

August 11, 2000

Ms. Julie Johnson
Administrative Rules Coordinator
Department of Transportation
Office of General Counsel
Room 115-B
P.O. Box 7910
Madison, WI 53707-7910

RE: Proposed Amendments to Trans. 233

Dear Ms. Johnson:

On behalf of a broad coalition of organizations and others that are concerned with Wis. Adm. Code ch. Trans. 233 ("Trans. 233") including Lake States Lumber Association, Marathon Oil Company, Midwest Equipment Dealers Association, National Federation of Independent Businesses, Outdoor Advertising Association of Wisconsin, Petroleum Marketers Association of Wisconsin, Tavern League of Wisconsin, Timber Producers Association of Michigan & Wisconsin, Wisconsin Association of Convenience Stores, Wisconsin Auto Collision Technicians Association, Wisconsin Automotive Trades Association, Wisconsin Automobile & Truck Dealers Association, Wisconsin Association of Truck Stop Operators, Wisconsin Builders Association, Wisconsin Economic Development Association, Wisconsin Fireworks Association, Wisconsin Federation of Cooperatives, Wisconsin Grocers Association, Wisconsin Manufacturers & Commerce, Wisconsin Merchants Federation, and Wisconsin Restaurant Association, we, as a working group of the coalition, are providing you with our written comments regarding the proposed amendments to Trans. 233.

SECTION 1

Trans. 233.01 Purpose – The third sentence of this section ("This chapter specifies . . .") fails to recognize the importance of minimizing the impacts on individual landowners. The restriction on the ability of landowners to enjoy the reasonable use of their property is one of the primary criticisms of Trans. 233. Accordingly, since many of these revisions are aimed at addressing these criticisms, it seems appropriate for the rule to specifically recognize the importance of minimizing the negative impacts on individual landowners.

SECTION 3

Trans. 233.012(2) – As drafted, the second sentence in this section suggests that final plats, even those approved prior to February 1, 1999, are subject to Trans 233 if there was

a substantial change between the preliminary and final plat. This seems inconsistent with the changes agreed to by the department as reflected in the memorandum drafted by legislative council dated February 18, 2000 ("DOT will revise ch. Trans. 233 to explicitly state that plats that have received preliminary or final approval prior to February 1, 1999 will not be subject to the new standards under ch. Trans. 233 as promulgated effective February 1, 1999.").

Recommendation -- Redraft this provision to make it consistent with the changes agreed to by the department, as reflected in the legislative council memorandum dated February 18, 2000.

SECTION 5

Trans. 233.03(5)(a) – In the second sentence, insert the phrase "or municipality" after the word "department" and include the phrase "from the date that a complete request is received by the department or municipality" after the word "days."

Trans. 233.03(5)(b) – In the first sentence, insert the word "calendar" after the number "20." In the second sentence, insert the word "calendar" after the number "60."

SECTION 6

Trans 233.03(6) – In the second to last sentence, what is an "affected third party?" Does a third party have to meet specific legal requirements to be considered "affected" and have standing to file a lawsuit?

SECTION 8

Trans. 233.08(2)(c) – This provision is overly broad. It places setback restrictions on highways based upon the classification and characteristics of the highway and does not adequately consider whether those highways will likely be expanded within a certain time frame. Nor does it take into consideration those highways that have recently been expanded and thus will not likely be further expanded any time in the near future. To strike a balance between the interests of the individual landowners to enjoy reasonable use of their property and the interests of the department to develop and maintain a safe and efficient transportation system, the setback restrictions should apply only to federal highways, state trunk and connecting highways considered to be "principal arterials", and other state trunk and connecting highways that will likely be expanded within a reasonable amount of time (i.e., the next 10 years) to relieve traffic congestion.

Recommendation – Delete sections 233.08(2)(c) 3, and 4 because they are arbitrary in nature and do not accurately indicate which state trunk and connecting highways will be expanded in the near future.

Trans. 233.08(3n) – If a highway is not likely to be expanded in the near future, it seems unreasonable to impose a setback 15 feet beyond the highway right of way. Furthermore, it is not clear why the department selected 15 feet (rather than, for example, 5 feet) as the appropriate setback distance for these highways.

Recommendation – Delete the 15-foot setback requirement for state trunk and connecting highways not identified in Trans. 233.08(2)(c).

SECTION 9

Trans 233.105(1) – What is a “user” and why should they, rather than the owner, be held responsible? It seems that the department’s concerns are adequately addressed by the term “owner” and the inclusion of the term “user” is both confusing and unnecessary.

Recommendation – Delete the term “user” from this provision and the required notation.

Trans 233.105(2)(intro) -- This provision unfairly authorizes the department to require individual landowners to dedicate land for vision corners without providing them with compensation when the department could achieve the same objective by requiring the landowner to grant an easement. Although the added language addresses the practical concern of complying with local ordinances, the department has not justified why it is necessary for the department to take title to a portion of someone’s land without compensation when another, less intrusive, option is available. Again, one of the objectives of Trans. 233 should be to minimize the impacts on individual landowners.

Recommendation – Delete the dedication requirement from this provision.

SECTION 12

Trans 233.11(3)(b) -- The “specific analysis for special exceptions for setbacks” fails to provide landowners with sufficient certainty as to what they must demonstrate in order to receive a special exception For example:

- What do criteria #2 and #6 mean and how do they differ?
- Criterion #2 is already considered as part of the department’s analysis for “blanket or area special exceptions” under Trans. 233.11(3)(e) and thus is superfluous.
- Criterion #3 is virtually the same as criteria covered by criterion #11 and thus is superfluous.
- Criterion #4 has already been considered under Trans. 233.08(2)(c)5 in determining the application of Trans. 233 and thus is superfluous here.
- What is meant by criterion #5? How does the department plan to evaluate the objectives of the community, developer, and owner? Isn’t this a function of local

zoning and planning (rather than the state) and thus covered, in large part, by criterion #11?

- How does criterion #8 comport with the purpose statement found in Trans. 233.01? The evaluation of the viability of a business has nothing to do with maintaining a safe and efficient transportation system. Rather, it seems more germane to determining how much the department may have to pay for the property if it acquires it by condemnation. The inclusion of this criterion as a key factor in determining whether to allow an individual landowner to place improvements within the setback area of HIS or HER property seems wholly inappropriate. Furthermore, criterion #7 seems to substantially similar to criterion #8.
- Criteria #9 (transportation safety), #10 (preservation of the public interest and investment in the highway), and #11 (other criteria deemed appropriate by the Department) provide the department with enough flexibility to select any reasonable criteria as the basis for determining whether to grant a request for a special exception.

Recommendation – Delete criteria #2, #3, #4, #5, and #8.

Trans. 233.11(3)(c) and (d) – The proposed special exception process places excessive restrictions on individual landowners to enjoy reasonable use of their property because it applies to all state trunk and connecting highways (whether or not they will likely be expanded in the future) and it requires landowners to waive their rights to compensation for removal of improvements in the setback area on all such highways. Under this process, a landowner may place an improvement within the setback area only if (a) the department determines that the removal of the improvement (upon the department's future expansion of the highway) will not affect the continuing viability of the use of the property, and (b) the landowner waives his or her right to compensation for the removal or relocation of the improvement. In addition to the concerns regarding the department's determination of continuing viability (see above), a landowner should be required to waive his or her constitutional rights to receive compensation in exchange for placing improvements in the setback of a highway that will not likely be expanded at any time in the near future.

Recommendation -- As an alternative to special exception process outlined in Trans. 233.11(3)(c) and (d), we suggest the following process:

- (1) Identify all state trunk and connecting highways on a DOT map that will likely be expanded within the next 20 years due to emerging congestion, taking into account those highways that have recently been expanded and either cannot be expanded further due to geographic or budgetary restrictions. (At a maximum, the state trunk and connecting highways identified on the DOT map and, thus, the applicability of Trans 233 setbacks should include no more than approximately half of the total highway miles in Wisconsin.)
- (2) Only those state trunk and connecting highways that are identified on the DOT map are subject to the DOT's 50-foot setback restriction. (Those state trunk and

connecting highways not identified on the DOT map are not subject to the DOT's setback restriction.) However, landowners that are subject to the DOT's 50-foot setback restriction retain the right to request a special exception from the DOT. A request for a special exception would trigger the following review process:

- (a) The DOT will review the request according to the criteria outline in Trans. 233.11(3)(b);
- (b) If the DOT determines that it will grant the special exception, the DOT assumes the risk and shall pay compensation to the landowner if the DOT requires removal of improvement in the future; and
- (c) If the DOT determines that it will NOT grant the special exception, the landowner may construct the improvement within the setback (unless the construction of the improvement would present a reasonable safety hazard), but must waive his or her right to compensation if the DOT requires removal of the improvement in the future.

SECTION 15

Trans. 233.13(2) (also Trans. 233.014(4)(note)) -- While it remains questionable whether the department has the authority to review non-Chapter 236 divisions of land along state trunk highways, Wisconsin law clearly does not authorize the department to review or determine the form of ownership in which the public chooses to hold property. By requiring the review (irrespective of whether those reviews are granted automatic certification of non-objection, landowners must still suffer the costs associated with a delay of the transfer of ownership caused by the department's review) of conversions of ownership and defining them as land divisions, the department is exceeding its legal authority. The department is not authorized to review the change in ownership of ANY existing structure or improvement, even if such structure or improvement has been in existence for less than 5 years. Such transactions are not land divisions -- "technical" or otherwise. They are merely changes in the form of ownership.

- Why does the department classify only developments, improvements, and structures that have been in existence for more than 5 years as "technical land divisions?" Why aren't similar developments, improvements, structures that have existed for less than 5 years also considered "technical land divisions?"

Because the department is an objecting authority, not an approving authority, for purposes of reviewing land divisions, change the word "approve" to "certify non-objection" in lines 9, 12, and 17 of Trans. 233.12(2).

Recommendation -- Exempt all changes in the form of ownership of existing plats, structures, and improvements from Trans. 233.

Sincerely,

Gary Antoniewicz, Midwest Equipment Dealers Association
Bob Bartlett/Tom Liebe, Petroleum Marketers Association of Wisconsin and Wisconsin
Association of Convenience Stores
Jerry Deschane, Wisconsin Builders Association
James Hough, Wisconsin Economic Development Association
Tom Larson, Wisconsin Realtors Association
Pat Osborne, Marathon Oil Company
Janet Swandby, Outdoor Advertising Association of Wisconsin

ATTACHMENT

Coalition of Businesses and Associations to Revise CR 109

Lake States Lumber Association
Marathon Oil Company
Midwest Equipment Dealers Association
National Federation of Independent Businesses
Outdoor Advertising Association of Wisconsin
Petroleum Marketers Association of Wisconsin
Tavern League of Wisconsin
Timber Producers Association of Michigan and Wisconsin
Wisconsin Association of Convenience Stores
Wisconsin Auto Collision Technicians Association
Wisconsin Automotive Trades Association
Wisconsin Automobile and Truck Dealers Association
Wisconsin Association of Truck Stop Operators
Wisconsin Builders Association
Wisconsin Economic Development Association
Wisconsin Fireworks Association
Wisconsin Federation of Cooperatives
Wisconsin Grocers Association
Wisconsin Manufacturers and Commerce
Wisconsin Merchants Federation
Wisconsin Restaurant Association

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; 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	Spoke in opposition.

5610 Medical Circle, Suite C Madison, WI 53719	
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.



Wisconsin Transportation Builders Association

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♦ **Executive Director**

Tom Walker

♦ **Deputy Executive Director**

Jack Arseneau

September 18, 2000

Rep. David Brandemuehl
317 North, State Capitol
Madison, WI 53702

Dear Rep. Brandemuehl:

While I am planning to testify Wednesday before the full Committee, I wanted to let you know that WTBA strongly endorses the revisions to Trans 233, as submitted by WisDOT. We believe that the revisions successfully balance the public's interest in preserving safety and mobility as development occurs, with those of adjacent property owners.

WTBA is especially supportive of the provisions on setbacks as proposed by WisDOT. Setbacks are a critical tool to ensure that future capacity can be added when needed, without the need to move the highway to a new location. Obtaining new right-of way is increasingly difficult to accomplish. Setbacks will also minimize the need to remove existing homes and businesses.

WTBA believes that this rule will prove very helpful in supporting growth within established communities, as envisioned in the state's new "Smart Growth" law.

We look forward to the September 20th hearing.

Sincerely,

Tom Walker
Executive Director

CC: Bob Cook, WisDOT
Eric Petersen



American Road &
Transportation Builders
Association



Memo

To: Representative Brandemuehl and Members
Of the Assembly Transportation Committee

From: Jerry Deschane, Wisconsin Builders Association

Date: 09/19/00

Re: Trans 233

The DOT rewrite of Trans 233 continues to miss the main point!

The Department of Transportation revisions to Trans 233 provide improvements on a number of "process" issues, but they continue to miss the most essential needed change: *property owners have a right to use their own property*. The Wisconsin Builders Association asks this committee not to approve this rule unless the department agrees to the following changes:

- 1) Landowners that receive a "special exception" to the setback provisions should not have to waive their right to compensation for future removal or damage of any legally-installed improvements.
- 2) If a landowner is denied a special exception, he or she may still install improvements within the setback, subject to signing a waiver for compensation for removal or damage of those improvements.

In addition to these critical issues, the Wisconsin Builders Association maintains that the department does not have legal authority to regulate land divisions beyond the authority specifically granted to them by ss. 236.

We will be represented at this week's hearing and will be happy to answer your questions at that time. In the meantime, I can be reached at (608) 242-5155, ext. 15; or via e-mail jdeschane@wisbuild.org

Thank you for your continued scrutiny of this issue.

connecting Wisconsin to the world



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WTBA Testimony On Trans 233

Assembly Transportation Committee

Tom Walker
Executive Director
September 20, 2000

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Tom Walker

♦ **Deputy Executive Director**

Jack Arseneau



American Road &
Transportation Builders
Association



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My name is Tom Walker and I am Executive Director of the Wisconsin Transportation Builders Association (WTBA).

WTBA represents almost 300 companies that design, build, and repair all segments of Wisconsin's transportation infrastructure, including roads, airports, railroads, bridges, bikepaths, and pedestrian facilities.

WTBA members are very supportive of the basic public policy goals incorporated by the Department in Trans 233, as it currently exists. We believe that access to new development should not compromise highway safety. We also believe that new buildings and other permanent improvements that generate traffic should be laid out to allow sufficient room for needed transportation capacity along existing rights-of-way.

We think development has a responsibility to provide for long-term solutions to the very traffic it generates, at a minimum by making sure that space for new capacity is assumed as business plans are drawn. There are clear benefits to businesses if this policy is followed. Businesses receive their economic viability from roads along which they locate. By setting aside future right-of-way within those corridors, there will be far less need for a bypass, which would move the highway and the its potential customers away from those businesses.

A recent poll published in On Common Ground asked the public what solution they preferred for congestion. The top choice was to plan for transportation needs as we plan for growth, with widening existing roads and interchanges a close second. These are precisely the goals which Trans 233 seeks to facilitate.

We recognize that a number of legitimate concerns have been raised about the details of Trans 233, and we commend the Committee's efforts to facilitate a constructive compromise. We believe that the revised rule proposed by DOT appropriately addresses those concerns, and respectfully ask the Committee to endorse it.

One of the issues that continues to be contentious is setbacks. The key question then, is, "why setbacks?"

WTBA strongly supports the fundamental public policy that new transportation capacity should be provided within or along existing highway corridors, wherever practicable, rather than by creating new corridors.

There are very significant environmental, fiscal and land use reasons for this policy:

- New corridors can fragment habitat areas, require extensive wetlands conversion, and increase run-off to streams and lakes during and after construction.

- New corridors often utilize active farmland, and in areas near cities can be one factor in creating new pressure for unplanned exurban development. In rural areas, new corridors can fragment existing farms into uneconomic parcels.
- Building new corridors is much more expensive than adding lanes to existing highways, provided development has not encroached on needed right-of-way. Saved resources can then be reallocated to other transportation priorities.
- Adding lanes to existing highways, where a community is supportive, encourages in-fill development, reinforces existing communities, and makes the maximum use of existing infrastructure and public facilities. These goals are clearly spelled out in the "Smart Growth" provisions of 1999 ACT 9.

Given these compelling policy goals, the next critical question is what tools are needed to achieve them.

Over the past decade, numerous state and regional studies have repeatedly pointed to the need for enhanced corridor preservation mechanisms. Corridor preservation allows DOT to plan now, but postpone actually building new capacity until it is clearly needed, while keeping that option open by steering development away from a likely corridor.

Corridor preservation saves taxpayer dollars, minimizes inducements for sprawl by making sure that highway capacity follows development, and ensures that long-term safety and mobility needs can be successfully addressed.

Setbacks are a very effective corridor preservation tool for existing highway corridors.

Once a setback line is broken, development will fill in and effectively foreclose the Department's ability to add lanes along that existing highway in the future.

The issue really is not the cost of paying for new right-of-way, although that would indeed be prohibitive. The real problem is that owners of adjacent property that would need to be purchased will inevitably and logically oppose being bought out, and argue to put the highway somewhere else.

In some cases, there will be no viable alternative to increasing long-term congestion; in others, new corridors will be the only possibility. In either case, the public will lose out.

These situations can and should be avoided through well-crafted setbacks on that portion of the State Highway System where congestion is a realistic possibility and can be identified through comprehensive planning processes. WTBA believes that the proposed rule revision successfully focuses setbacks where they are appropriate.

A number of organizations have suggested that setbacks be limited to highways where capacity projects are programmed within six years, rather than using the 20-year planning horizon. We do not agree.

Under federal law, states and Metropolitan Planning Organizations, or MPO's, must cooperatively develop state and metropolitan transportation plans, using a 20-year planning horizon, at a minimum. All transportation decisions, even the state's air quality compliance plans, must conform to those plans. It is even illegal to spend federal highway or transit funds in a metropolitan area for any project that is not included in the 20-year plan.

In addition, 1999 ACT 9 requires local comprehensive plans to incorporate state and regional transportation plans. After adoption, local governments will need to follow those plans in their decision-making.

By comparison, programs are derived from plans. They merely list which of the Plan's projects will be built during the time-frame of the program, given resources at hand.

In the case of Major Projects, the time lapse from identifying emerging congestion to incorporation in a Plan to actual programming to construction can easily take 20 or 30 years. The EIS and location decisions on Highway 50 in Kenosha and Walworth Counties were made in 1981. The project will finally be completed in 2001. If setbacks were restricted to projects in a 6-year program, development could easily prevent construction of planned projects that have not yet been programmed.



At its May, 2000 meeting, the TPC ratified EIS work on 10 potential capacity projects. Not a single one of them is in the current 6-year program. If setbacks were limited to projects in a 6-year program, DOT could not employ setbacks on the very corridors the TPC has selected for possible enumeration.

This is surely illogical.

These projects, if enumerated by the Legislature, will eventually be programmed from FY 2006 through FY 2014, or even later. Protecting these corridors now is surely the right thing to do, rather than waiting for them to be programmed.

Programs are literally the end of a very long process. Waiting for programming decisions to define setbacks is far too late.

Thank you for the opportunity to comment on this important rule.



**HOUGH, FASSBENDER, OSBORNE
& ASSOCIATES, INC.**

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Patrick Osborne

Trans. 233
Remaining Concerns with Proposed Rule

September 15, 2000

Primary Concern

- **Requiring landowners to waive their right to future compensation in exchange for a special exception/Denying landowners all reasonable use of their property if they are not granted a special exception (Trans. 233.11(3)(d))**— The proposed rule unjustly requires landowners to waive their right to future compensation related for the removal or damage of improvements placed within the setback area in exchange for a special exception. In addition, the propose rule denies those landowners who do not receive a special exception the reasonable use of their property located along highways even if they agree to waive their rights to compensation resulting from future highway expansion.

Recommendation

Grant landowners the ability to enjoy the reasonable use of their property by allowing them to place improvements within the setback area: (1) without waiving their right to future compensation if they receive a variance, and (2) by waiving their right to future compensation if they are denied a variance.

Secondary Concerns

- **Special exception criteria are overly broad (Trans. 233.11(3)(b))** – The criteria for granting a special exception is unreasonably ambiguous and allow the DOT to reject an application for a special exception for ANY reason it chooses. For example, the broad language of criteria #9 (transportation safety), #10 (preservation of the public interest and investment in the highway), and #11 (other criteria deemed appropriate by the Department) authorizes the DOT to use any criteria it wishes to deny an application for a special exception and essentially makes the other criteria superfluous.

Recommendation

Amend the criteria to provide applicants with greater certainty as to when a special exception will be granted.

- **No notice to landowners (Trans. 233.08(c))** -- The proposed rule fails to provide landowners with any form of notice informing them their property is located along a

highway that is likely to be expanded and, consequently, that it is subject to a strict application of the setback requirement.

Recommendation

Amend the rule to require the DOT to provide individual notice to landowners whose property is located adjacent to highways identified under Trans. 233.08(c).

- **Application of strict setback requirement to recently expanded highways –** (Trans. 233.08(2)(c)) – The proposed rule unfairly includes those highways that have recently been expanded to the list of highways in which the setback requirement will be strictly applied. Because such highways will not likely be expanded again within the near future, the strict setback requirement should not apply to these highways.

Recommendation – Amend rule to exempt those highways that have been recently expanded from the strict application of the setback requirement.



Transportation Development Association of Wisconsin

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**I thought you might be interested
in the attached...**

- TDA testimony re:

Trans 233 (August 4)

- Transportation Update

to TDA members on

Trans 233 (September 11)

Philip J. Scherer

Executive Director

Testimony of Charlie Causier, HNTB Corporation
and
Member of the Transportation Development Association

For Wisconsin Department of Transportation Public Hearing on Trans 233
August 4, 2000

My testimony today is as a member of the Transportation Development Association.

TDA is a statewide alliance of approximately 500 agencies, groups, local units of government and others committed to the development and maintenance of a responsive transportation system for the state. Among our members, we have cities, counties, towns, villages, chambers of commerce, economic development organizations, businesses, industries, organized labor, planning agencies and many others. We have interest in all modes of transportation and in transportation needs throughout the state. We are committed to a transportation system that meets our mobility and economic needs in an environmentally responsible manner.

Need to use dollars limited transportation revenues wisely and maximize investments

As an association and as individual members, we are fully aware of the vast needs that exist on our entire transportation system -- including our state trunk highway system. We are also aware of the fact that current revenues, even under the most optimistic scenarios, will fall short of meeting documented needs. In that light, we feel that investments in every segment of our transportation system must be preserved and protected to make sure that they are not lost prematurely. Controlling access points along our higher function routes and maintaining adequate setbacks are two ways that we can protect our investment in roads. Public rights of way must be preserved and protected so that roads can function as planned and key corridors can be properly maintained and upgraded where necessary. We owe it to not only those currently using and paying for our roads, but also those that will need good transportation well into the future. We must not burden our children with unnecessary costs so that we can experience immediate or short-term financial gain.

Corridor preservation is just good planning

Wisconsinites and others are fully aware of the relationship between transportation and land use as well as the relationship between transportation and our economy. That understanding has led to the completion of local and regional plans that coordinate land use and transportation, numerous highway corridor studies and the inclusion of a comprehensive planning package in the state's recently passed biennial budget. Clearly good planning and related land use tools are needed to make sure development and transportation are well coordinated. Basic among those efforts must be the development of programs, ordinances, administrative rules and other tools that avoid unnecessary conflicts, maximize utilization of the existing system and preserve options necessary to address our growing mobility needs.

Poor planning can result in excessive and unnecessary costs

Unless we preserve and protect our existing transportation corridors, airport environments and other transportation facilities, we may well be forced to look at relocating businesses or homes to undertake needed improvements. In some cases, the local government and/or state may be forced to relocate existing highways and airports simply because they can no longer function as planned. The cost of such activities -- from a financial, political and environmental perspective is enormous. We must take steps to avoid having to spend public funds for the purchasing of homes or businesses to improve or widen a highway or extend a runway, simply because we did not take the precautions necessary to preserve and protect key corridors. Simply stated, we must do good planning.

Trans 233 represents a reasonable approach

Trans 233 as amended and under consideration today reflects a reasonable compromise and a rational approach to the issue of preserving and protecting key state trunk highway corridors. The five criteria outlined in Section 8 (233.08 (2)) of the currently proposed rule are critical to the protection of key routes and should be retained.

The appeal process for variances as outlined in 233 is reasonable and fair. TDA does; however, recommend that the Wisconsin Department of Transportation use extreme caution in granting exemptions or variances that could limit future improvements.

Trans 233 should error on the side of caution, protecting not only those roads with currently programmed improvements, but also any state trunk highway that might need to be improved in the future – whether that be 10, 20 or 30 from now.



Transportation Update

September 2000

Legislators likely to hear criticism of Trans 233 revision despite positive transportation benefits

The Assembly Transportation Committee is seeking public input on WisDOT's proposed revisions to Trans 233. This administrative rule applies to land divisions that abut a state trunk or connecting highway. The Assembly hearing is scheduled for Wednesday, September 20 at 10:00 a.m. (for details see box on the right). Trans 233 is also being reviewed by the Senate transportation committee. Both committees must take action on the rule before the September 29 review process deadline.

Trans 233 addresses important safety, capacity, land use and environmental considerations. It acknowledges the significant investment Wisconsinites have made in their state trunk highway system and the importance of protecting that investment. In addition, it recognizes the importance of good planning and the need to preserve key transportation corridors. Nonetheless, many groups dislike key rule provisions. Public comments during the legislative hearing are likely to send legislators opposing views of public sentiment.

"Trans 233, as amended and currently under consideration, is a reasonable compromise and a rational approach to the issue of preserving and protecting key state trunk highway corridors," explains Phil Scherer, TDA Executive Director.

Background and current elements of regulation

Trans 233, originally named Hy 33, has been in effect since 1956. It was created to regulate subdivisions, ensuring "the safety of entrance upon and departure from those highways and for the preservation of public interest and investment in those highways."

The Trans 233 provisions address:

- access
- setbacks
- vision corners
- drainage
- noise abatement

Trans 233 was first revised in February of 1999. In the meantime, WisDOT and other groups have started implementing the rule and found areas that warranted further consideration. These modifications are what is currently being considered by the Legislature.

The rule includes language that applies the regulation to all land divisions (subdivisions, county plats, certified survey maps, condo plats, deeds, etc.) Trans 233 would also allow charging a fee to cover WisDOT's cost to review the land division. The final draft rule adds definitions to clarify many aspects and encourages developers to contact WisDOT early in the process. If the rule

Legislative hearing scheduled on Trans 233

Assembly Transportation Committee:
Wednesday, September 20 at 10:00 a.m.
417 N. State Capitol

provisions cannot be met, a variance may be applied for.

The WisDOT transportation districts will be the agencies responsible for reviewing and approving land divisions. However, the WisDOT district may delegate review and approval to a city or village in which the highway is located, at the request of the local unit of government.

Controlling access points increases safety

Highway access from a land parcel is detailed in the proposed rule with a number of key considerations:

- Spacing and number of access points will be considered. This is important because statistics show that increasing access points leads to increased accident rates.
- Existing access points are also examined when there is a new land division. This is an opportune time to determine whether the access points are still necessary, are in the best location, and will continue to serve their original purpose.
- Direct access to the highway versus a public street will be considered as well as access to adjacent parcels.

Setbacks: good planning

A notable difference between this final draft rule and the 1999 version of Trans 233, is that compromises have been made

For more information on the proposed regulation

To ask questions, request a copy of the proposed amendment to Trans 233, or a color map of the state trunk highway system where setbacks will remain/be reduced, contact the TDA office (608)256-7044 (commdir@tdawisconsin.org) or Bonnie Tripoli at WisDOT (608)266-2372 (bonnie.tripoli@dot.state.wi.us).

Transportation Update

to limit where 50 ft. setbacks are required. Under the earlier version, they were needed along the entire 11,800 mile STH system; the new rule would only have full setbacks on about half of the STH system. WisDOT has established a list of setback criteria (see box at right) to identify the key corridors in the system needing 50 ft. setbacks; the rest of the system will have 15 ft. setbacks.

Preserving future transportation options: setbacks keep options open to address safety and capacity problems which may occur in the future as well as avoiding future land use conflicts, by using solid planning principles.

Saving transportation resources: building new corridors is more expensive than improving existing highways (assuming development has not encroached on needed right-of-way). The resources saved can be reallocated for other transportation priorities.

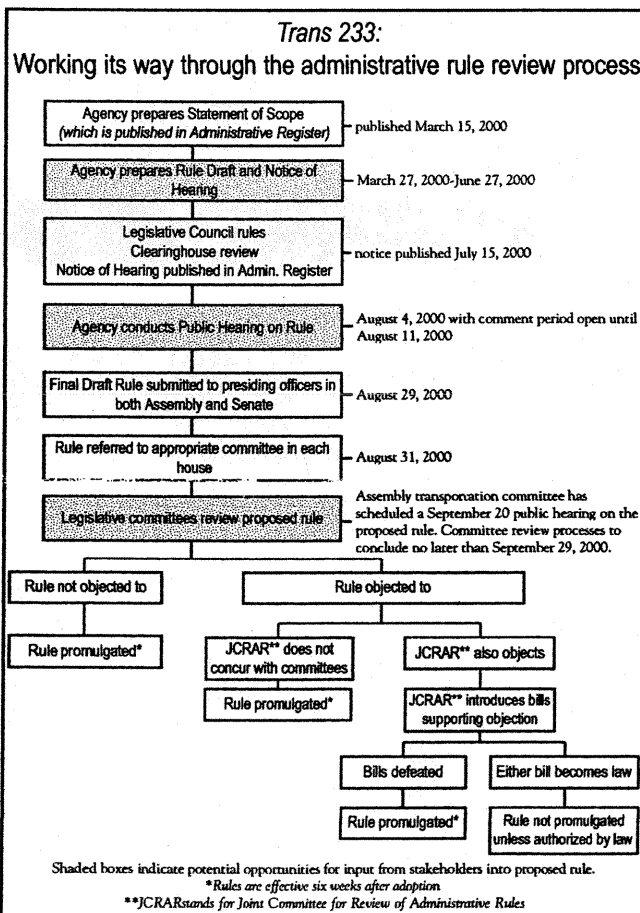
Protecting customer base for businesses along corridor: many businesses benefit by being located adjacent to a state trunk highway. However, if the corridor becomes too congested and unsafe or eventually needs to be rerouted because there is no room for expansion within the corridor, businesses risk losing vital customer traffic.

Trans 233 status

The Wisconsin Department of Transportation recently conducted a public hearing and comment period on the draft rule amendment. WisDOT reviewed those comments and incorporated many of them into the final draft rule, which has been presented to the presiding officers in the

Assembly and Senate. The rule is currently being considered by the Assembly Transportation Committee and the Senate Insurance, Tourism, Transportation and Corrections Committee. As the box on the first page indicates, the Assembly committee has scheduled a hearing to receive public input (For more information on the administrative rules process see flow chart on this page or consult the Summer 1999 issue of *TransAction*, available at www.tdavisconsin.org/members/publications/title.html#1).

It is important to keep in mind that despite the positive components of the rule outlined in this Update, there are groups opposed to the provisions in this rule. As in all legislative decisions, the transportation committee members will likely rely heavily on what they hear from their constituents both in favor of and opposed to the rule.



Criteria for normal setbacks included in Trans 233 final draft rule

Under this revision, the "normal setback" will apply to a lesser number of highway miles than the 1999 Trans 233 revision. State trunk and connecting highways will have a "reduced setback" on all segments not meeting the criteria:

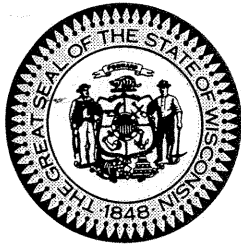
1. State trunk highways and connecting highways that are part of the national highway system and approved by the federal government in accordance with 23 USC 103 (b) and 23 CFR 470.107(b).
2. State trunk highways and connecting highways that are functionally classified as principal arterials in accordance 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 1 1/2 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.

Useful definitions

normal setback: 110 feet from the centerline of the highway or 50 feet from the nearest right of way, whichever is greater.

reduced setback: 15 feet from the nearest right of way line unless local ordinances require a greater setback.

vision corner: provides for adequate visibility of oncoming vehicles where roadways intersect.



DAVID BRANDEMUEHL

*State Representative
49th Assembly District*

TO: Members, Assembly Committee on Transportation

FROM: Rep. David Brandemuehl, Chair

DATE: September 18, 2000

RE: Mr. William Ford's Legislative Council Staff Memorandum on TRANS 233 for upcoming Committee Hearing

Attached you will find a Legislative Council Staff Memorandum regarding proposals to revise Clearinghouse Rule 00-109 (TRANS 233). Mr. William Ford has prepared the memorandum in order to "provide, for the September 20, 2000 meeting of the Assembly Committee on Transportation, a concise description of the various provisions of CR 109 that are proposed to be amended and what those proposed revisions are." Please bring the memo to the hearing on Wednesday. Thank you for your time and attention.

Committee Memberships:

Transportation (Chair); Education; Highway Safety; Natural Resources; Urban & Local Affairs; Rustic Roads Board; Transportation Projects Commission

Office: P.O. Box 8952 • Madison, Wisconsin 53708-8952 • (608) 266-1170 • Rep.Brandemuehl@legis.state.wi.us

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Senate Board

BOB COOK
DOT

Assembly Board

Mr. Bill Ford, Leg Council
1 E. Main, Ste 401

Ms. Jody Nussbaum
1 E. Main, Ste 402

Rep. Robert Turner
109 North, State Capitol

Rep. Barbara Gronemus
112 North, State Capitol

Rep. Donald Hasenohrl
114 North, State Capitol

Rep. Leon Young
120 North, State Capitol

Rep. Julie Lassa
122 North, State Capitol

Rep. Michael Huebsch
20 North, State Capitol

Rep. Scott Suder
21 North, State Capitol

Rep. Jeff Stone
306 North, State Capitol

Rep. Larry Balow
409 North, State Capitol

Rep. John Townsend
6 North, State Capitol

Rep. Joseph Leibham
121 West, State Capitol

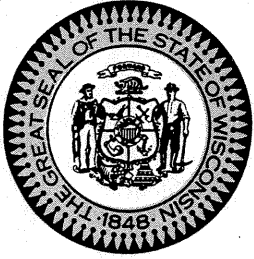
Rep. Gene Hahn
15 West, State Capitol

Rep. Steve Kestell
17 West, State Capitol

Rep. John Steinbrink
307 West, State Capitol

Rep. Gary Sherman
323 West, State Capitol

Rep. Jerry Petrowski
4 West, State Capitol



DAVID BRANDEMUEHL

State Representative
49th Assembly District

FACSIMILE COVER SHEET

Number of pages attached, including cover page: 2

If pages are not all received or are illegible, please call : (608) 266 - 1170

PLEASE DELIVER TO:

FAX NUMBER OF ADDRESSEE: 267-6734

FROM: Jules Johnson

MESSAGE:



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PAGES	2
RESULT	OK



DAVID BRANDEMUEHL

*State Representative
49th Assembly District*

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PLEASE DELIVER TO:

Jewels Johnson

FAX NUMBER OF ADDRESSEE: 267-6734

FROM: *Jules Johnson*

MESSAGE:

Machtan, Martin

To: Rep.Turner; Rep.Hasenohrl; Rep.Lassa; Rep.Suder; Rep.Balow; Rep.Leibham; Rep.Kestell;
Rep.Sherman; Rep.Gronemus; Rep.Young; Rep.Huebsch; Rep.Stone; Rep.Townsend;
Rep.Hahn; Rep.Steinbrink; Rep.Petrowski

Subject: Trans 233 Public Hearing

To the Members of the Assembly Committee on Transportation:

Representative Brandemuehl would like to know which members will be attending the Assembly Transportation Committee's public hearing on Trans 233 (Clearinghouse Rule 00-109). As a reminder, the hearing is scheduled for Wednesday, September 20, 2000 and starts at 10:00am in Room 417 North. I would appreciate it if all Representatives who have not already contacted me about their attendance plans do so or have a member of their staff do so before the evening of Friday September 15th. You will find my email address and phone number listed below. Thank you for your time and your help!

Sincerely,

Martin A. Machtan

Martin A. Machtan
Office of State Rep. David Brandemuehl
Room 317 North, State Capitol
P.O. Box 8952
Madison, WI 53708
(608) 266-1171
Martin.Machtan@legis.state.wi.us

THE WHEELER REPORT
111 W. WILSON ST. #205
MADISON, WI 53703
608-287-0130
E-MAIL: wheeler@thewheelerreport.com

Monday, September 11, 2000

MEETING NOTICE

Wisconsin Tobacco Control Board, 2:30 pm, Tue, Sept 12, MCOB Board Room, 8701 Watertown Plank Rd., Milwaukee. (Conference Call and Meeting).

State Building Commission, 1:30 pm, Wed, Sept 13, Governor's Conference Rm, Room 125-S, State Capitol. (Administrative Affairs Subcom, 9 am, Rm 201-SE; Higher Education Subcom, 10:30 am, Rm 201-SE.)

FILED WITH FINANCE

WHEDA. Statement from the executive director regarding the Wisconsin Development Reserve Fund. No action required.

LEGISLATIVE COMMITTEE MEETING NOTICES

Assembly Transportation, 10 am, Wed, Sept 20, 417-N.

TRANS 233. (CR-00-109). Division of land abutting a state trunk highway or connecting highway.

Assembly Utilities, 9 am, Tue, Sept 26, 328-NW.

CR-00-080. (DOA) Non-municipal electric utility public benefit fees.

CR-00-081. (DOA) Energy conservation and efficiency and renewable resource programs.

CR-00-082. (DOA) Low income assistance benefits.

(An exec may be held)

NEWS RELEASES

Rep. Stone. Says Midwest Express tax proposal "good idea, four months too late."

DOJ. AG to convene forum on Internet economy; to focus on e-commerce and technology in WI.

Lt. Gov. Calls for action against problem-plagued Ameritech.

Reps. Jensen, Foti. Prepare comments to EPA gas rules proposal. (Note to Press attached.)

Customers First!. Releases electric generation action plan.

DHFS. Elder abuse reports up in 1999.

Rep. Kreibich. Senior citizens audit college classes at no cost.

OCL. August 2000 administrative actions.

WI Tobacco Control Bd. Meeting notice for Tue, Sept 12.

TAUWP. News from TAUWP.

Wisconsin Energy. Launches \$6 billion program aimed at electric supply, reliability and quality.

NEWSPAPERS

Appleton Post Crescent. Story. Packers' economic benefits reach into Fox Cities.

Eau Claire Leader Telegram. Editorial. Farmers deserve cut of retail prices.

Green Bay Press Gazette. Story. Tuesday's vote will be unique, election officials say.

Milwaukee Business Journal. Editorial. Wisconsin's dirty little secret gouges us all (gas prices).

Milwaukee Journal Sentinel. Story. Study challenges benefits of smaller class sizes.

Sheboygan Press. Editorial. How can Green Bay not OK referendum?

Wisconsin State Journal. Don't turn HMO's into villains.

(END)



Wisconsin Department of Transportation

www.dot.state.wi.us

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Terrence D. Mulcahy, P.E.
Secretary

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E-Mail: ogc.exec@dot.state.wi.us

The Honorable Senator Roger Breske
Chairman, Senate Transportation Committee
Room 18 South, State Capitol
Madison, Wisconsin 53702

August 29, 2000

The Honorable Representative David Brandemuehl
Chairman, Assembly Committee on Highways & Transportation
Room 317 North, State Capitol
Madison, Wisconsin 53702

RE: Proposed Administrative Rule **TRANS 233**
Notification of Legislative Standing Committees
CLEARINGHOUSE RULE 00-109

Dear Senator Breske and Representative Brandemuehl:

In accordance with the Department of Transportation's efforts to keep you informed of its ongoing rulemaking actions, enclosed is a courtesy copy of Final Draft rule **Trans 233**, relating to **division of land abutting a state trunk highway or connecting highway**, which is being submitted to the Legislature for committee review.

Sincerely,

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

Julie A. Johnson
Paralegal

JAJ/dim

Enclosure

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