STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

CR 00-109

The Wisconsin Department of Transportation proposes an order to repeal TRANS 231.01(3); renumber TRANS 233.012; renumber and amend TRANS 233.11(2); amend TRANS 231.01(intro.), (4) to (7) and (9), 231.02(2) to (4) and (6), 231.03(2), (5), (7)(a) and (c), 231.04(1), (3) and (4)(a), 231.06(2) and (3), 231.07(2), 233.01, 233.02(intro.), 233.03(intro.), and (2) to (4), 233.05(1), 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), (1r), (2m), (5m), (6m), (6r), (7m) and (8m), 233.03(6) to (8), 233.08(2)(c) and (3n), 233.11(3)(b) to (f), and (4) to (7), relating to division of land abutting a state trunk or connecting highway.

REPORT OF THE DEPARTMENT OF TRANSPORTATION ON THE FINAL RULE DRAFT

This report is submitted to the presiding officers of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

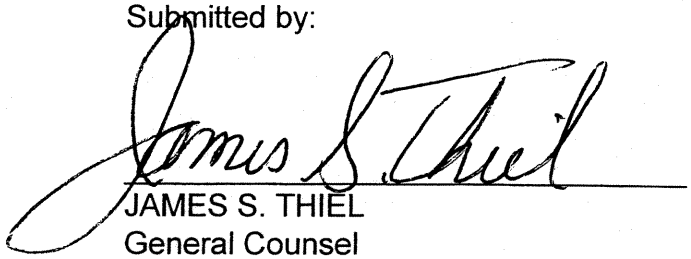
Part 1--Analysis prepared by the Department of Transportation.

Part 2--Rule text in final draft form.

Part 3--Recommendations of the Legislative Council.

Part 4--Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

Submitted by:



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PART 1
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); and 66.0301(2), as affected by 1999 Wis. Acts 150 and 167; and 86.31(6), Stats., as affected by 1999 Wis. Act 9

STATUTES INTERPRETED: ss. 1.13(2), 16.9651(2), 66.1001(2)(c), and 86.255, all as created by 1999 Wis. Act 9; 15.04(1)(g), 1.11, 1.12, 32.035, 88.87, 703.11, 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.

General Summary of Proposed Rule.

FIVE OBJECTIVES.

This proposed revision to ch. Trans 233 attempts to accomplish five 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 special exceptions 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. **Fourth**, it makes changes recommended by the Legislative Council Rules Clearinghouse on July 28, 2000, and corrects outmoded terms. **Fifth**, it reflects the testimony and discussion at the public hearing before the Department of Transportation on August 4, 2000, and all the written comments received.

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 Charles H. 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]."

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 exception; 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."

Wisconsin expressly adopted the reasoning of the U.S. Supreme Court and upheld a Milwaukee setback requirement. Bouchard v. Zetley, 196 Wis. 635, 645, 220 N.W. 209 (1928). In 1959, the Wisconsin Supreme Court also upheld the validity of a 150 foot setback from a highway right of way line to combat hazards to traffic. Highway 100 Auto Wreckers v. West Allis, 6 Wis. 2d 637, 650-651, 96 N.W.2d 85 (1959). In 1989, the Wisconsin Supreme Court held that a setback requirement does not effect a taking unless the restriction "practically or substantially renders the land useless for all reasonable purposes." Klinger v. Oneida County, 149 Wis. 2d 838, 848-849, 440 N.W.2d 348 (1989).

In a very recent 1996 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 or desired use of the property. To make this determination, the courts have adopted an ad hoc, case-by-case, 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 for 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 6 years is too short a period, the plan 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.

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. A consensus appeared to be reached that WISDOT should attempt to define a system of highways where a normal setback and where a reduced setback would be consistent with safety and public interest in the highways.

Therefore, WISDOT proposed a separate **setback** portion of the 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 state trunk or connecting 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 consists 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, all other state trunk and connecting highways within incorporated areas and within the extraterritorial zoning boundaries of cities and villages, major intersections consisting of the portion of a state trunk highway or connecting highway within one-half mile of its intersection or interchange with a freeway or expressway, and those highways with current and forecasted congestion projected to be worse than Level of Service "C" within the following 20 years. In response to testimony at the hearing on **August 4, 2000**, and written recommendations, the normal setback was established to coincide with the extraterritorial zoning boundaries of cities and villages as provided in sec. 62.23(7a), Stats. 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.

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.

A map generally showing these highways with the normal setback and with the 15 foot setback are attached to this proposed rule. The normal setback currently applies to about 7,320 miles of highway; the reduced setback to about 4,312 miles.

3. IMPLEMENT CHANGES IN STATE AND FEDERAL LAW.

The third purpose of this proposed rule revision 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 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 66.1001(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 look forward for at least 20 years as required by federal law. WISDOT 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 place greater reliance on long-range planning and corridor preservation.

4. IMPLEMENT CHANGES RECOMMENDED BY LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

The fourth purpose of this proposed rule revision is to include changes recommended by the Legislative Council Rules Clearinghouse in its report dated **July 28, 2000**. The recommendations fall into only 2 Rules Clearinghouse categories: (a) Format, Style and Placement in Administrative Code, and (b) Clarity, Grammar, Punctuation and Use of Plain Language. Details of the changes recommended by the Legislative Rules Clearinghouse can be found in the Part 4 report on pp. 55-56. The proposed rule also makes technical corrections to delete outmoded references to the former "highway commission," to correct spelling and nomenclature, and adopt modern rule drafting conventions in Ch. Trans 231.

5. MAKE CHANGES RECOMMENDED AT AUGUST 4 PUBLIC HEARING AND IN WRITTEN COMMENTS.

The fifth purpose of this proposed rule revision is to include changes recommended at the public hearing before the Department on **August 4, 2000** and in written comments received by the Department regarding the **August 4, 2000** public hearing draft. In brief, the changes resulting from the hearing refined the definition of the highway system subject to the normal and reduced setbacks, recognized the extraterritorial zoning jurisdiction of cities and villages under sec. 62.23(7a), Stats., clarified the "grandfathering" provision, defined "desirable traffic access pattern," "user," "reviewing municipality," "technical land division" and "major intersection," clarified that if the Department fails to act within the time specified it shall be considered to have no objection to the land division or special exception, clarified noise and drainage and recording provisions. More details of modifications made as a result of testimony and written comments can be found in the Part 4 report on pp. 49-54.

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 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.

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.

PART 2
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), 66.0301(2), as affected by 1999 Wis. Acts 150 and 167; 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), 66.1001(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, relating to division of land abutting a state trunk highway or connecting highway.

SECTION 1. Trans 231.01(intro.) is amended to read:

Trans 231.01 General. (1) This regulation is for the purpose of designating standards within which the ~~district engineers or the maintenance engineer of the commission, or authorized representatives of said engineers, are~~ department is authorized to issue permits pursuant to s. 86.07(2), Stats., for placing, constructing or altering driveways for movement of traffic between state trunk highways and abutting property or otherwise making excavations or fills or installing culverts or making other alterations in a state trunk highway or in other manner disturbing any such highway or bridge thereon.

SECTION 2. Trans 231.01(3) is repealed.

SECTION 3. Trans 231.01(4) to (7) and (9) are amended to read:

Trans 231.01(4) No permit issued pursuant to this authority shall ~~supercede~~ supersede more restrictive requirements imposed by valid applicable local ordinances.

(5) Permits for such installations or alterations exceeding the limits or conditions established hereby shall be issued only on specific approval of the ~~commission~~ secretary.

(6) No permit shall be issued or be valid for construction of a driveway connecting directly with the through roadway of a controlled-access highway unless and until such driveway is authorized by specific finding, determination and declaration approved by the ~~commission~~ department.

(7) Applications for permits shall be made on forms available at the offices of the ~~state highway commission~~ department, and will be furnished upon request.

(9) No permit may be issued under this chapter for construction of a highway or a private road or driveway that connects directly with a state trunk highway and that provides vehicular access to a land division, as defined in s. Trans 233.015(4), unless the land division was created before February 1, 1999 or the department, district office, as defined in s. Trans 233.015(1r), or reviewing municipality, as defined in s. Trans 233.015(6m), determines that the land division meets the requirements of ch. Trans 233. If the department determines that a land division created after February 1, 1999, differs substantially from the land division shown on a land division map to which the department, district office or reviewing municipality certified no objection under ch. Trans 233, any permit issued under this chapter for that land division is void and may be summarily canceled by written notice to the land owner and the private road or driveway shall be discontinued.

SECTION 4. Trans 231.02(2), (3), (4) and (6) are amended to read:

Trans 231.02(2) That the permittee shall furnish all materials, do all work, and pay all costs in connection with the construction of the driveway and its appurtenances on the right of way. Materials used and type and character of work shall be suitable and appropriate for its intended purpose, and the type of construction shall be as designated and subject to approval of the ~~engineer~~ department. The permittee shall make the installation without jeopardy to or interference with traffic using the highway. Highway surfaces, shoulders, ditches and vegetation disturbed shall be restored to equivalent of original condition by the permittee.

(3) That no revisions or additions shall be made to the driveway or its appurtenances on the right of way without the written permission of the ~~engineer~~ department.

(4) The ~~commission~~ department reserves the right to make such changes, additions, repairs and relocations within statutory limits to the driveway or its appurtenances on the right of way as may at any time be considered necessary to permit the relocation, reconstruction, widening, and maintaining of the highway or to provide proper protection to life and property on or adjacent to the highway.

(6) The ~~commission~~ department does not assume any responsibility for the removal or clearance of snow, ice or sleet, or the opening of windrows of such material, upon any portion of any driveway or entrance along any state highway even though snow, ice or sleet is deposited or windrowed on ~~said~~ the driveway or entrance by its authorized representatives engaged in normal winter maintenance operations.

SECTION 5. Trans 231.03(2), (5), (7)(a) and (c) are amended to read:

Trans 231.03(2) The number of driveways permitted serving a single property frontage along a state trunk highway shall be the minimum deemed necessary by the ~~engineer~~ department for reasonable service to the property without undue impairment of safety, convenience, and utility of the highway.

(5) The driveway ~~shall~~ may not obstruct or impair drainage in highway side ditches or roadside areas. Driveway culverts, where necessary, shall be adequate for surface water drainage along the highway and in no case less than the equivalent of 15-inch diameter pipe. The distance between culverts under successive driveways

shall be not less than 10 feet except as such restricted area is permitted to be filled in under the provisions of sub. (7).

(7)(a) The filling in or grading down shall be to grades approved by the ~~engineer~~ department and, except where highway drainage is by means of curb and gutter, water drainage of the area shall be directed away from the highway roadbed in a suitable manner.

(c) Where no highway side ditch separates the restricted area from the highway roadbed, permanent provision may be required to separate the area from the highway roadbed, to prevent its use for driveway or parking purposes, by construction of a border, curb, rail, or posts deemed adequate by the ~~engineer~~ department.

SECTION 6. Trans 231.04(1), (3) and (4)(a) are amended to read:

Trans 231.04(1) WIDTH OF DRIVE. No driveway except as hereinafter provided shall have a width greater than 35 feet measured at right angles to the centerline of the driveway, except as increased by permissible radii. In no instance shall a driveway have a width greater than 62 feet, ~~(~~including flare of return radii~~)~~, measured along a line 10 feet from and parallel to the edge of the pavement on which the entrance will be constructed.

(3) ANGULAR PLACEMENT OF DRIVE. The angle between the centerline of a driveway serving two-way traffic and the edge of the pavement ~~shall~~ may not be less than 45°. Where suitable precautions are taken, or one-way operation along divided highways permits only one-way operation of the driveways, the angle of the entrance drive to grantee's property may be decreased. The angle of the exit drive with the highway pavement shall be not less than 45°.

(4)(a) An island of a minimum length of 10 feet shall be maintained between driveways serving the same premises. ~~(~~The measurement shall be along a line 10 feet from and parallel to edge of pavement.~~)~~ The permit shall specify that the island area, if less than 20 feet in length or 10 feet in width, is to be defined by physical structures such as curbs, posts, boulders, masonry walls~~,~~ or guard ~~rail, etc~~ rails. Materials used to define the island, except concrete curbs, shall be painted white. The side of the island next to the highway shall be not less than 10 feet from the pavement edge. The side of the island farthest from the highway shall be at the right-of-way line.

SECTION 7. Trans 231.06(2) and (3) are amended to read:

Trans 231.06(2) RETURN RADII. The return radii projected between the line of face of curb of the highway and the driveway shall be determined by the ~~engineer~~ department basing ~~his~~ its decision on the type of traffic and the restrictions given in subs. (1) and (4). In all cases, the entire flare shall fall within the right of way.

(3) ANGULAR PLACEMENT OF DRIVE. The angle between the centerline of the driveway and the curb line shall be not less than ~~45~~ 45°.

SECTION 8. Trans 231.07(2) is amended to read:

Trans 231.07(2) RETURN RADII. The radius of the return connecting the line of face of curb of the highway and the edge of driveway ~~shall~~ may not exceed 10 feet. In all cases the entire flare shall fall within the right of way.

SECTION 9. 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 highways 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 and needs 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~~ , to preserve the 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 and on land owners and users. Preserving the public investment in an integrated transportation system also assures that no person, on the grounds of race, color, or national origin, is excluded from participation in, denied the benefits of, 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 and needs 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), 66.1001(2)(c), as affected by 1999 Wis. Acts 150 and 167; 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 520 center-line miles of connecting highways. Of at least 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~~ appears at the top of the highway numbering ~~maker~~ 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. With very rare exceptions, 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 10. Trans 233.012 is renumbered Trans 233.012(1).

SECTION 11. Trans 233.012(2) is created to read:

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

SECTION 12. Trans 233.015(1m) and (1r) 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 department's facilities development manual.

NOTE: Guidelines established in the Department's Facilities Development Manual are not considered "rules," as defined in s. 227.01(13), Stats., and so are not subject to the requirements under s. 227.10, Stats.

(1r) "District office" means an office of the division of transportation districts of the department.

SECTION 13. Trans 233.015(2m), (5m), (6m) and (6r) are created to read:

Trans 233.015(2m) "In-ground swimming pool" includes a swimming pool that is designed or used as part of a business or open to use by the general public or

members of a group or association. "In-ground swimming pool" does not include any above-ground swimming pools without decks.

(5m) "Major intersection" means the area within one-half mile of the intersection or interchange of any state trunk highway or connecting highway with a designated expressway, or freeway, under s. 84.295, Stats., or a designated interstate highway under s. 84.29, Stats.

(6m) "Reviewing municipality" means a city or village to which the department has delegated authority to review and object to land divisions under s. Trans 233.03(7).

(6r) "Secretary" means the secretary of the department of transportation.

SECTION 14. Trans 233.015(7m) and (8m) are created to read:

Trans 233.015(7m) "Technical land division" means a land division involving a structure or improvement that has been situated on the real property for at least 5 years, does not result in any change to the use of existing structures and improvements and does not negatively affect traffic. "Technical land division" includes the conversion of an apartment building that has been in existence for at least 5 years to condominium ownership, the conversion of leased commercial spaces in a shopping mall that has been in existence for at least 5 years to owned spaces, and the exchange of deeds by adjacent owners to resolve mutual encroachments.

(8m) "User" means a person entitled to use a majority of the property to the exclusion of others.

SECTION 15. Trans 233.02(intro.) is amended to read:

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

SECTION 16. Trans 233.03(intro.), (2), (3) and (4) are amended to read:

Trans 233.03 Procedures for review. (intro.) The following procedures apply to review by the department, district office or reviewing municipality of proposed certified survey maps, condominium plats and other land divisions:

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

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

Additional information required is the name and address of the register of deeds, any approving agency, the land division map preparer and the land divider. This information is to be submitted to the district office.

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

SECTION 17. Trans 233.03(5) is repealed and recreated to read:

Trans 233.03(5) TIME LIMIT FOR REVIEW. (a) Except as provided in pars. (b) to (d), not more than 20 calendar days after receiving a completed request to review a land division map, the department, district office or reviewing municipality shall do one of the following:

1. Determine that the land division is a technical land division. Upon determining that a land division is a technical land division, the department, district office or

reviewing municipality shall certify that it has no objection to the land division map and shall refund all fees paid for review of that land division map.

2. Provide written notice to the land divider either objecting to or certifying that it has no objection to the land division.

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.

(b) The department and district offices are not required to complete conceptual reviews under sub. (1) within a specified time, but shall endeavor to complete a conceptual review under sub. (1) within 30 calendar days after receiving the completed request.

(c) If a special exception is requested under s. Trans 233.11, the department, district office or reviewing municipality shall complete its review of the land division map within the time limit provided in s. Trans 233.11(6).

(d) A request is considered complete under this subsection unless, within 5 working days after receiving the request, the department, district office or reviewing municipality provides written notice to the land divider stating that the request is incomplete and specifying the information needed to complete the request. On the date that additional information is requested under this subdivision, the time period for review ceases to run, but resumes running upon receipt of the requested information.

(e) If the department, district office or reviewing municipality fails to act within the time limit provided in this section or s. Trans 233.11(6), the department, district office or reviewing municipality shall be considered to have no objection to the land division map or special exception.

SECTION 18. Trans 233.03(6) to (8) are created to read:

Trans 233.03(6) DISTRICT AUTHORITY TO REVIEW LAND DIVISION MAPS. Beginning on the effective date of this subsection . . . . [Revisor inserts date], each district office may review land division maps under this chapter. The department shall develop implementing procedures to assure consistency and uniformity of such reviews among district offices and shall provide uniform guidance in figure 3 of procedure 7-50-5 of the department's facilities development manual dated December 1, 2000.

NOTE: Guidelines established under this subsection are not considered "rules", as defined in s. 227.01(13), Stats., and so are not subject to the requirements under s. 227.10, Stats. However, this rule references uniform guidance by date so that future revisions to that uniform guidance will become effective only if ch. Trans 233 is amended.

(7) MUNICIPAL AUTHORITY TO REVIEW LAND DIVISION MAPS. The department may, upon request, delegate to a city or village authority to review and object to any proposed land division that abuts a state trunk highway or connecting highway lying within the city or village. The department shall develop a uniform written delegation agreement in cooperation with cities and villages. The delegation agreement may authorize a city or village to grant special exceptions under s. Trans 233.11. Any decision of a reviewing municipality relating to a land division map or special exception is subject to the appeal procedure applicable to such decisions made by the department or a district office, except that the department may unilaterally review any such decision of a reviewing municipality to ensure conformity with the delegation agreement and this chapter and may reverse or modify the municipality's decision as appropriate. No reviewing municipality may change its setback policy after executing a delegation agreement under this section, except by written amendment to the delegation agreement approved by the department.

(8) APPEALS. (a) *Department review.* Except as provided in this paragraph and par. (b), a land divider, governmental officer or entity, or member of the general public may appeal a final decision of a district office or reviewing municipality regarding a land division map, special exception, or consequence of a failure to act to the secretary or the secretary's designee. Appeals may be made not more than 20 calendar days after that final decision or failure to act. The secretary or the secretary's designee may reverse, modify or affirm the decision. Not more than 60 calendar days after receiving the appeal, the secretary or secretary's designee shall notify the appealing party and the land divider in writing of the decision on appeal. If the secretary or secretary's designee does not provide written notice of his or her decision within the 60-day limit, the department is considered to have no objection to the final decision of the district office or reviewing municipality. The department may not unilaterally initiate a review of a decision of a district office certifying non-objection to a land division map, with or without a special exception. The department may unilaterally review any decision of a reviewing municipality relating to a land division map to ensure conformity with the delegation agreement and this chapter, and may reverse or modify the municipality's decision as appropriate. No person may appeal a conceptual review under sub. (1).

(b) *Judicial review.* 1. 'Chapter 236 land divisions.' Judicial review of any final decision of the department, district office or reviewing municipality relating to a land division that is subject to chapter 236, Stats., shall follow appeal procedures specified in that chapter.

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 any final decision of the department, district office or reviewing municipality relating to a land division that is not subject to chapter 236, Stats., shall follow the procedures specified in chapter 227, Stats., for judicial review of agency decisions.

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.

SECTION 19. Trans 233.05(1) is amended to read:

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

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

exception shall be confirmed and granted only through the driveway permitting process and all permits are revocable."

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

SECTION 20. Trans 233.08(2)(c) and (3n) are created to read:

Trans 233.08(2)(c) At least once every 2 years, the department shall produce general reference maps that generally identify major intersections and the highways specified in pars. 1. to 5. The department may reduce or extend, by not more than 3 miles along the highway, the area subject to a setback established under par. (a) or (b) to establish logical continuity of a setback area or to terminate the setback area at a readily identifiable physical feature or legal boundary, including a highway or property boundary. Persons may seek special exceptions to the setback requirement applicable to these major intersections and highways, as provided in s. Trans 233.11(3). The setback area established under par. (a) or (b) applies only to major intersections and to highways identified as:

1. State trunk highways and connecting highways that are part of the national highway system and approved by the federal government in accordance with 23 USC 103(b) and 23 CFR 470.107(b).

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

3. State trunk highways and connecting highways within incorporated areas, within an unincorporated area within 3 miles of the corporate limits of a first, second or

third class city, or within an unincorporated area within 1½ miles of a fourth class city or a village.

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

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

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, the "level of service" refers to 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 Wisconsin Department of Transportation's Facilities Development Manual to determine the level of highway service. Under the rule as effective February 1, 1999, 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.

(3n) Any person may erect, install or maintain any structure or improvement at 15 feet and beyond from the nearer right-of-way line of any state trunk highway or connecting highway not identified in s. Trans 233.08(2)(c). Any person may request a special exception to the setback requirement established under this subsection, as provided in s. Trans 233.11(3). This subsection does not apply to major intersections or within the desirable stopping sight distance, as determined under procedure 11-10-5 of the department's facilities development manual dated June 10, 1998, of the intersection of any state trunk highway or connecting highway with another state trunk highway or connecting highway. This subsection does not supersede more restrictive requirements imposed by valid applicable local ordinances.

NOTE: Technical figures 2, 3, 3m, 4, 4m, 5, 6 and 6m within Procedure 11-10-5 have various dates other than June 10, 1998 or are undated.

SECTION 21. 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~~ owner or user shall be responsible for any noise barriers for noise abatement from existing state trunk highways or connecting highways. Noise resulting from geographic expansion of the through-lane capacity of a highway is not the responsibility of the 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. Owners or users of these lots who desire noise abatement are responsible for abating noise sufficient to protect these lots."

NOTE: Some land divisions will result in facilities located 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 highway, in the absence of any increase to the highway's through-lane capacity.

(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 for the owner 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, appropriate to the circumstances, 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 to accept legal responsibility for unforeseen acts of nature or forces beyond their control. Nothing in

this subsection 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 development of private land adjacent to highways frequently changes the direction and volume of flow of surface waters. The Legislature found that it is necessary to control and regulate the construction and drainage of all highways in order to protect property owners from damage to lands caused by unreasonable diversion or retention of surface waters caused by 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 commence the action 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 Department's Facilities Development Manual.

SECTION 22. 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 23. 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, district office or, if authorized by a delegation agreement under sub. (7), reviewing municipality may ~~not~~ authorize ~~variances~~ special exceptions from this chapter ~~except~~ only 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, district office or reviewing municipality. 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, district office or reviewing municipality 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~~ only as provided in this subsection. The department, district office or reviewing municipality may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter.

NOTE: The phrase "practical difficulty or unnecessary hardship" has been eliminated from the rule that was effective February 1, 1999, 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 the first year following revisions of ch. Trans 233, effective February 1, 1999, the Department granted the vast majority of "variances" requested, using a site and neighborhood-sensitive context based on specific analysis.

SECTION 24. Trans 233.11(3) (b) to (f) and (4) to (7) are created to read:

Trans 233.11(3)(b) *Specific analysis for special exceptions for setbacks.* Upon request for a special exception from a setback requirement of this chapter, the department, district office or reviewing municipality shall specifically analyze the setback needs. The analysis may consider all of the following:

1. The structure or improvement proposed and its location.

2. 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. Whether the current and forecasted congestion of the abutting highway is projected to be worse than level of service "C," as determined under s. Trans 210.05(1), within the following 20 years.

5. The objectives of the community, developer and owner.

6. The effect of the proposed structure or improvement 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, providing 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.

(c) *Adjust setback.* If the department, district office or reviewing municipality grants a special exception by adjusting the setback area, the department shall pay just compensation for any subsequent department-required removal of any structure or

improvement that the department has allowed outside of the approved, reduced setback area on land that the department acquires for a transportation improvement. The department may not decrease the 15 foot setback distance established under s. Trans 233.08(3n), except in conformity with a comprehensive local setback ordinance, generally applicable to the vicinity of the land division, that expressly establishes a closer setback line.

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

setback area, the department is not required to pay compensation, relocation costs or damages relating to any structure or improvement authorized by the special exception. The department, district office or reviewing municipality may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter. The department, district office or reviewing municipality shall require the executed agreement or other appropriate document to be recorded with the register of deeds under sub. (7) as part of the special exception.

(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 shall record blanket or area special exceptions with the register of deeds in the areas affected or shall provide public notice of the blanket or area special exceptions 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, district office or reviewing municipality shall consider the period 20 years after the date of analysis.

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. Except 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: This subsection uses the phrase "practical difficulty or unnecessary hardship 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 a variance 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 department intends the "special exception" provision in this rule to be administered in a somewhat less restrictive fashion than "no reasonable use of the property" without a "variance."

(5) MUNICIPAL SPECIAL EXCEPTIONS. A delegation agreement under s. Trans 233.03(8) may authorize a reviewing municipality to grant special exceptions. No municipality may grant special exceptions to any requirement of this chapter, except in conformity with a delegation agreement under this subsection. Any decision of a reviewing municipality relating to a special exception is subject to the appeal procedure applicable to such decisions made by the department or a district office, except that the department may unilaterally review any such decision of a reviewing municipality only for the purposes of ensuring conformity with the delegation agreement and this chapter.

(6) TIME LIMIT FOR REVIEW. Not more than 60 calendar days after receiving a completed request for a special exception under s. Trans 233.11, the department, district office or reviewing municipality shall provide to the land divider written notice of its decision granting or denying a special exception. The 60-day time limit may be extended only by written consent of the land divider.

NOTE: The Department intends that decisions concerning special exceptions be made in the shortest practicable period of time. The Department intends the 60-day time limit applicable to special exceptions to allow sufficient time for a land divider

and the Department, district office or municipality to explore alternative locations or plans to avoid and minimize conflicts and to facilitate mutually acceptable resolutions to conflicts.

(7) RECORDING REQUIRED. A special exception granted under this subsection is effective only when the special exception is recorded in the office of the register of deeds. Any structure or improvement erected under authority of a special exception granted under this subsection is presumed to have been first erected on the date the special exception is recorded.

(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., except as follows:

The treatment of chapter Trans 233.03(6) takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2), Stats., or on February 14, 2001, whichever occurs earlier.

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

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

LCRC FORM 2

WISCONSIN LEGISLATIVE COUNCIL STAFF

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PART 3

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."

PART 4
CR 00-109

ANALYSIS OF FINAL DRAFT OF TRANS 233

(a) **Need for Amended Rule. FIVE OBJECTIVES.**

This proposed revision to ch. Trans 233 attempts to accomplish five 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 special exceptions 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. **Fourth**, it makes changes recommended by the Legislative Council Rules Clearinghouse on July 28, 2000, and corrects outmoded terms. **Fifth**, it reflects the testimony and discussion at the public hearing before the Department of Transportation on August 4, 2000, and all the written comments received.

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 Charles H. Thompson. Copy attached.

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]."

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 exception; 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."

Wisconsin expressly adopted the reasoning of the U.S. Supreme Court and upheld a Milwaukee setback requirement. Bouchard v. Zetley, 196 Wis. 635, 645, 220 N.W. 209 (1928). In 1959, the Wisconsin Supreme Court also upheld the validity of a 150 foot setback from a highway right of way line to combat hazards to traffic. Highway 100 Auto Wreckers v. West Allis, 6 Wis. 2d 637, 650-651, 96 N.W.2d 85 (1959). In 1989, the Wisconsin Supreme Court held that a setback requirement does not effect a taking unless the restriction "practically or substantially renders the land useless for all reasonable purposes." Klinger v. Oneida County, 149 Wis. 2d 838, 848-849, 440 N.W.2d 348 (1989).

In a very recent 1996 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 or desired use of the property. To make this

determination, the courts have adopted an ad hoc, case-by-case, 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 for 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 6 years is too short a period, the plan 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.

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. A consensus appeared to be reached that WisDOT should attempt to define a system of highways where a normal setback and where a reduced setback would be consistent with safety and public interest in the highways.

Therefore, WISDOT proposed a separate **setback** portion of the 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 state trunk or connecting 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 consists 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, all other state trunk and connecting highways within incorporated areas and within the extraterritorial zoning boundaries of cities and villages, major intersections consisting of the portion of a state trunk highway or connecting highway within one-half mile of its intersection or interchange with a freeway or expressway, and those highways with current and forecasted congestion projected to be worse than Level of Service "C" within the following 20 years. In response to testimony at the hearing on **August 4, 2000**, and written recommendations, the normal setback was established to coincide with the extraterritorial zoning boundaries of cities and villages as provided in sec. 62.23(7a), Stats. 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.

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.

A map generally showing these highways with the normal setback and with the 15 foot setback are attached to this proposed rule. The normal setback currently applies to about 7,320 miles of highway; the reduced setback to about 4,312 miles.

3. IMPLEMENT CHANGES IN STATE AND FEDERAL LAW.

The third purpose of this proposed rule revision 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 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 66.1001(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 look forward for at least 20 years as required by federal law. WISDOT 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 place greater reliance on long-range planning and corridor preservation.

4. IMPLEMENT CHANGES RECOMMENDED BY LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

The fourth purpose of this proposed rule revision is to include changes recommended by the Legislative Council Rules Clearinghouse in its report dated **July 28, 2000**. The recommendations fall into only 2 Rules Clearinghouse categories: (a) Format, Style and Placement in Administrative Code, and (b) Clarity, Grammar, Punctuation and Use of Plain Language. Details of the changes recommended by the Legislative Rules Clearinghouse can be found in sub. (d) below. The proposal also makes technical corrections to delete outmoded references to the former "highway commission," to correct spelling and nomenclature, and adopt modern rule drafting conventions in Ch. Trans 231.

5. MAKE CHANGES RECOMMENDED AT AUGUST 4 PUBLIC HEARING AND IN WRITTEN COMMENTS.

The fifth purpose of this proposed rule revision is to include changes recommended at the public hearing before the Department on **August 4, 2000** and in written comments received by the Department regarding the **August 4, 2000** public hearing draft. In brief, the changes resulting from the hearing refined the definition of the highway system subject to the normal and reduced setbacks, recognized the extraterritorial zoning jurisdiction of cities and villages under sec. 62.23(7a), Stats.,

clarified the "grandfathering" provision, defined "desirable traffic access pattern," "user," "reviewing municipality," "technical land division" and "major intersection," clarified that if the Department fails to act within the time specified it shall be considered to have no objection to the land division or special exception, clarified noise and drainage and recording provisions. More details of modifications made as a result of testimony and written comments can be found in sub. (b) below.

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 cannot achieve these legal mandates and expectations without a comprehensive system of review of land divisions abutting state trunk and connecting highways.

(b) **Modifications as a Result of Testimony at Public Hearing**. A transcript of the hearing is attached. Three persons formally testified at the hearing on August 4, 2000. In brief:

• Mr. Charlie Causier testified that the rule revision proposed was a reasonable compromise. He emphasized that the provision defining the highway system to which normal and reduced setbacks generally applied was critical to the compromise and the appeal process was reasonable and fair. He advised WISDOT to exercise extreme caution when entering agreements with cities and villages that may wish to be delegated WISDOT review authority under Ch. Trans 233. As a result of this testimony, portions of the proposed rule allow review of decisions delegated to cities and villages to ensure conformity with the delegation agreement and Ch. Trans 233.

• Mr. Arden Sandsnes testified that there is nothing that clearly triggers a review of condominium plats similar to other reviews. Mr. Sandsnes is correct. WISDOT has found that s. 703.115, Stats., provides a local option for counties to review condominium instruments that may act as a trigger as well as any request for access to or work on the abutting state trunk or connecting highway. There is also a pattern of general cooperation between local authorities and WISDOT in transportation and comprehensive planning that is encouraged by new legislation.

Mr. Sandsnes also pointed out a problem with the wording of the grandfathering provision for land division approvals prior to February 1, 1999, for structures or improvements prior to land division, and for recording of special exceptions. WISDOT made changes to address all of these concerns raised by Mr. Sandsnes.

At the conclusion of the hearing, Mr. Sandsnes also recommended that WISDOT use the same language as the statutory extraterritorial jurisdiction of cities and villages to address impacts outside corporate limits. This recommendation was well-received by many affected interests and was adopted.

• Mr. Francis Thousand made a number of recommendations for clarification and improvement to the rule that were made, including the following: Make time limit specific and move "intent" language to note; define "user;" change certification language as it is not always the "owner" who signs the so-called owner's certificate on the plat; make drainage analysis appropriate to circumstances rather than suggesting an engineer must always perform the analysis.

Mr. Thousand recommended that WISDOT **not** delegate review and certification of non-objection authority to WISDOT Districts due to the lack of uniformity and District failure to follow guidelines in practice. WISDOT did not make this change as the overwhelming earlier consensus and requests in the process leading up to this rule revision desired delegation of authority to Districts.

Written Comments Following Hearing: Written comments were received from two persons from the private sector (including one unsigned) and six persons from the public sector (including four from WISDOT District Offices in Green Bay, LaCrosse, Madison, and Eau Claire).

Private Sector:

• Mr. Thomas Arnott complained that it takes too much time to get a survey approved in WISDOT's District 7, Rhinelander. The rule revision makes it clear that if WISDOT does not act upon a complete submittal or special exception within the specified period of time (20 days or 60 days if special exception requested), WISDOT is deemed to have no objection. WISDOT must notify the person that the submittal is incomplete and what is missing within 5 days or it is deemed complete. Mr. Arnott also complains regarding the need to survey a large parcel abutting a state trunk highway although the actual land division involves a remote part of the parcel. WISDOT recommends the surveyor contact the District office for a conceptual review as provided in the rule revision. Mr. Arnott complains that a person cannot paint his or her house if it falls within the normal setback; this is a misunderstanding. WISDOT's rule does not prohibit maintenance of improvements and structures that are lawfully within the setback. The rule revision expressly allows improvements and structures that are lawfully within the setback prior to land division to continue.

• Mr. Tom Larson sent an unsigned letter that makes very specific recommendations regarding 8 sections of the hearing draft of August 4, 2000. The full text of the

August 4 hearing draft was delivered to Mr. Larson and other interested persons on June 30.

Section 1. Language was added to Trans 233.01 as recommended by Mr. Larson relating to minimizing adverse effects on the environment and on land owners.

Section 3. The "grandfathering" provision was clarified. If WISDOT did not object to the preliminary plat; it cannot object to the final plat. Section 236.11(1)(b), Stats., reads in part:

> "If the final plat conforms substantially to the preliminary plat as approved, including any conditions of that approval, and to local plans and ordinances adopted as authorized by law, it is entitled to approval."

The language in Trans 233.012 is consistent with the statute and the changes previously agreed to and documented in the Legislative Council Memorandum by Mr. Ford.

Section 5. The technical suggestions made by Mr. Larson regarding Trans 233.03(5)(a) and (b) have been incorporated in this draft of Trans 233. As a matter of Wisconsin law, the word "day" always means "calendar day," not "working day." WISDOT added the phrase "calendar day" for uniformity and clarity as requested. The phrase "reviewing municipality" was added as requested in new Trans 233.03(5)(d).

Section 6. WISDOT eliminated the phrase "affected third party" as suggested. There is no "standing" requirement; any member of general public may appeal.

Section 8. Mr. Larson suggested that the normal setback be eliminated for all state trunk and connecting highways within corporate limits, within all unincorporated areas adjacent to municipalities that are subject to extraterritorial municipal zoning, and all state trunk highways and connecting highways with average daily traffic of 5,000 or more. This suggestion was rejected; it is inconsistent with the recommendations made by other members of the private sector and public sector and does not recognize that these are the highways where there is greatest pressure for development that would adversely affect corridor preservation and the investment of the public in the system. The Legislature has determined that 4,000 vehicles per day warrants designation of a highway as a 4-lane or greater freeway or expressway in sec. 84.295(3), Stats. These are precisely the areas that need a normal setback. Based upon experience, WISDOT may also grant either special exceptions in particular circumstances, or blanket special exceptions to cover whole segments of highway or geographic areas. However, as a matter of long-range planning and route designation, the normal setback needs to be applied to these highway categories.

Mr. Larson also suggested that the reduced setback be set at 5 feet rather than 15 feet. This suggestion was rejected because 5 feet is inadequate for even a single lane of highway or even modern shoulder width standards.

Section 9. For clarity, WISDOT has defined "user" in Trans 233.015(8m) as a person entitled to use a majority of the property to the exclusion of others, when it is appropriate for the user to abide by access restrictions, or provide noise barriers, if desired, rather than a remote owner, or be responsible for flooding the highway rather than the remote owner, or to abide by agreements relating to structures or improvements and special exceptions.

Mr. Larson objects to any requirement for dedication of any rights to preserve vision at intersections or at private driveways as a condition of granting a permit. WISDOT has retained this provision stating WISDOT may impose a vision corner restriction, but will accept an easement in lieu of a dedication in fee as is normally required under sec. 236.29, Stats. Vision corners are clearly needed for the safety of the traveling public, pedestrians, and residents. Municipalities may incur liability for failure to trim vegetation obstructing the view at an intersection with a connecting highway. Private property owners occupying any land adjacent to railroad highway crossings are also required by law to maintain vision corners, sec. 195.29(6), Stats., or may be fined. The requirement for clear vision at intersections and private drives in many locations unobstructed by vegetation would be useless without similar restrictions on obstructing structures or improvements.

Section 12. Mr. Larson objects to five of the eleven elements that may be considered when deciding whether to grant a special exception from the normal or reduced setback requirements. The elements for analysis are permissive and are illustrative of what WISDOT **may** consider when determining setback needs in response to a special exception request; it is **not** a list of what a land divider must prove in order to obtain a setback special exception. No two locations or situations are precisely identical. WISDOT has also used the phrase "special exception" and eliminated the phrase "practical difficulty or unnecessary hardship" 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 the associated "practical difficulty" phrase to make it extremely difficult to grant "variances" and in so doing has eased the way for 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 so restrictive and WISDOT has not administered the rule in so restrictive a fashion. The proposed revision also provides many thousands of miles of reduced setbacks, allows for the adjustment of the normal setback line, grandfathers existing structures and improvements, allows exceptions within the remaining setback after adjustment of the normal setback, allows blanket special exceptions based on experience, and allows WISDOT to delegate authority to local governments and impose setbacks consistent with reduced local requirements.

Mr. Larson recommends that WISDOT identify all state trunk and connecting highways that likely will be expanded in the next 20 years, rather than using the system identification criteria outlined in Trans 233.08(3) and shown on the attached map. WISDOT, metropolitan planning organizations and other units of government are better

able to identify and plan for corridor preservation and orderly development to serve the needs of the community and traveling public than to predict exactly which highways will receive the resources to be expanded. Although Mr. Larson suggests that a land divider should be allowed in all circumstances to construct improvements or structures within a setback as long as the land divider assumes the risk of future removal without compensation, this is unrealistic when viewed from the standpoint of community reliance on a business, changes in ownership, employment impacts, and resistance to the project as a whole due to the impact it would have on the community that would force a bypass or continued congestion and impaired safety.

Section 15. Mr. Larson states that technical land divisions should not always require a period of existence of 5 years or more to qualify for the waiver from all requirements granted by this proposed rule revision. The period of 5 years was selected based on sec. 236.02(12)(b), Stats., that looks at a period of "successive divisions within a period of 5 years" that individually would not otherwise constitute a "subdivision" subject to Ch. 236, Stats. WISDOT also provides for a waiver for an exchange of deeds by adjacent owners to resolve mutual encroachments without any time limitations. Based on its experience, WISDOT concludes that a period of 5 years is reasonable to limit intentional evasion of the purposes of Ch. Trans 233. WISDOT has also clarified that structures and improvements lawfully erected and maintained within a setback prior to land division are allowed to continue to exist.

WISDOT has made the changes regarding "certifying non-objection" rather than "approval" as recommended by Mr. Larson.

Public Sector:

Mr. Richard Kleinmann, City Surveyor of West Bend, recommended the establishment of a specific maximum rainfall event for the purposes of drainage computations; for example, 100-year, 50-year, 10-year-24 hour, 5-year, or 1-year-2 hour or other event. This is certainly possible to do, see for example, Ch. ATCD 48.16(1), Table 1, that shows the probable 24-hour rainfall events, in inches of rain, for each county in Wisconsin over 10 years, and over 25 years. However, this increase in specificity would in all likelihood impose undue burdens on smaller land dividers, inconsistent with the scale and nature of the land division involved. WISDOT has elected to use the phrase "drainage analysis and drainage plan that assures to a reasonable degree, appropriate to the circumstances" that there is adequate drainage to comply with sec. 88.87, Stats. Mr. Kleinmann's point is well taken and professional judgment will certainly be involved in requiring detailed and specific plans and analyses for more significant land divisions. WISDOT also added an elaborate note following Trans 233.105 providing additional guidance and reference to Chapter 13 and Procedure 13-1-1 of WISDOT's Facilities Development Manual.

• Registered Professional Engineers and Professional Staff in WISDOT Districts and Central Office were also requested to review and comment on the hearing draft of August 4, 2000. District Offices and the Central Office consolidated these reviews into written comments from the District and Offices involved. For the most part, there was

general approval of the proposed revisions, but modifications and clarifications requested regarding the identification of the normal and reduced setback systems. The following refinements were adopted: Use normal setback within 2,640 feet of major intersections and interchanges of state trunk highways with freeways and expressways; terminate the system boundaries at a logical public road or property line boundary in order to prevent abrupt changes within blocks or areas and to eliminate minor gaps and preserve route continuity; apply the normal setback to unincorporated areas within the extraterritorial zoning jurisdiction of cities and villages (also recommended by private sector at public hearing); disallow private driveway entry to state trunk highways if there is a flagrant violation of a special exception granted or the terms of the approved and recorded land division plat or map; clarify "grandfathering" provision to allow structures and improvements lawfully erected within a setback prior to land division to continue to exist.

(c) **List of Persons who Appeared or Registered at Public Hearing**. The public hearing was held in Madison on August 4, 2000. The following persons appeared/registered at the hearing:

Charlie Causier Director of Planning/TDA 11270 West Park Place Milwaukee, WI 53213	Spoke in favor.
Arden T. Sandsnes, Vice President Royal Oak Engineering 5610 Medical Circle, Suite C Madison, WI 53719	Spoke in opposition.
Francis Thousand Land Surveyor 5113 Spaanem Avenue Madison, WI 53716	Spoke in opposition.
Ernest Peterson P. O. Box 5522 Madison, WI 53705	Registered in favor.
Gary Antoniewicz, Attorney Midwest Equipment Dealers Assoc. Inc. c/o Boardman Law Firm, LLP P. O. Box 927 Madison, WI 53701-0927	Registered in opposition.
Thomas Liebe Petroleum Marketers Association 44 East Mifflin, Suite 404 Madison, WI	Registered in opposition.

Martin A. Machtan Research Assistant to Rep. Brandemuehl 317 North, State Capitol Madison, WI 53702	Registered for information.
John P. Casucci Registered Land Surveyor National Survey & Engineering 16745 W. Bluemound Road Brookfield, WI 53005	Registered for information.
Mike Sullivan, Design Engineer City of Oak Creek 8640 S. Howell Avenue Oak Creek, WI 53154	Registered for information.
Representative Jeff Stone Wisconsin Assembly 306 North State Capitol, Madison, WI	Registered for information.
Jacqueline Jarvis, Development Director City of Sheboygan 807 Center Avenue Sheboygan, WI 53081	Registered for information.
Thomas J. Holton, City Engineer City of Sheboygan 833 Center Avenue Sheboygan, WI 53081	Registered for information.
Sean M. Walsh Registered Land Surveyor Department of Administration/Plat Review 17 South Fairchild Street Madison, WI	Registered for information.
Paul Nilsen Legislative Reference Bureau 100 North Hamilton Madison, WI	Registered for information.

(d) **Response to Legislative Council Recommendations**. Changes made as a result of the Legislative Council recommendations are as follows:

2. Format, Style and Placement in Administrative Code. All recommendations in this category were adopted except deletion of the express cross references to 23 USC 109, 134, 135, 138 and 315. The reason these federal laws are expressly mentioned is that they are most directly related to abutting land divisions and what is needed to protect the public investment in transportation facilities and the safety of users and frequenters of transportation facilities. The Department is authorized and directed by Wisconsin law to implement these related federal law setting detailed design and

construction standards and procedures for highway and transportation projects, for long-range metropolitan transportation planning (minimum 20 year planning horizon) and programming, for long-range statewide transportation planning (minimum 20 year horizon), for parkland preservation that is exclusive to transportation projects, and for federal regulations to carry out these requirements respectively and other transportation safety measures.

5. Clarity, Grammar, Punctuation and Use of Plain Language. All recommendations in this category were adopted except the deletion of references to statutes that authorize and direct the Department to impose conditions on land divisions to accommodate long-range transportation plans and to protect the public investment include: 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.

(e) **Final 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.