1, 1999 are explicitly allowed to continue to exist. Plats that have received preliminary or final 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. 

SECTION 4. Trans 233.015(1m), (2m) and (4)(note) are created to read:

Trans 233.015(1m) "Desirable traffic access pattern" means traffic access that is consistent with the technical and professional guidance provided in the State of Wisconsin Facilities Development Manual. *When coming available?*

NOTE: For any given site, several patterns may work. These guidelines are exempt from the definition of rule under ss. 227.01(13), Stats.: "'Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which: "... (d) Relates to the use of highways and is made known to the public by means of signs or signals,"... or "(e) Relates to the construction or maintenance of highways or bridges, except as provided in ss. 84.11 (1r) and 85.025,"...or "(r) Is a pamphlet or other explanatory material that is not intended or designed as interpretation of legislation enforced or administered by an agency, but which is merely informational in nature,"...or "(y) Prescribes measures to minimize the adverse environmental impact of bridge and highway construction and maintenance."

(2m) "In-ground swimming pool" means a swimming pool that is designed or used as part of a business or to serve the general public or members. It does not include any above-ground swimming pools without decks or any residential swimming pools. *5*

(4)(note) There are some land divisions within the definition of s. Trans 233.015(4) that may not involve any change in use of existing structures and improvements or traffic. Examples of this type of land division would be the conversion of an apartment building that has been in existence for 5 years to condominium ownership or the conversion of leased commercial spaces in a shopping mall that has been in existence for 5 years 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. *9*

SECTION 5. Trans 233.03(5) is repealed and recreated to read:

Trans 233.03(5) **TIME TO COMPLETE REVIEW.** The department, district or the municipality to which the department has officially and formally delegated review authority under sub. (8) shall complete the review by either objecting or certifying non-objection to the land division map as follows:

(a) *Initial decision.* In the absence of any request for a special exception under s. Trans 233.11, the district or municipality shall complete the review by either objecting

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or certifying non-objection to the land division map within 20 calendar days from the date that a complete request is received by the required office of the department or municipality. A request shall be deemed complete unless the department provides notice that the request is incomplete within 5 working days. If a land division involves only 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 within this 20 calendar day period after verifying from the information provided that it is only a technical land division. 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 than 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. There is no decision time limit applicable to conceptual reviews under sub. (1), except that it is intended that the department shall ?

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respond to any request for a conceptual review under sub. (1) within 30 calendar days.

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(b) Appeal. *of only objection & nonobjection*
Any final decision of a district or municipality regarding a land *dept.?*

division, 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 the final decision of a district or municipality 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 land division. There are no appeals from conceptual reviews under sub. (1).

NOTE: The 20-day time limit for action on a review without any special exception or variance is also established by statute for subdivision plat reviews in sec. 236.12(3) and (6), Stats.

(c) *Intent of 60-day provision.* It is the intent of the 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. { The 60 day period may be extended by written consent of the land divider. }

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(d) *Judicial review.* 1. 'Chapter 236 land divisions.' Judicial review of final departmental or municipal decisions for land divisions subject to chapter 236, Stats., shall follow appeal procedures specified in that chapter.

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NOTE: Land divisions subject to plat approval under sec. 236.10, Stats., shall follow the procedures specified in sec. 236.13(5), Stats.

2. 'All other land divisions.' Judicial review of final departmental or delegated municipal decision for land divisions that are not subject to chapter 236, Stats., shall follow the procedures specified in chapter 227, Stats., for judicial review of agency decisions.

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NOTE: Final administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to judicial review as provided in ch. 227, Stats.

3. 'Restrictions for public benefit.' Any recorded restriction placed on a land division which was required by a public body or which names a public body or public utility as grantee, promisee or beneficiary, vests in the public body or public utility the right to enforce the restriction at law or in equity against anyone who has or acquires an interest in the land subject to the restriction. The restriction may be released or waived by

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appropriate recorded document by the public body or public utility having the right of enforcement. There is no appeal from the denial of a request to release or waive a restriction for public benefit.

NOTE: See secs. 236.293 and 236.42(2), Stats.

SECTION 6. Trans 233.03(6) to (8) are created to read:

Trans 233.03(6) PROCEDURE. Land division reviews and approvals shall be granted by the department, ^{or} its 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 final decision of the district or municipal authority to the secretary of the department or designee. The department ~~will~~ ^{may} not unilaterally initiate a review of a decision of a district certifying nonobjection to a land division with or without a special exception. However, if an affected third party objects to a certificate of nonobjection provided by a district office, the department may reverse the district decision if it finds the objection of the third party to be meritorious. The department may unilaterally review any municipal decision to require conformity with the delegation agreement and this chapter.

(7) DISTRICT AUTHORITY TO REVIEW LAND DIVISIONS. Authority to review land divisions under this chapter is delegated by the department to each of its district offices on the effective date of this chapter . . . [Revisor insert date] or February 14, 2001, whichever occurs earlier. Persons not satisfied with a district decision may

appeal to the department's central office as provided in sub. (6). The department shall develop implementing procedures to assure consistency and uniformity among districts and shall provide uniform guidance in chapter 7 of the *State of Wisconsin Department of Transportation Facilities Development Manual* dated December 1, 2000.

NOTE: Uniform guidance is referenced by date in this rule so that future revisions will only become effective if ch. Trans 233 is amended, which requires legislative review. These guidelines are exempt from the definition of rule under ss. 227.01(13), Stats.: "'Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which:"... "(d) Relates to the use of highways and is made known to the public by means of signs or signals,"... or "(e) Relates to the construction or maintenance of highways or bridges, except as provided in ss. 84.11 (1r) and 85.025,"...or "(r) Is a pamphlet or other explanatory material that is not intended or designed as interpretation of legislation enforced or administered by an agency, but which is merely informational in nature," or... "(y) Prescribes measures to minimize the adverse environmental impact of bridge and highway construction and maintenance."

(8) MUNICIPAL AUTHORITY TO REVIEW LAND DIVISIONS. 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 granted by cities or villages that have been delegated this authority by the department are subject to the internal appeal procedure applicable to land division approvals granted by the department or its districts, except that the department may unilaterally review any municipal decision to require conformity with the delegation agreement. No city or village delegated authority to review land divisions may change its setback policy once the authority has been delegated without a written and approved amendment to the delegation agreement.

SECTION 7. Trans 233.05(1)(intro.) is amended to read:

Trans 233.05(1)(intro.) 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~~ special exception 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:

SECTION 8. Trans 233.08(2)(c) and (3n) are created to read:

⑤² Trans 233.08(2)(c) The department shall produce general reference maps that generally identify the highways specified in pars. 1. to 5. at least every 2 years. X
Persons may seek special exceptions to the setback requirement applicable to these highways through the special exceptions process for setbacks in s. Trans 233.11(3). "Level of service "C"" as used in this paragraph has the same meaning as in ss. Trans 210.03(4) and 210.05(1). The setback provision of par. (a) applies to highways identified as:

1. State trunk 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 and connecting highways that are functionally classified as principal arterials in accordance with procedure 4-1-15 of the state of Wisconsin department of transportation facilities development manual dated July 2, 1979.

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3. State trunk and connecting highways within incorporated areas and within one mile of those corporate boundaries.

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

5. State trunk and connecting highways with current and forecasted congestion projected to be worse than level of service "C" within the following 20 years.

NOTE: The National Highway System (NHS) includes the Interstate System, Wisconsin's Corridors 2020 routes, and other important routes. Highways on the NHS base system were designated by the Secretary of USDOT and approved by Congress in the National Highway System Designation Act of 1995. NHS Intermodal Connector routes were added in 1998 with the enactment of the Transportation Equity Act for the 21st Century. Modifications to the NHS must be approved by the Secretary of USDOT. Guidance criteria and procedures for the functional classification of highways are provided in (1) the Federal Highway Administration (FHWA) publication "Highway Functional Classification--Concepts, Criteria and Procedures" revised in March 1989, and (2) former ch. Trans 76. The federal publication is available on request from the FHWA, Office of Environment and Planning, HEP-10, 400 Seventh Street, SW., Washington, DC 20590. Former ch. Trans 76 is available from the Wisconsin Department of Transportation, Division of Transportation Investment Management, Bureau of Planning. The results of the functional classification are mapped and submitted to the Federal Highway Administration (FHWA) for approval and when approved serve as the official record for Federal-aid highways and one basis for designation of the National Highway System. In general, the highway functional classifications are rural or urban: Principal Arterials, Minor Arterials, Major Collectors, Minor Collectors, and Local Roads. The definition of "level of service" used for this paragraph is the same as in ss. Trans 210.03(4) and 210.05(1) for purposes of the MAJOR HIGHWAY PROJECT NUMERICAL EVALUATION PROCESS. In general it 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. Department engineers will use the procedures outlined in the general design consideration guidelines in Chapter 11, Section 5 of the State of Wisconsin Facilities Development Manual to determine the level of highway service. Under the current rule, prior to this proposed change, s. Trans 233.08(1) provides 4 ways to erect something in a setback area (1) for utilities, follow the procedures set forth in the rule, (2) obtain a variance (now "special exception"), (3) for utilities, get local approval for utilities on or adjacent to connecting highways, or for utilities within the right of way of state trunk highways, get department approval (a mere "technical" exception), and (4) erect something that doesn't fall within the definition of "structure" or within the definition of "improvement." The provision below now adds a fifth "exception," (5) be 15 feet or more outside the right of way line of a defined and mapped set of highways.

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(3n) Notwithstanding sub. (1), a person may erect, install or maintain any structure or improvement at 15 feet and beyond from the right of way line of any state

trunk or connecting highway not identified in s. Trans 233.08(2)(c). Persons may also seek special exceptions to the setback requirement applicable to these highways not identified in s. Trans 233.08(2)(c) through the special exceptions process for setbacks in s. Trans 233.11(3), except that there can be no adjustment of the 15 foot setback line except as expressly limited under s. Trans 233.11(3)(b).

SECTION 9. Trans 233.105(1), (2)(intro.) and (3) are amended to read:

Trans 233.105(1) NOISE. When noise barriers are warranted under the criteria specified in ch. Trans 405, the ~~land divider~~ ^{of} owners or users shall be responsible for any noise barriers for noise abatement from existing state trunk highways or connecting highways. Noise resulting from future geographic expansion of the through lane capacity of the highway itself by the government, more through lanes constructed, is not the responsibility of the land owner, user or land divider. 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. The department of transportation is not responsible for abating noise sufficient to protect these lots. Owners or users of these lots are responsible for abating noise sufficient to protect these lots if noise abatement is desired by the owners or users."

NOTE: Some land divisions will result in location of facilities in proximity to highways where the existing noise levels will exceed recommended federal standards. 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 and users that they are responsible for further noise abatement for traffic and traffic increases on existing highways in the absence of any geographic expansion of capacity of the highway itself by the government (more lanes constructed).

(2)(intro.) 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. The department shall allow the owner to grant a permanent vision corner easement in lieu of dedication whenever dedication makes it difficult to comply with local ordinances. If the department requires such a dedication or grant, the owner shall include the following notation on the land division map:

(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~~ assures to a reasonable degree of engineering certainty 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. Various methods of hydrologic and hydraulic analysis consistent with sound engineering judgment and experience and suitably tailored to the extent of the possible drainage problem are acceptable. Land dividers are not required by this ^{subsection} drainage provision to accept legal responsibility for unforeseen acts of nature or forces beyond their control. Nothing in this drainage provision relieves owners or users of land from their obligations under s. 88.87(3)(b), Stats.

NOTE: In sec. 88.87(1), Stats., the Legislature has recognized that changes in the direction and volume of flow of surface waters are frequently caused by development on private land adjacent to highways. The Legislature found that it is necessary to control and regulate the construction and drainage of all highways so as to protect property owners from damage to lands caused by unreasonable diversion or retention of surface waters due to a highway and to impose correlative duties upon

owners and users of land for the purpose of protecting highways from flooding or water damage. Wisconsin law, sec. 88.87(3), Stats., imposes duties on every owner or user of land to provide and maintain a sufficient drainage system to protect downstream and upstream highways. Wisconsin law, sec. 88.87(3)(b), Stats., provides that whoever fails or neglects to comply with this duty is liable for all damages to the highway caused by such failure or neglect. The authority in charge of maintenance of the highway may bring an action to recover such damages, but must be commenced within 90 days after the alleged damage occurred. Section 893.59, Stats. Additional guidance regarding drainage may be found in Chapter 13 and Procedure 13-1-1 of the State of Wisconsin Department of Transportation Facilities Development Manual.

SECTION 10. Trans 233.11(title) and (1) are amended to read:

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.

SECTION 11. Trans 233.11(2) is renumbered (3)(a) and amended to read:

Trans 233.11(3)(a) (title) Special exceptions for setbacks 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 defeat an orderly overall development plan of a local unit of government~~ when warranted by specific analysis of the setback needs as determined by the department. 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 authorizing special exception that adjusts the setback area or authorizes~~ 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 as

provided in this subsection. The department may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter.

NOTE: The phrase "impractical difficulty or unnecessary hardship" has been eliminated to avoid the adverse legal consequences that could result from the existing use of the word "variance." The Wisconsin Supreme Court has interpreted "variance" and this phrase to make it extremely difficult to grant "variances" and in so doing has eased the way for third party legal challenges to many "variances" reasonably granted. See State v. Kenosha County Bd. of Adjust., 218 Wis. 2d 396, 577 N.W.2d 813 (1998). The Supreme Court defined "unnecessary hardship" in this context as an owner having "no reasonable use of the property without a variance." *Id.* at 413. The "special exception" provision in this rule is not intended to be so restrictive and has not been administered in so restrictive a fashion. In its first year of operation, the Department granted the vast majority of "variances" requested in a site and neighborhood-sensitive context based on specific analysis.

SECTION 12. Trans 233.11(3)(b) to (f), (4) and (5) are created to read:

Trans 233.11(3)(b) *Specific analysis for special exceptions for setbacks.* Upon request for a special exception from setback requirements of this chapter, the department shall make a specific analysis of the setback needs. The analysis of the department may consider all of the following:

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. Current and forecasted congestion projected to be worse than level of service "C" within the following 20 years.
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. Transportation safety.

10. Preservation of the public interest and investment in the highway.

11. Other criteria to promote public purposes consistent with local ordinances or plans for provision for light and air, fire protection, solving drainage problems, protecting the appearance and character of a neighborhood, conserving property values, and, in particular cases, to promote aesthetic and psychological values as well as ecological and environmental interests.

NOTE: "Level of Service "C"" as used in this paragraph has the same meaning as in ss. Trans 210.03(4) and 210.05(1).

(c) *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. The department may not adjust the 15 foot setback line for those highways identified under s. Trans 233.08(3n) unless a comprehensive local setback ordinance generally applicable to vicinity of the land division expressly sets a closer setback line.

(d) *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 affect the continuing viability or conforming use of the business, activity, or use associated with

the proposed structure or improvement, or adversely affect the community in which it is located, then the owner 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. As a condition of granting the special exception, the owner shall execute 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 special exception. The department may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter.

(e) *Blanket or area special exceptions for setbacks.* 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 from setback requirements of this chapter 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.

(f) *Horizon of setback analysis.* For purposes of its specific analysis, the department shall consider a period within the following 20 years.

NOTE: 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).

(4) SPECIAL EXCEPTIONS FOR PROVISIONS OF THIS CHAPTER OTHER THAN SETBACKS. Other than special exceptions for setback requirements as provided in sub. (3), the department may not authorize 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 defeat an orderly overall development plan of a local unit of government. 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 may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter.

NOTE: The phrase "impractical difficulty or unnecessary hardship" has been used in this subsection to indicate a higher standard for special exceptions from provisions of this chapter other than setbacks. However, the phrase "special exception" has been used rather than the word "variance." The Supreme Court defined "unnecessary hardship" in this context as an owner having "no reasonable use of the property without a variance." See State v. Kenosha County Bd. of Adjust., 218 Wis. 2d 396, 413, 577 N.W.2d 813 (1998). The "special exception" provision in this rule for provisions other than setbacks is intended to be administered in a somewhat less restrictive fashion than "no reasonable use of the property" without a "variance."

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(5) MUNICIPAL SPECIAL EXCEPTIONS. A municipal delegation agreement under s. Trans 233.03(8) 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 or its districts, except that the department may unilaterally review any municipal decision granting a variance or special exception to require conformity with the delegation agreement and this chapter.

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SECTION 14. Trans 233.13 is renumbered Trans 233.13(1).

SECTION 15. Trans 233.13(2) is created to read:

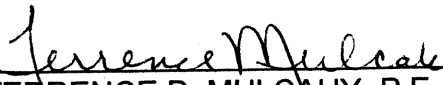
Trans 233.13(2) TREATMENT OF CONDOMINIUM CONVERSIONS AND OTHER LAND DIVISIONS INVOLVING NO CHANGE IN USE OF EXISTING STRUCTURES AND IMPROVEMENTS OR TRAFFIC IMPACTS, OR BOTH. If a land division involves only a condominium conversion plat on existing developed property and the existing development has been in existence for 5 years and the condominium development has traffic impacts similar to the existing development, the department will approve the land division. If a land division involves only 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 are no traffic impacts. Examples of these types of land division would be the conversion of leased commercial spaces in a shopping mall to owned spaces. If the land division involves only the movement of a property line between adjacent owners, the department shall approve the land division if there are no traffic impacts. An example of this type of land division would be 2 property owners exchanging deeds to resolve mutual encroachments. 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: 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 has existed the requisite time. This review is necessary to prevent evasion of the safety and public investment purposes of the law on which this rule is based.

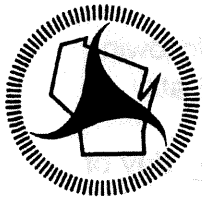
(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2), Stats.

Signed at Madison, Wisconsin, this 30 day of June, 2000.


TERRENCE D. MULCAHY, P.E.)
Secretary
Wisconsin Department of Transportation

MAR 01 2000



Wisconsin Department of Transportation

www.dot.state.wi.us

Tommy G. Thompson
Governor

Charles H. Thompson
Secretary

Office of General Counsel
4802 Sheboygan Ave., Rm. 115B
P.O. Box 7910
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FAX: 608-267-6734
E-Mail: ogc.exec@dot.state.wi.us

February 29, 2000

Mr. Gary L. Poulson, Deputy Revisor
Revisor of Statutes Bureau
131 West Wilson Street
Suite 800
Madison, Wisconsin 53703

RE: **STATEMENT OF SCOPE OF PROPOSED RULEMAKING, TRANS 233**

Dear Mr. Poulson:

Enclosed is the Statement of Scope for the proposed amendment of ch. Trans 233. Please publish the Scope Statement in accordance with § 227.135(3), Stats., in the Administrative Register.

Sincerely,

Marianne E. Hag
for Julie A. Johnson
Paralegal

Enclosures

cc: Richard G. Chandler/DOA State Budget Director
Senator Judy Robson, Co-Chair/JCRAR
Representative Glenn Grothman, Co-Chair/JCRAR
Alice Morehouse
Mike Goetzman
Jim Gruendler
John Haverberg

STATEMENT OF SCOPE

DESCRIPTION OF THE OBJECTIVE OF THE RULE:

Trans 233, relating to land divisions abutting state trunk highways and connecting streets, was revised effective February 1, 1999. WISDOT has been working cooperatively with many affected interests and legislators to refine the implementation of the new provisions of Trans 233 through a four step process, in brief:

- Education, Training, Meetings.
- Specific Responses to Questions.
- Uniform Implementation.
- Refine Rule As Necessary.

This proposed rule revision is intended to implement conceptual agreements by WISDOT for clarification or modification of the rule as part of this continuing cooperative process "for the safety of entrance and departure from the abutting [highways] and for the preservation of the public interest and investment in the [highways]."

DESCRIPTION OF EXISTING POLICIES RELEVANT TO THE RULE AND OF NEW POLICIES PROPOSED TO BE INCLUDED IN THE RULE AND AN ANALYSIS OF POLICY ALTERNATIVES:

Trans 233 was established in 1956 and required amendments in 1999 for consistency with existing laws, new developments in land use and transportation planning principles, and for clarification and uniformity. The objective of this revision is to recognize state and local economic and land use goals in the rule, enhance the effectiveness of the rule "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 highway access permit conditional thereon," and to provide reasonable flexibility and clarity that does not jeopardize public investments or safety now or in the future.

STATUTORY AUTHORITY FOR THE RULE:

Sections 236.12(2)(a), 236.13(1)(e), and 236.12(3), Stats.
Sections 84.25, 84.29, 84.295, and 86.07, Stats.
Sections 1.11, 80.01(3), 84.01(29), and 84.106, Stats., as created by
1999 Wis. Act 9

ESTIMATES OF THE AMOUNT OF TIME THAT STATE EMPLOYEES WILL SPEND DEVELOPING THE RULE AND OF OTHER RESOURCES NECESSARY TO DEVELOP THE RULE:

Approximately 5 days for each member of an 8-member development team to continue meeting with the public and consider the proposed rule after it is drafted, and 6 days for initial and 2 days for final policy articulation and drafting by two persons. There will be coordination required with interest groups in order to obtain review and comment and establish appropriate public hearing(s) at convenient locations. Other reviews and approvals will be handled in the normal course of DOT business.

Signed at Madison, Wisconsin, this 29th
day of February, 2000.

Charles H. Thompson
CHARLES H. THOMPSON
Secretary
Wisconsin Department of Transportation



JUL 07 2000

Wisconsin Department of Transportation

www.dot.state.wi.us

Tommy G. Thompson
Governor

Terrence D. Mulcahy, P.E.
Secretary

Office of General Counsel
4802 Sheboygan Ave., Rm. 115B
P.O. Box 7910
Madison, WI 53707-7910

Telephone: 608-266-8810
FAX: 608-267-6734
E-Mail: ogc.exec@dot.state.wi.us

The Honorable Judy Robson
Senate Chairman
Joint Committee for Review
of Administrative Rules
Room 15 South, State Capitol
Madison, Wisconsin 53702

June 30, 2000

The Honorable Glenn Grothman
Assembly Chairman
Joint Committee for Review
of Administrative Rules
Room 15 North, State Capitol
Madison, Wisconsin 53702

RE: **NOTICE OF PUBLIC HEARING** and Text of Proposed Rule, relating to **division of land abutting a state trunk or connecting highway, Trans 233**

Dear Senator Robson and Representative Grothman:

Enclosed for your information is a Notice of Public Hearing and Text of Proposed Rulemaking relating to the above-entitled matter. These documents have also been filed with the Revisor of Statutes, the Legislative Council, and the Department of Administration in accordance with the requirements of §§ 227.15 and 227.17, Stats.

Sincerely,

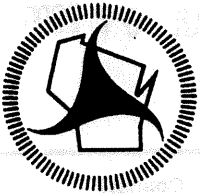
A handwritten signature in cursive script that reads "Julie A. Johnson".

Julie A. Johnson
Paralegal

Enclosure

cc: Alice Morehouse
Mike Goetzman
Mike Cass
John Haverberg
Bonnie Tripoli
Ernie Peterson
Ron Nohr

JUL 07 2000



Wisconsin Department of Transportation

www.dot.state.wi.us

Tommy G. Thompson
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June 30, 2000

The Honorable Judy Robson
Senate Chairman
Joint Committee for Review
of Administrative Rules
Room 15 South, State Capitol
Madison, Wisconsin 53702

The Honorable Glenn Grothman
Assembly Chairman
Joint Committee for Review
of Administrative Rules
Room 15 North, State Capitol
Madison, Wisconsin 53702

RE: **NOTICE OF PUBLIC HEARING** and Text of Proposed Rule, relating to **division of land abutting a state trunk or connecting highway**, Trans 233

Dear Senator Robson and Representative Grothman:

Enclosed for your information is a Notice of Public Hearing and Text of Proposed Rulemaking relating to the above-entitled matter. These documents have also been filed with the Revisor of Statutes, the Legislative Council, and the Department of Administration in accordance with the requirements of §§ 227.15 and 227.17, Stats.

Sincerely,

A handwritten signature in cursive script that reads "Julie A. Johnson".

Julie A. Johnson
Paralegal

Enclosure

cc: Alice Morehouse
Mike Goetzman
Mike Cass
John Haverberg
Bonnie Tripoli
Ernie Peterson
Ron Nohr

The Wisconsin Department of Transportation proposes an order to renumber TRANS 233.012 and 233.12; renumber and amend TRANS 233.11(2); amend TRANS 233.01, 233.05(1)(intro.), 233.105(1), (2)(intro.) and (3), and 233.11(title) and (1); repeal and recreate TRANS 233.03(5); and create TRANS 233.012(2), 233.015(1m) and (2m), 233.03(6) to (8), 233.08(2)(c) and (3n), 233.11(3)(b) to (f), (4) and (5), and 233.13(2), relating to division of land abutting a state trunk or connecting highway.

**NOTICE OF HEARING
AND
TEXT OF PROPOSED RULE**

NOTICE IS HEREBY GIVEN that pursuant to ss. 15.04(1)(g), 85.16(1), 86.07(2), 85.025, 85.05, 84.01(15), 84.015, 84.03(1), 84.01(2), 85.02, 88.87(3), 20.395(9)(qx), 236.12(2)(a) and (7), 236.13(1)(e) and (3), 1.11(1), 1.12(2); 1.13(3), as created by 1999 Wis. Act 9; 114.31(1), 84.01(17), 66.30(2); and 86.31(6), Stats., as affected by 1999 Wis. Act 9; and interpreting ss. 1.13(2), 16.9651(2) and 66.0295(2)(c), Stats., all as created by 1999 Wis. Act 9; 15.04(1)(g), 1.11, 1.12, 32.035, 88.87, 703.11, Stats; 84.01(15), 84.015, 84.03(1), Stats., and the federal laws and regulations thereby expressly endorsed and adopted by the Legislature, including 23 USC 109, 134, 135, 138, and 315; and 236.12(2)(a), 236.34, 236.45 and 703.11, Stats., the Department of Transportation will hold a public hearing in **Room 421** of the Hill Farms State Transportation Building, 4802 Sheboygan Avenue, Madison, Wisconsin on the **4th** day of **August**, 2000, at **9:00 AM**, to consider the amendment of ch. Trans 233, Wisconsin

Administrative Code, relating to division of land abutting a state trunk or connecting highway.

An interpreter for the hearing impaired will be available on request for this hearing. Please make reservations for a hearing interpreter at least 10 days prior to the hearing.

The public record on this proposed rule making will be held open until close of business August 11, 2000, to permit the submission of written comments from persons unable to attend the public hearing or who wish to supplement testimony offered at the hearing. Any such comments should be submitted to Julie Johnson, Administrative Rules Coordinator, Department of Transportation, Office of General Counsel, Room 115-B, P. O. Box 7910, Madison, WI 53707-7910.

Parking for persons with disabilities and an accessible entrance are available on the north and south sides of the Hill Farms State Transportation Building.

Analysis Prepared by the Wisconsin Department of Transportation

STATUTORY AUTHORITY: ss. 15.04(1)(g), 85.16(1), 86.07(2), 85.025, 85.05, 84.01(15), 84.015, 84.03(1), 84.01(2), 85.02, 88.87(3), 20.395(9)(qx), 236.12(2)(a) and (7), 236.13(1)(e) and (3), 1.11(1), 1.12(2); 1.13(3), as created by 1999 Wis. Act 9; 114.31(1), 84.01(17), 66.30(2); and 86.31(6), Stats., as affected by 1999 Wis. Act 9

STATUTES INTERPRETED: ss. 1.13(2), 16.9651(2), 66.0295(2)(c), and 86.255, Stats., all as created by 1999 Wis. Act 9; 15.04(1)(g), 1.11, 1.12, 32.035, 88.87, Stats; 84.01(15), 84.015, 84.03(1), Stats., and the federal laws and regulations thereby expressly endorsed and adopted by the Legislature, including 23 USC 109, 134, 135, 138, and 315; and 236.12(2)(a), 236.34, 236.45 and 703.11, Stats.;

General Summary of Proposed Rule.

THREE OBJECTIVES.

This proposed revision to ch. Trans 233 attempts to accomplish three objectives. **First**, it implements agreements reached through a broad-based, participative process for consideration of improvements to the 1999 rule, sponsored by the Subcommittee on Review of Ch. Trans 233 of the Assembly Committee on Transportation. **Second**, it attempts to strike a proper balance between individual and governmental highway

setback concerns through a combination of specific analysis and applicability of different setback provisions to defined portions of the state trunk and connecting highway system. The proposal reflects the testimony and discussion at the hearing before the Joint Committee for Review of Administrative Rules on June 21, 2000. **Third**, it recognizes and reflects recent changes in state and federal laws regarding land use that affect highway and transportation planning and development.

BRIEF HISTORY.

Trans 233, relating to land divisions abutting state trunk highways and connecting streets, was established in 1956 and required amendments for consistency with existing laws, new developments in land use and transportation planning principles, and for clarification and uniformity. Trans 233 was first revised effective February 1, 1999.

WISDOT has gained about a year and half experience with the revised rule and has been working cooperatively with many affected interests and legislators to refine the implementation of the new provisions of Trans 233 through a four step process, in brief:

Education, Training, Meetings.

Specific Responses to Questions.

Uniform Implementation.

Refine Rule As Necessary.

Through this process, WISDOT and others have reached numerous agreements to amend TRANS 233, Wis. Admin. Code, in conjunction with the Subcommittee on Review of Ch. Trans 233 of the Assembly Committee on Transportation. These agreements have been memorialized in the Wisconsin Legislative Council Staff Memorandum of William Ford to Representative David Brandemuehl dated **February 18, 2000** and an attached memo from James S. Thiel of **February 14, 2000** to former Secretary of Transportation Thompson.

1. IMPLEMENT AGREEMENTS.

The first purpose of this proposed rule revision is to implement these conceptual agreements for clarification or modification of the rule as part of this continuing cooperative process "for the safety of entrance and departure from the abutting [highways] and for the preservation of the public interest and investment in the [highways]." Further details of these improvements are provided in notes following each section of the proposed rule revision.

The legislative Subcommittee asked WISDOT and other interested parties to continue to work together to develop amendments to s. Trans 233.08, relating to **setback** requirements and restrictions. There has been a setback provision in the rule since 1956 that has always contained language limiting structures and improvements within the setback.

WISDOT followed-up with several conceptual meetings and discussions with affected interests and exchanges of various drafts and correspondence relating to **setbacks**. A hearing was held before the Joint Committee for Review of Administrative Rules (JCRAR) on June 21, 2000, at which further concepts and ideas were advanced or clarified.

2. ADDRESS SETBACK ISSUES.

The second purpose of this proposed rule revision is to address these competing **setback** and related issues that came forward at the JCRAR hearing on June 21, in a manner consistent with the Committee's continuing oversight.

The proposed resolution of these concerns is discussed in some detail in this general summary of the rule. There are about 11,800 miles of state trunk highways. There are about 520 miles of connecting highways in 112 cities and 4 villages.

The statutes and the **setback** provisions of the current rule apply in full to all state trunk highways and connecting highways in all 72 counties with one modification; in Milwaukee County, the City of Milwaukee is excluded.

The U.S. Supreme Court has determined that the constitutionality of highway setbacks is well-established. **Gorieb v. Fox**, 274 US 603, 608-610, 47 S. Ct. 675, 677, 71 L. Ed. 1228, 53 A.L.R. 1210 (1927); **Euclid v. Ambler**, 272 US 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926); See also "Validity of front setback provisions in zoning ordinance or regulation", 93 A.L.R.2d 1223; and 83 Am. Jur. 2d **Zoning and Planning**, sec. 191 (2000):

"Setback regulations are widely upheld as an appropriate use of zoning power, although, of course, such regulations must be reasonable and not confiscatory."

In a recent Wisconsin case upholding the validity of a highway setback requirement, the Wisconsin Court stated that setbacks:

"promote a variety of public purposes...provision for light and air, fire protection, traffic safety, prevention of overcrowding, rest and recreation, solving drainage problems, protecting the appearance and character of a neighborhood, conserving property values, and may, in particular cases, promote a variety of aesthetic and psychological values as well as ecological and environmental interests." (citing 3 The Law of Zoning and Planning sec. 34B.02[2] (1995). **Town of Portland v. WEPCO**, 198 Wis. 2d 775, 779, 543 N.W.2d 559, 560-61 (1996)

Not all traffic safety reasons for setbacks are apparent. Setbacks from freeways and expressways and other major through highways also serve to enhance traffic safety by making it possible for workers and equipment to access the many light, water, sewer,

power, communication and other public utilities in or across highways for maintenance and construction from the back of the highway right of way line. Without setbacks highway and law enforcement authorities would be required to allow access from the highway lanes themselves or close traffic lanes, or both, on these higher speed and higher traffic volume highways. By their very nature these actions would impede traffic, increase congestion and increase the crash and injury risk to the motorists on the highway, highway and law enforcement personnel, and the public utility workers.

A recent Wisconsin Legislative Council analysis of the law of regulatory takings generally concludes that the ongoing judicial goal is to find an appropriate balance between two conflicting principles: the property rights of individuals and the government's authority on behalf of all citizens to regulate an owner's use of the land.

The general rule is that a regulation is only a "taking" requiring compensation if it deprives the owner of "all or substantially all" of the value of a constitutionally protected property interest. It is not enough for the property owner to show that the regulation denies the owner of the expected use of the property. To make this determination, the courts have adopted an ad hoc, case-by-case, specific analysis of each situation, because there is no clear "set formula."

Requiring the dedication of property for public use, including the dedication of private property for public highway and transportation purposes, as part of a land division approval process is not a taking of private property for public use without just compensation. This issue was decided by the Wisconsin Supreme Court in Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442, 446-448 (1965) and confirmed recently in Hoepker v. City of Madison Plan Commission, 209 Wis. 2d 633, 649-650, par. 21, 563 N.W.2d 145, 152 (1997). Additionally, the Legislature has established a procedure for inverse condemnation through which an individual may seek compensation for a regulatory taking, sec. 32.10, Stats.

It is important to distinguish the above land division situations initiated by private owners from those where WISDOT does acquire property from one private property owner to provide to another private owner as a result of WISDOT's actions. For example, WISDOT has the authority to condemn lands of one property owner to provide a public access road to another property owner who would otherwise be landlocked by the highway construction actions initiated by WISDOT. Section 84.09, Stats; 61 OAG 36 (1972). Another example is where WISDOT's highway construction actions initiated by WISDOT require the taking of the parking lot of a small grocery store. If no relocation of the grocery store to serve the community is reasonably possible and the grocery store is critical to the community, WISDOT has authority to condemn lands of an adjacent private owner to provide a functional parking lot for the other private owner and thereby preserve the facility for the community. In all of these cases WISDOT pays compensation for an actual taking. Section 84.09, Stats; 61 OAG 36 (1972).

On May 26 WISDOT proposed to conduct a specific setback analysis when requested of land divisions abutting a state trunk of connecting highway to determine

whether WISDOT can responsibly adjust the setback line or allow a specific structure or improvement within the setback, in a timely manner, with a reasonable appeal process.

The May 26 WISDOT proposal had a 20-year horizon for analysis.

In response, one group of interests proposed that any setback analysis be tied to WISDOT's 6-year plan adopted under sec. 84.01(17), Stats. WISDOT and others rejected this suggestion because the 6-year plan is too short a period, is both under inclusive and over inclusive, is constrained by financial resources rather than public need, and is inconsistent with federal law.

Also in response, another group of interests generally indicated that WISDOT's 20-year specific analysis proposal had gone too far in striking the balance in favor of addressing private, individual concerns to the detriment of sound transportation planning in the interest of safety, convenience and investment of the public. WISDOT had been too short-sighted in its 20-year specific analysis proposal and ought to consider a broader set of criteria.

Finally, the hearing before the Joint Committee for Review of Administrative Rules on June 21 brought out further testimony and suggestions regarding setbacks from additional legislators, from the existing interest groups, and from new groups and individuals.

Therefore, WISDOT proposes a separate setback portion of this proposed rule revision to balance individual, private concerns while preserving the public interest as follows:

A. HIGHWAYS AND MAPS FOR "NORMAL" SETBACK. The normal setback associated with land divisions that has been in existence since 1956 is 110 feet from the center line of the highway or 50 feet from the nearest right of way line, whichever is greater. This normal setback provision will be made applicable to a reduced system of highways. This will consist of those state trunk and connecting highways identified as part of the National Highway System (NHS), [the NHS includes all of Wisconsin's Corridors 2020 as a subset], as well as all other principal arterials, and all other state trunk highways with current average daily traffic of 5,000 or more, and all other state trunk and connecting highways within incorporated areas and within one mile of those corporate boundaries, and those highways with current and forecasted congestion projected to be worse than Level of Service "C" within the following 20 years. [***INSERT MILEAGE NUMBERS****] The rule calls for updating reference maps that identify this system at least every two years. Persons may still seek special exceptions to this normal setback requirement through a specific analysis process.

B. OTHER HIGHWAYS. The remaining state trunk and connecting highways will have a reduced setback of 15 feet from the nearest right of way line, unless local ordinances require a greater setback. Persons may still seek special exceptions to this reduced setback requirement through a specific analysis process.

One or two maps generally showing these highways with the normal setback and with the 15 foot setback are attached to this proposed rule.

3. IMPLEMENT CHANGES IN STATE AND FEDERAL LAW.

The third purpose of this proposed rule provision is to recognize and reflect recent changes in state and federal laws and regulations regarding land use that affect highway and transportation planning and development.

Human Equality.

Section 15.04(1)(g), Stats., requires the head of each Wisconsin agency to examine and assess the statutes under which the head has powers or regulatory responsibilities, the procedures by which those statutes are administered and the rules promulgated under those statutes to determine whether they have any arbitrary discriminatory effect on the basis of race, religion, national origin, sex, marital status or sexual orientation. If WISDOT or agency head finds any such discrimination, he or she shall take remedial action, including making recommendations to the appropriate executive, legislative or administrative authority.

Similarly, Title VI of the Civil Rights Act of 1964 states that "no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 USC 2000d. It bars intentional discrimination as well as disparate impact on protected groups. The federal government has taken steps to require the implementation of these laws at the earliest possible time in the transportation planning process.

Highway building projects that require the destruction of downtown areas due to lack of corridor preservation and lack of adequate setbacks and lack of concern for the affected populace have allegedly had a disparate impact on low income and minority populations. WISDOT believes that it cannot fulfill the mandates of these laws without a comprehensive system of review of land divisions abutting state trunk and connecting highways.

Environment.

Sections 1.11, 1.12, 32.035 and 1.13, 16.9651(2), and 66.0295(2)(c), Stats., as created by 1999 Wisconsin Act 9, direct, authorize, and encourage Wisconsin state agencies, including WISDOT, to the fullest extent possible, to consider the effect of their actions on the environment (air, water, noise, endangered plants and animals,

parklands, historic, scenic, etc.), the use of energy, the impact on agriculture and to balance the mission of the agency and local, comprehensive planning goals, including building of community identity by revitalizing main streets and enforcing design standards, encouragement of neighborhood designs that support a range of transportation options, and providing an integrated, efficient and economical transportation system that affords mobility, convenience and safety that meets the needs of all citizens, including transit dependent and disabled citizens, and implements transportation corridor plans.

Similarly, federal laws require WISDOT to abide by federal design and construction standards while also considering, for example, the impact of WISDOT's actions on air, noise, water pollution, man-made and natural resources, community cohesion and injurious displacement of people, businesses and farms, and implementing federal regulations that require a minimum 20-year transportation planning horizon. WISDOT is authorized and directed by Wisconsin law to carry out all of these federal mandates by secs. 84.01(15), 84.015, and 84.03(1), Stats.

In order to achieve these objectives, WISDOT must do specific analyses looking forward for at least 20 years as required by federal law. WISDOT believes that it cannot fulfill the mandates of these laws without a comprehensive system of review of land divisions abutting state trunk and connecting highways.

RESTRICTIONS REQUIRING USE OF EXISTING CORRIDORS.

The Wisconsin Supreme Court has determined that WISDOT cannot expand its authority to acquire property by agreeing to environmental and human impact mitigation demands of other state and federal authorities in order to get their concurrence to proceed with a project. **Mitton v. Transportation Dept.**, 184 Wis. 2d 738, 516 N.W.2d 709 (1994). Subsequent to this decision, the Wisconsin Legislature enacted sec. 86.255, Stats., in 1999 Wis. Act 9, that places further restrictions on WISDOT's authority to acquire property. These judicial and legislative restrictions have made it necessary for WISDOT to rely on farther, long-range planning and corridor preservation.

CONCLUSION.

Within the rigorous expectations placed upon and expected of WISDOT in providing a transportation system for the public, the ultimate objective of this proposed rule revision is to recognize state and local economic and land use goals, enhance the effectiveness of the rule "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 highway access permit conditional thereon," to provide reasonable flexibility and clarity that does not jeopardize public investments or safety now or in the future, and to provide 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 and investment in such highways." The rule is intended to ensure adequate setbacks and access controls, with sufficient flexibility to provide for locally planned traditional streetscapes

and setbacks in existing and planned urban areas, and to ensure the maximum practical use of existing highway facilities and rights of way to minimize the need for new alignments or expansion of lower function facilities. WISDOT believes that it cannot achieve these legal mandates and expectations without a comprehensive system of review of land divisions abutting state trunk and connecting highways.

Fiscal Effect. There will be an insubstantial reduction in revenues from the fee for the services provided by WISDOT in conjunction with review of land divisions. The change should not have an effect upon any county, city, village, town, school district, vocational, technical and adult education district and sewerage district liability unless they are assuming the role of developer. That situation occurs approximately five to ten times per year statewide. Developers will see a slight reduction in costs related to some condominium plat reviews. Surveyors who submit maps for review will pay less in total fees for the same reason, but those savings could be passed onto the developer. There will also be a slight reduction in costs of surveys passed on to developers or owners.

Several of WISDOT's transportation districts may use existing personnel to review more or less land divisions than in the past. There will be fewer reviews by WISDOT's Central Office staff, but there may be greater involvement with delegations of reviews to local units of government. It is expected that some of the District costs will be defrayed by WISDOT delegating the review for some developments of land abutting connecting highways to the local municipality as allowed in s. 236.12(2)(a), Stats. Since, in general, local officials do review these documents now, there would be no additional costs to any reviewing authority, except to the extent they may voluntarily wish to also review developments of land abutting state trunk highways within their geographic jurisdiction.

In the long-term, there will in all likelihood be state, local and private savings that can be attributed to better long-range transportation planning and less adverse and more positive effects upon communities, businesses, residents, and the environment. An efficient and safe transportation system will have a positive, but hard to quantify, fiscal effect.

Initial Regulatory Flexibility Analysis. Section 236.12(7), Stats., allows WISDOT to establish by rule the reasonable service fees for all or part of the costs of the activities and services provided by WISDOT under that chapter of the statutes. The rule revision eliminates fees to cover the costs of WISDOT for reviewing condominium plats where there is only a change from lease to ownership without a change in property use that affects transportation systems. There is also a delegation to district offices and municipalities that will provide greater access and flexibility in verifying and field reviewing documents. The setback requirements are also reduced on defined highways where consistent with safety and sound transportation planning. Finally, there is a provision for specific analysis and review of requests for special exceptions that does not have to meet the strict, restrictive legal standards for granting variances announced by the Wisconsin Court in **State v. Kenosha County Bd. of Adjust.**, 218 Wis. 2d 396, 577 N.W.2d 813 (1998). The rule also makes new exceptions for locating residential swimming pools within the setback at the owner's option.

Copies of Proposed Rule. Copies of the rule may be obtained upon request, without cost, by writing to Julie Johnson, Administrative Rules Coordinator, Department of Transportation, Office of General Counsel, Room 115-B, P. O. Box 7910, Madison, WI 53707-7910, or by calling (608) 267-3703. Alternate formats of the proposed rule will be provided to individuals at their request.

TEXT OF PROPOSED RULE

Under the authority vested in the state of Wisconsin, department of transportation, by ss. 15.04(1)(g), 85.16(1), 86.07(2), 85.025, 85.05, 84.01(15), 84.015, 84.03(1), 84.01(2), 85.02, 88.87(3), 20.395(9)(qx), 236.12(2)(a) and (7), 236.13(1)(e) and (3), 1.11(1), 1.12(2); 1.13(3), as created by 1999 Wis. Act 9; 114.31(1), 84.01(17), 66.30(2); and 86.31(6), Stats., as affected by 1999 Wis. Act 9, the department of transportation hereby proposes to amend a rule interpreting ss. 1.13(2), 16.9651(2), 66.0295(2)(c), and 86.255, Stats., all as created by 1999 Wis. Act 9; 15.04(1)(g), 1.11, 1.12, 32.035, 88.87, 703.11, Stats; 84.01(15), 84.015, 84.03(1), Stats., and the federal laws and regulations thereby expressly endorsed and adopted by the Legislature, including 23 USC 109, 134, 135, 138, and 315, Stats., relating to division of land abutting a state trunk or connecting highway.

SECTION 1. Trans 233.01 is amended to read:

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. The ability of state trunk and connecting highways to serve as an efficient part of an integrated intermodal transportation system meeting interstate, statewide, regional and local needs is jeopardized by failure to consider and accommodate long-range transportation plans

during land division processes. 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, to help maintain speed limits, and to provide for the development and implementation of an intermodal transportation system to serve the mobility needs of people and freight and foster economic growth and development, while minimizing transportation-related fuel consumption, air pollution, and adverse effects on the environment. Preservation of the public investment in an integrated transportation system also assures no person, on the grounds of race, color, or national origin, is excluded from participation in, denied the benefits, or subjected to discrimination under any transportation program or activity.

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. The authority to impose minimum standards for land divisions to consider and accommodate long-range transportation plans is ss. 15.014(1)(g), 85.16(1), 85.025, 85.05, 84.01(15), 84.015, 84.03(1), 84.01(2), 85.02, 88.87(3), 20.305(9)(qx), 1.11(1), 1.12(2), 1.13(3), as created by 1999 Wisconsin Act 9; 114.31(1), 84.01(17), 66.30(2), and 86.31(6), as affected by 1999 Wisconsin Act 9.

NOTE: The Department is authorized and required by ss. 84.01(15), 84.015, 84.03(1) and 20.395(9)(qx), to plan, select, lay out, add to, decrease, revise, construct, reconstruct, improve and maintain highways and related projects, as required by federal law, Title 23, USC and all acts of Congress amendatory or supplementary thereto, and the federal regulations issued under the federal code; and to expend funds in accordance with the requirements of acts of Congress making such funds available. Among these federal laws that the Department is authorized and required to follow are 23 USC 109 establishing highway design standards; 23 USC 134, requiring development and compliance with long-range (minimum of 20 years) metropolitan area transportation plans; and 23 USC 135, requiring development and compliance with long-range (minimum of 20 years) statewide transportation plans. Similarly, the Department is authorized and required by the state statutes cited and other federal law to assure that it does not

unintentionally exclude or deny persons equal benefits or participation in transportation programs or activities on the basis of race, color, national origin and other factors, and to give appropriate consideration to the effects of transportation facilities on the environment and communities. 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 and 519.97 center-line miles of connecting highways. Out of about 116 municipalities in which there are connecting highways; 112 are cities and 4 or more are villages.

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 marker. 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.

SECTION 2. Trans 233.012 is renumbered Trans 233.012(1).

SECTION 3. Trans 233.012(2) is created to read:

Trans 233.012(2) Structures and improvements legally placed in a setback area under ch. Trans 233 prior to February 1, 1999 are explicitly allowed to continue to exist. Plats that have received preliminary or final 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.

SECTION 4. Trans 233.015(1m), (2m) and (4)(note) are created to read: