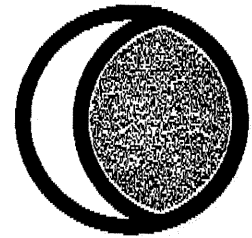


PMAW



WACS

February 28, 2000

Representative David Brandemuehl
Chair, Assembly Transportation Committee
VIA FACSIMILE: 266-7038

Senator Roger Breske
Chair, Senate Transportation Committee
VIA FACSIMILE: 267-0309

Dear Representative Brandemuehl and Senator Breske,

Last week, at the Assembly Transportation Committee hearing, Bob Cook raised strong concern that the reason I have been asking for JCRAR oversight of Trans 233, is because the Coalition wishes to stall the process. That is not the case. I wrote Mr. Cook a letter expressing our reasoning and I wanted you to have a copy.

Please call me with any questions. Thank you for all of your help on this matter.

On behalf of the Coalition,

Jennifer Badeau

**PETROLEUM MARKETERS
ASSOCIATION OF WISCONSIN**

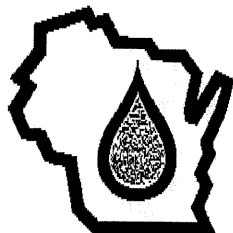
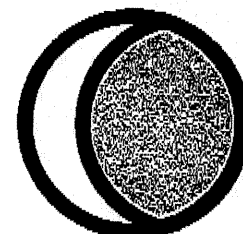


**WISCONSIN ASSOCIATION
OF CONVENIENCE STORES**

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**PMAW****WACS**

February 28, 2000

Bob Cook
Executive Assistant
Department of Transportation
P.O. Box 7910
Madison, WI 53707

VIA FACSIMILE: 266-9912

Dear Bob,

At the Assembly Transportation meeting on February 24, you expressed concern that the Coalition is trying to stall the process and that is our reason for requesting JCRAR review. I am writing to assure you, that is not our intent. Our desire is to have a resolution to the setback issue as soon as possible. We very much want to work with you toward that resolution.

However, we first contacted your department with a letter stating our concerns in November 1999. That letter stressed our opinion that the definition of structures and improvements has been improperly expanded by the department (these same concerns being brought to your attention by the Wisconsin Realtors Association as early as March 1999). On December 7, 1999 we received a letter from Secretary Thompson, acknowledging receipt of our letter and a statement that we would be included in "future discussions on this issue." Yet, we have never been invited to meet with DOT. Only during legislative meetings have we discussed Trans 233 with the department. Only because of legislative involvement, do we have a negotiating session scheduled with you on March 6, 2000. That is why we are interested in JCRAR oversight - to ensure that negotiations continue.

Toward that end, we ask that you please come to the March 6 meeting with a proposed solution regarding setbacks -- a firm starting point for our negotiations. In addition, we would appreciate an opportunity to review your proposal in advance of the March 6 meeting.

**PETROLEUM MARKETERS
ASSOCIATION OF WISCONSIN**

**WISCONSIN ASSOCIATION
OF CONVENIENCE STORES**

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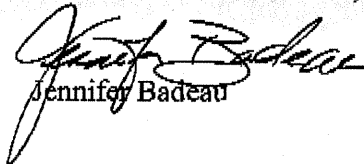
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*Letter to Bob Cook
February 28, 2000
Page 2*

We have offered you several possible options for resolving our concerns: 1) carve out specific items from the setback prohibitions; 2) adapt Trans 233 so that it follows a procedure similar to that found in Wisconsin Statutes 84.295(10), notifying property owners BEFORE they will lose compensation for any items placed in the setback, or 3) link setback prohibitions to 6-year plans or other firm plans for state trunk highway expansion. Again, we very much want to work out a solution with the department in the most expeditious manner possible.

Finally, after additional discussions between coalition members and the Wisconsin Realtors Association, we believe the department should implement, through the emergency rule-making process, the changes agreed upon so far (see the Legislative Council Memorandum, dated February 18, 2000). As discussed at the Assembly Transportation Subcommittee meeting on February 17th, proceeding in this manner will allow land dividers to take advantage of these changes as we continue to work together to find a workable solution to our concerns regarding setbacks.

On behalf of the Coalition,


Jennifer Badeau

Cc: Secretary Charles Thompson
Representative David Brandemuehl
Senator Roger Breske



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701-2536

Telephone: (608) 266-1304

Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

DATE: February 18, 2000
TO: REPRESENTATIVE DAVID BRANDEMUEHL
FROM: William Ford, Senior Staff Attorney
SUBJECT: Agreements Reached to Amend Ch. Trans 233

1. Introduction

This memorandum describes agreements to amend Wis. Adm. Code ch. Trans 233 reached between the Coalition to Reform Trans Ch. 233 ("the Coalition") and the Department of Transportation (DOT) at the February 17, 2000 meeting of the Subcommittee on Review of Ch. Trans 233 of the Assembly Committee on Transportation. It is the intent of the subcommittee that the DOT, the Coalition and other interested parties will cooperate in developing draft administrative rules to implement the agreements described in this memorandum and that DOT will promulgate these as amendments to ch. Trans 233. It is also the intent of the subcommittee that the DOT, the Coalition and other interested parties will continue to work together to develop amendments to s. Trans 233.08, relating to setback requirements and restrictions.

A more detailed description of the issues discussed by the subcommittee is contained in a memorandum I provided to you, dated January 1, 2000, entitled *Issues Raised With Respect to Chapter Trans 233*.

2. Process for Approving Land Divisions

- a. DOT will transfer the authority to review land divisions under ch. Trans 233 from the state office to its district offices by a date that is no later than February 14, 2001.
- b. DOT will provide an appeal process under which persons not satisfied with a district decision with respect to a land division may appeal to DOT's central office.
- c. DOT will develop implementing procedures at the district level to assure consistency and will provide uniform guidance in DOT's facility development manuals and in other manuals specified and cross-referenced in ch. Trans 233.

d. A request for review of a land division will receive an automatic certificate of nonobjection if DOT 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.

e. DOT shall request any additional information it determines is necessary to review a proposed land division within five working days after receiving a request for a review. Upon receipt of the additional information, the 20-day time period will again begin running. The 20-day review procedure shall be specified in ch. Trans 233.

f. DOT's central office will not, on its own initiative, reverse a certificate of nonobjection provided by a DOT district office with respect to a proposed land division. However, if an affected third party objects to a certificate of nonobjection provided by a DOT district office, DOT's central office may reverse the district office's decision if it finds the objection by a third party to be meritorious.

3. Explicit Approval of Plats Approved Prior to the Effective Date of Ch. Trans 233 and of Improvements and Structures Placed Prior to the Effective Date of Ch. Trans 233

a. DOT will revise ch. Trans 233 to give explicit approval to structures and improvements legally placed in a setback area prior to February 1, 1999. (Chapter Trans 233 took effect on February 1, 1999.)

b. 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.

4. Exclude Condominium Developments From Ch. Trans 233

DOT agrees to revise ch. Trans 233 to state that condominium conversion plats on existing developed property are exempt from ch. Trans 233 and are not subject to fees under s. Trans 233.13 if the existing development has been in existence five years and if the condominium development has traffic impacts similar to the existing development.

5. DOT Guidelines for Administering Ch. Trans 233

DOT agrees that its drafted guidelines for interpreting ch. Trans 233 will be incorporated by reference into ch. Trans 233. Furthermore, DOT states that these incorporated guidelines will be referenced by date such that future revisions to the guidelines will only become effective if ch. Trans 233 is amended, which requires legislative review.

Please contact me at the Legislative Council Staff offices if I can be of further assistance.

WF;jal:wu;ksm;rv



Wisconsin Department of Transportation

www.dot.state.wi.us

Tommy G. Thompson
Governor

Charles H. Thompson
Secretary

Office of the Secretary
4802 Sheboygan Ave., Rm. 120B
P.O. Box 7910
Madison, WI 53707-7910

Telephone: 608-266-1113
FAX: 608-266-9912
E-Mail: sec.exec@dot.state.wi.us

February 24, 2000

The Honorable David Brandemuehl
Wisconsin State Representative
317 North, State Capitol
P.O. Box 8952
Madison, WI 53708

Dear Representative Brandemuehl:

The Wisconsin Department of Transportation (WisDOT) appreciates your efforts and the efforts of the Assembly Transportation Committee with respect to the review of Trans. 233.

WisDOT has received the February 18, 2000 memo drafted by Committee Council William Ford which outlines the agreements reached during discussions before members of the Transportation Committee. WisDOT acknowledges that Mr. Ford's memo accurately describes the modifications that WisDOT has agreed to make to Trans. 233.

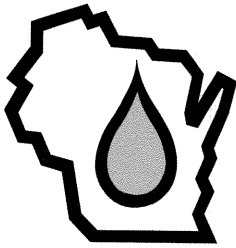
In addition, WisDOT agrees to continue discussions with all interested parties on the issue of setbacks as they pertain to Trans. 233. At this time, we intend to initiate one formal rule change when the setback issue has been resolved. Should negotiations on setbacks reach an impasse, we will ask the Committee's guidance in forwarding the agreed upon modifications as a separate rule change. In the interim, WisDOT will begin to honor the agreements outlined in the memo as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Cook".

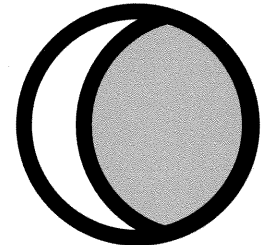
Robert J. Cook
Executive Assistant

RJC:rmk



PMAW

February 22, 2000



WACS

REPRESENTATIVE DAVID BRANDEMUEHL
Assembly Transportation Committee, Chair
Wisconsin State Capitol
P.O. Box 8952
Madison, WI 53708

RE: Agreements Reached to Amend Ch. Trans 233

Dear Representative Brandemuehl,

Thank you for forwarding Bill Ford's Legislative Council Memo. It accurately describes and details the agreements DOT has made, so far, to change Trans 233. However, the memo does not adequately reflect that no agreement has been reached on what we consider to be the most important issue.

The most important issue to the Coalition – setbacks – was the subject of heated debate. But, no compromise has been reached in this area. In fact, DOT has failed to forward a solid suggestion or single compromise proposal on setbacks. This, despite the fact that the Wisconsin Realtors Association first raised the issue in October of 1999; and despite the fact that the Coalition raised the issue to DOT in a letter dated November 1999; and despite the fact that the two subcommittee meetings have focused on this issue.

DOT states that it has considered options ranging from amortization, to allowing for smaller setback sizes, but it has not detailed these options nor offered them as real compromise possibilities. In effect we are in the same situation as when we first raised this issue – with no solution in sight regarding setbacks. We fear this is because the DOT actually does not want to compromise on this issue.

Specifically, we are concerned that without ongoing legislative oversight of the negotiations, DOT will not offer any real change to Trans 233. For this reason, we repeat our request that the Assembly Transportation Committee refer this issue to the Joint Committee on Review of Administrative Rules. Such a referral will NOT result in an automatic suspension of Trans 233, but will simply cause another legislative committee to follow the issue and monitor the negotiations. THEN, if negotiations stall or fail, JCRAR has the option of suspending all or part of Trans 233.

Please send this issue to JCRAR, not to automatically suspend the rule, but to maintain continued legislative oversight on DOT. This will help ensure that all parties continue to negotiate in good faith and in a timely manner.

On behalf of the Coalition to Reform Trans 233,


Jennifer Badeau

**PETROLEUM MARKETERS
ASSOCIATION OF WISCONSIN**

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WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701-2536

Telephone: (608) 266-1304

Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

DATE: February 16, 2000
TO: REPRESENTATIVE DAVID BRANDEMUEHL
FROM: William Ford, Senior Staff Attorney
SUBJECT: Status of Issues Before the Subcommittee

*No' from center
revis Don 233*

INTRODUCTION

This memorandum describes the status of the resolution of issues discussed at the January 27, 2000 meeting of the Subcommittee on Review of Ch. Trans 233 of the Assembly Committee on Transportation. A more detailed description of the issues discussed at that meeting is provided in a memorandum I provided to you, dated January 1, 2000, entitled *Issues Raised With Respect to Chapter Trans 233*.

At the January 27 meeting of the Subcommittee, the Department of Transportation (DOT) agreed to revise ch. Trans 233 in response to issues raised by the Coalition to Reform Ch. 233 ("the Coalition"). Both the DOT and the Coalition agreed to provide a written description of the items agreed to at that meeting.

The Coalition has provided a description of its understanding of the agreements reached, and a discussion of issues that it feels remain unresolved, in a memorandum to you from Jennifer Badeau, Director of Government Affairs, Petroleum Marketers Association of Wisconsin and Wisconsin Association of Convenience Stores, dated February 8, 2000 (copy attached).

The DOT has provided a description of its understanding of the agreements reached in a memorandum to Secretary of Transportation Charles H. Thompson from James S. Thiel, General Counsel, and John Haverberg, Director, Bureau of Highway Development, DOT, dated February 14, 2000 (copy attached). Note that the DOT memorandum also describes agreements reached between DOT and other persons with respect to ch. Trans 233 that were not addressed as issues before the Subcommittee on Review of Ch. Trans 233.

-2- is ~~it~~ going to be a revision of trans 233

A. PROCESS FOR APPROVING LAND DIVISIONS

1. DOT Agreement

- a. DOT will transfer the authority to review land divisions under ch. Trans 233 from the state office to its district offices by a date that is no later than February 14, 2001.
- b. DOT will provide an appeal process under which persons not satisfied with a district decision with respect to a land division may appeal to DOT's central office.
- c. DOT will develop implementing procedures at the district level to assure consistency and will provide uniform guidance in DOT's facility development manuals and in other manuals specified and cross-referenced in ch. Trans 233.
- d. A request for review of a land division will receive an automatic certificate of nonobjection if DOT 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.

2. Unresolved Issues

- a. Require that DOT must request any additional information it determines is necessary to review a proposed land division within five days after receiving a request for a review. Upon receipt of the additional information, the 20-day time period will again begin running. The 20-day review procedure shall be specified in ch. Trans 233.
- b. DOT's central office may not reverse a certificate of nonobjection provided by a DOT district office with respect to a proposed land division.

B. EXPLICIT APPROVAL OF PLATS APPROVED PRIOR TO THE EFFECTIVE DATE OF CH. TRANS 233 AND OF IMPROVEMENTS AND STRUCTURES PLACED PRIOR TO THE EFFECTIVE DATE OF CH. TRANS 233

DOT Agreement

- a. DOT will revise ch. Trans 233 to give explicit approval to structures and improvements legally placed in a setback area prior to February 1, 1999. (Chapter Trans 233 took effect on February 1, 1999.)
- b. 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.

*Public
not relevant*

Agreement in principle

C. EXCLUDE CONDOMINIUM DEVELOPMENTS FROM CH. TRANS 233

1. DOT Agreement

DOT agrees to revise ch. Trans 233 to state that condominium conversion plats on existing developed property are exempt from ch. Trans 233 if the existing development has been in existence per a "specified" period of time and if the condominium development has traffic impacts similar to the existing development.

2. Unresolved Issue

The Coalition disputes DOT's authority to regulate land divisions that are not subdivisions as defined in s. 236.02 (12), Stats. (See Coalition memorandum.)

D. DOT "GUIDELINES" FOR ADMINISTERING CH. TRANS 233

DOT Agreement

DOT agrees that its drafted guidelines for interpreting ch. Trans 233 will be incorporated by reference into ch. Trans 233. Furthermore, DOT states that these incorporated guidelines will be referenced by date such that future revisions to the guidelines will only become effective if ch. Trans 233 is amended, which requires legislative review.

E. THE SETBACK CRITERIA OF CH. TRANS 233

Unresolved Issue

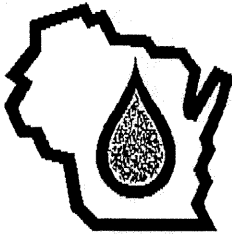
*non-father
(variance procedure) 2*

No agreement has been reached with respect to the issue of setbacks. The Coalition questions the DOT's authority to regulate setbacks on land divisions that are not subdivisions under ch. 236, Stats. DOT states that it is continuing negotiations regarding various options and criteria relating to the scope and applicability of setbacks to various highway situations.

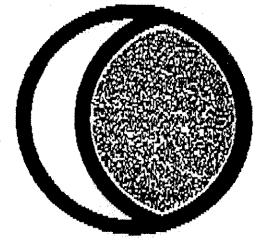
Please contact me at the Legislative Council Staff offices if I can be of further assistance.

WF:jal:wu;ksm

Attachments



PMAW



WACS

February 8, 2000

Representative David Brandemuehl
Chair, Assembly Transportation Committee
Wisconsin State Capitol
P.O. Box 8952
Madison, WI 53708

Dear Representative Brandemuehl,

Thank you again for forming a subcommittee on Trans 233. The *Coalition to Reform Trans 233* very much appreciates the opportunity to discuss our concerns about this rule.

Attached please find a memo by the *Coalition*, detailing our understanding of issues raised and agreements reached during the January 27th Assembly Transportation Subcommittee meeting. Please feel free to call me with any questions on this document.

We look forward to additional meetings on this issue. Sheri Krause of your office informed me that the next meeting is scheduled for Thursday, February 17, 2000. If there is anything else I can do, in preparation of this meeting, please let me know.

Sincerely,

Jennifer Badeau
Director of Government Affairs

PETROLEUM MARKETERS
ASSOCIATION OF WISCONSIN



WISCONSIN ASSOCIATION
OF CONVENIENCE STORES

Representing Independent Businesses



MEMORANDUM

TO: ASSEMBLY COMMITTEE ON TRANSPORTATION
FROM: THE COALITION TO REFORM TRANS 233
DATE: FEBRUARY 8, 2000

**RE: ISSUES RAISED AND AGREEMENTS REACHED DURING THE
JANUARY 27TH ASSEMBLY TRANSPORTATION
SUBCOMMITTEE MEETING**

This memorandum describes the Coalition's remaining concerns with Wisconsin Administrative Code Trans 233 as well as our understanding of changes WisDOT agreed to make to the rule. It is our further understanding that we will be given draft revision language from WisDOT before the department begins promulgation of a revised Trans 233. However, it is our strong preference that once a final agreement is reached, the department be directed to revise Trans 233 as an Emergency Rule.

COALITION'S REMAINING CONCERNS WITH TRANS 233

1) **DOT's Statutory Authority.** WisDOT cites two primary sources of enabling authority for the promulgation of the revised Trans 233. The first source is Chapter 236, Wis. Stats., and the second Sec. 86.07(2), Wis. Stats. Neither, however, supplies sufficient authorization for such a rule change.

Chapter 236, Wis. Stats., specifically limits its application to subdivision. Sec. 236.03(1), Wis. Stats. The term subdivision is further defined at Sec. 236.02(12), Wis. Stats., and limited by the legislature to the following:

"Subdivision" is a division of a lot, parcel or tract of land by the owner thereof or the owner's agent for the purpose of sale or of building development, where;

- (a) The act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area; or
- (b) Five or more parcels or building sites of 1 1/2 acres each or less in area are created by successive divisions within a period of 5 years.

Therefore, this particular legislation offers little to WisDOT beyond subdivisions under Chapter 236, and fails to cover land divisions by Certified Survey Map, condominium plat or "other means not provided by statute".

Similarly, WisDOT's reliance on Sec. 86.07(2), Wis. Stats., is inappropriate. Sec. 86.07 reads as follows:

86.07 Digging in highways or using bridges for advertising.

(1) Any person who draws, paints, prints or pastes upon any culvert, bridge or guard rail on any highway shall be fined not less than \$10 nor more than \$200 or imprisoned for not more than 30 days or both.

(2) No person shall make any excavation or fill or install any culvert or make any other alteration in any highway or in any manner disturb any highway or bridge without a permit therefore from the highway authority maintaining the highway. Such permit shall contain the statement and be subject to the condition that the work shall be constructed subject to such rules and regulations as may be prescribed by said authority and be performed and completed to its satisfaction, and in the case of temporary alterations that the highway or bridge shall be restored to its former condition, and that the permittee shall be liable to the town or county or state, as the case may be, for all damages which occur during the progress of said work or as a result thereof. Nothing herein shall abridge the right of the department or the county board or its highway committee to make such additional rules, regulations and conditions not inconsistent herewith 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 such permit conditional thereon. If any culvert is installed or any excavation or fill or any other alteration is made in violation of the provisions of this subsection, the highway may be restored to its former condition by the highway authority in charge of the maintenance thereof; and any person who violates this subsection shall be punished by a fine of not less than \$5 nor more than \$100, or by imprisonment not exceeding 6 months, or both.

The subject of Trans 233, has nothing to do with digging or excavating in a highway, nor are we dealing with the disturbance of a highway or bridge. We are dealing with the property rights of individuals and businesses who happen to own property near state highways, connecting highways or service roads. WisDOT's reliance on this statutory provision is tenuous, at best.

WisDOT's "leap" from old Trans 233 to new 233, has the effect of drastically expanding its authority. However, WisDOT has shown no authority for such an expansion, nor for its redefinition of what can be permitted in setback areas. WisDOT also lacks any authority to support its creation of a procedure which completely abrogates property rights. What authority, for example, can WisDOT cite for its requirement that property owners "trade" their rights to taking compensation for a variance.

2) **Setbacks.** As stated above, the Coalition does not believe WisDOT has the broad power over setbacks that it now asserts under Trans 233. Specifically, we do not believe WisDOT has the power to regulate setbacks on land divisions other than subdivisions that meet the Chapter 236 definition. Specifically, WisDOT lacks any authority to regulate condominium plats, and developments that do not abut STHs and do not directly access STHs.

Further, even when the department does have legitimate authority to regulate a setback area, private property is being taken! In other words, although there is a public benefit to rational setback regulations, it must be balanced against the private property rights of the land owner. It is a clearly understood principal of our existing laws that the property of no person shall be taken for public use without just compensation. See *Zealy v. City of Waukesha*, 20 Wis. 2d 365, 548 N.W.2d 528 (1996).

Yet, Trans 233.105 (2) states *"The department may not grant a variance authorizing 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 the 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."*

We disagree with this position and urge the department to return to its pre-February 1, 1999 policy regarding setbacks. Prior to then, Trans 233 was interpreted to limit "structures" and "improvements" within the setback area. And, this term was commonly understood to mean buildings. Now, under the revised Trans 233, WisDOT broadly defines the term "structures and improvements" and strictly prohibits both unless the property owner agrees to waive any rights for compensation in the event of a WisDOT condemnation.

The Coalition asks that WisDOT return to its previous policy; pre-February 1, 1999. Specifically, the following should be allowed within setbacks: air pumps, catch ponds, drainage facilities, driveways, parking lots, pay phones, septic systems, signs, storm water systems, retaining walls, and vacuum stations.

But, perhaps the better solution for regulation of setbacks, would be to require WisDOT to follow already established procedures for the expansions of state trunk highways. These procedures are found at Wisconsin Statutes 84.295(10), ESTABLISHING LOCATIONS AND RIGHT-OF-WAY WIDTHS FOR FUTURE FREEWAYS OR EXPRESSWAYS. Under this law, the department is directed to conduct investigations and studies as to the future development needs of a state trunk highway. If the department finds that an expansion is warranted, it must then provide *abundant* notice and adequate opportunity for public input.

Specifically, under section 84.295(10), Wis. Stats., the department shall hold a public hearing regarding the proposed STH expansion. If the department conducts a survey of the proposed expansion, that survey map must be placed in the register of deeds office. Notice of this map shall be published as a class 1 notice. And most importantly, notice of the recording shall be served, by registered mail, to the affected property owners.

Return variance rule

The statute goes on to state that after such adequate notice, a property owner can place an improvement or structure in the setback area *only* if he first gives WisDOT at least 60 days prior notice. This gives WisDOT the opportunity to acquire the right of way.

Section 84.295(10), Wis. Stats., concludes by stating, "*When the right of way is acquired, no damages shall be allowed for any construction, alterations or additions in violation of this paragraph.*" We read that to mean WisDOT must affirmatively take the right of way before it can completely regulate setback areas, and before it can refuse to compensate for taking property in this area.

The existence of this statute means that the legislature has already addressed the conflict between expansion of state trunk highways and private property rights. Presumably much discussion was involved in enacting this statute. We certainly believe the legislature carefully balanced the conflicting interests involved. Therefore, WisDOT should be directed to follow these statutory procedures rather than those it unilaterally developed as part of Trans 233.

3) **Condominium Plats.** As discussed more generally above, WisDOT lacks any statutory authority to review condominium plats, other than those addressed in Ch. 236, Wis. Stats. However, Chapter 236 Wis. Stats., is very limited in application, and only involves "subdivisions" which are defined as "a division of a lot, parcel or tract of land by the owner thereof or the owner's agent for the purpose of sale or of building development, where (a) the act or division creates five (5) or more parcels or building sites of 1 ½ acres or less in area; or (b) five or more parcels of building sites on 1 ½ acres each or less in area are created by recessive divisions within a period of five (5) years," Sec. 236.02(12), Wis. Stats. No other valid authority has been cited by WisDOT to review condominium plats. WisDOT's expansion of authority clearly requires legislative action.

4) **Retroactive Impact of Rule Change.** In the event TRANS. 233 is altered by the legislature as a result of this process, we will need to consider the impact such alteration will have on those properties which have been forced to comply with the post-February 1, 1999, version of TRANS. 233. At the most recent Subcommittee meeting, WisDOT indicated that more than 250 variances have already been granted under the new TRANS. 233. In the event the impact of TRANS. 233 is lessened, the legislature will need to address those individuals and businesses that have already been harmed by the rule, particularly any of those who have signed away compensation rights in exchange for variance.

WISDOT'S AGREEMENTS TO REVISE TRANS 233

1) **WisDOT's Approval Process for Land Divisions.** The department agreed to make several changes to its process for approving land divisions. First, the department agreed to revise Trans 233 so that district offices will be given authority to review and approve land divisions.

Second, the property owner will be given a right to appeal this decision to the central office and that appeal process will be clarified in the rule.

Third, if WisDOT does not review the requested division within 20 days of submittal, it is deemed non-objectionable. The department shall, within three (to five) days of receiving the application, review it for completeness, and shall at that time request any additional information needed. Upon receipt of that additional information, the 20-day clock will again start ticking. This timeline must be clarified in the revised rule rather than in the department's guidelines to Trans 233.

Fourth and finally, it is understood that WisDOT has valid reason to periodically review district decisions. However, if the central office disagrees with district decisions, land division approvals made by the district will not be rescinded. Rather, the department's recourse is to better educate the district office as to appropriate decision making criteria and, when necessary, temporarily assume control of district level decision making authority.

2) **Grandfather Structures and Improvements, as well as Approved Plats, Existing prior to February 1, 1999 (the effective date of Trans 233.)** WisDOT agreed to revise Trans 233, explicitly stating that existing structures and improvements, as well as those having received final plat approval prior to February 1, 1999, are grandfathered and deemed approved under the new rule.

3) **Exclude Condominium Developments from Trans. 233.** As discussed above, we dispute WisDOT's authority to review condominium plats. In addition, recall that, at the meeting, WisDOT suggested an automatic approval process for new condominium developments whereby no review fee would be charged.

4) **Finalize and Reference Departmental Guidelines.** WisDOT has drafted guidelines for Trans 233, entitled *Implementing Procedures*. These guidelines are to be used as further clarification of the rule and as a procedural manual for district offices. WisDOT agreed to reference and include these guidelines in the revised Trans 233. Further, it is understood that these guidelines can not be subsequently revised without legislative approval.

5) **Agreements with the Wisconsin Realtors Association.** WisDOT stated that agreements it made with the Wisconsin Realtors Association (in previous meetings) would be incorporated into their revision of Trans 233. These include: a) **Noise Barriers** – clarifying that the landowner, and not the land divider, is responsible for erecting noise barriers. However, if WisDOT expands an existing highway, then the department is responsible for erecting necessary noise barriers; b) **Vision Corners** – changing Trans 233 so that land owners will only be required to grant an easement for a vision corner. WisDOT will NOT require the land owner to dedicate land for this purpose; c) **Drainage** – clarify that the land divider will NOT be asked to guarantee that anticipated discharge (“estimate”) is correct. The intent being that the land divider can not be held liable for incorrect estimates; and d) **Desirable Access Management Drainage** – reference in Trans 233 the *Transportation Facilities Development Manual*, as the standard WisDOT can use to reject a land division proposal if it finds a “desirable traffic access pattern” does not exist.

COALITION TO REFORM TRANS 233

*LSLA – Lake States Lumber Association · MEDA – Midwest Equipment Dealers Association ·
NFIB – National Federation of Independent Businesses · OAAW – Outdoor Advertising
Association of Wisconsin · PMAW – Petroleum Marketers Association of Wisconsin · TLW –
Tavern League of Wisconsin · TPA – Timber Producers Association of Michigan & Wisconsin ·
WACS – Wisconsin Association of Convenience Stores · WACTAL – Wisconsin Auto Collision
Technicians Association · WATA – Wisconsin Automotive Trades Association · WATDA –
Wisconsin Automobile & Truck Dealers Association · WATSO – Wisconsin Association of Truck
Stop Operators · WBA – Wisconsin Builders Association · WEDA – Wisconsin Economic
Development Association · WFA – Wisconsin Fireworks Association · WFC – Wisconsin
Federation of Cooperatives · WGA – Wisconsin Grocers Association · WMC – Wisconsin
Manufacturers & Commerce · WMF – Wisconsin Merchants Federation ·
WRA – Wisconsin Restaurant Association*

MEMORANDUM

TO: Charles H. Thompson, Secretary

FROM: James S. Thiel, General Counsel, State Bar #1012582
John Haverberg, Director, Bureau of Highway Development

DATE: February 14, 2000

RE: Trans 233 Agreement with Wisconsin Realtors, Coalition and Others

BACKGROUND. On July 13, 1999, you responded to the initial concerns of the Wisconsin Realtors Association (Realtors) with revised Trans 233, Wis. Admin. Code, regarding land divisions abutting state trunk and connecting highways. The Realtors expressed a number of initial concerns shortly after these revisions went into effect on February 1, 1999. Your July 13, 1999 letter expressed your gratitude for the Realtors' willingness to cooperatively refine the implementation of the new provisions of Trans 233 for mutual private and public benefit. You also pledged a four step approach to address the Wisconsin Realtors' concerns on a continuing basis. In brief:

1. Education, Training, and Meetings with Interested Groups.
2. Specific Responses to Specific Questions.
3. Uniform Implementation.
4. Then, Refine Rule As Necessary.

Your letter also included a memorandum from WISDOT responding to specific legal and operational concerns expressed by the Realtors in Tom Larson's 12-page memo of February 19, 1999. William Malkasian, Executive Vice President of the Realtors, sent us a copy of this memo on March 30, 1999. A copy of your letter with the accompanying memorandum is attached.

On January 24, 2000, as a follow-up to this continuing cooperative process, you reached further agreement with the Realtors. Tom Larson of the Realtors has summarized our progress, discussions and the Realtors' understanding of our mutual conceptual solutions. The purpose of this memorandum to you is to confirm this agreement with the Realtors, with comments and corrections for clarification, as requested by the Realtors. This memorandum also represents what WISDOT agreed at committee and subcommittee meetings, e.g. January 27, 2000, and discussions with Legislators, the Coalition and other interested groups participating in this process. It also serves as a response to the Coalition's memo of November 22, 1999 and the Realtors' memo by Tom Larson of November 24, 1999. The following page summarizes all the agreements in principle on all the general issues to date:

February 14, 2000

Agreement in Principle on TRANS 233 Issues
General issues

Following is the “agreement in principle” on a list of issues reached by the Department, the Realtors, and several organizations/groups:

Issue	“Agreement in Principle”
Lack of certainty provided by conceptual review process	<ul style="list-style-type: none">• The department will develop implementing procedures at District level to assure the desired consistency, while still providing for an appeal process to the department’s central office.• Uniform guidance will be published in the department’s Facilities Development Manual and other manuals as appropriate and expressly cross-referenced in the Rule.
Inclusion of “condominium plats” in definition of “land division”	<ul style="list-style-type: none">• Rule will be clarified to say that condominium plats on existing developed properties are exempt from the Rule, with set minimum period of existence and similar traffic impact.
Noise barrier requirements place excessive burden on land dividers	<ul style="list-style-type: none">• Rule will be clarified to say that responsibility to construct or finance needed noise barriers for new land divisions next to existing highways applies to owner rather than land divider.• Rule will also be clarified to say that that noise resulting from expansion of the highway (more lanes) is not responsibility of the land divider or owner.
Land dedication requirements for vision corners are unreasonable	<ul style="list-style-type: none">• Rule will be clarified to say that permanent easements for vision corners may be allowed in lieu of dedication if the dedication creates a problem for the land divider in complying with local ordinances.
Drainage provisions expose land dividers to excessive liability	<ul style="list-style-type: none">• The Rule will be revised to make it clear that land dividers are not required to accept legal responsibility for all unforeseen acts of nature or forces beyond their control.• The Rule will be clarified to inform land dividers of their responsibilities for providing the drainage computations and information under state statutes. Various methods may be used for estimating runoff.
Lack of criteria for determining “desirable traffic access pattern”	<ul style="list-style-type: none">• Technical guidance is available in the department’s Facilities Development Manual and other manuals and will be expressly cross-referenced in the Rule. For any given site, several patterns may work.
Variance process is too restrictive	<ul style="list-style-type: none">• Rule will be changed to allow exceptions in some instances based on defined criteria, e.g. existing community ordinances and development patterns.• Rule will be changed to provide a different name (“special exception”?) and criteria for variances to avoid the strict legal standards applied by courts when reviewing the granting of variances.

The following is a specific response to each point in the Realtors' (Tom Larson's) summary of agreements of January 24, 2000:

SETBACK REQUIREMENT

In addition to the agreements outlined above [i.e. variance name, criteria and legal standard, conceptual review, uniform guidelines, and the appeal process], WISDOT is continuing negotiations regarding various options and criteria relating to the scope and applicability of setbacks to various highway situations.

CONCEPTUAL REVIEW PROCESS

WISDOT Agreement in bold:

1. Transferring the authority to review land divisions from the state office to its district offices by a yet-to-be-determined date (not to exceed 12 months from the date of this memo). This will allow the entire review process to occur at the local level by those who are most familiar with the specific land-division proposal [**WISDOT AGREES**].

EXISTING IMPROVEMENTS AND PLATS

WISDOT Agreement in bold:

1. Grandfather existing improvements and structures [**WISDOT AGREES**], and clarify that WISDOT may not request the removal or movement of these items as part of the land-division process [**DIFFICULT TO GENERALIZE**];
2. Modify current variance process to avoid the strict legal standard for variances [**WISDOT AGREES**]; and
3. Clarify that existing plats (plats that have received either preliminary or final approval prior to February 1, 1999) will not be subject to the standards under the new rule [**WISDOT AGREES, CAVEAT – NO SUBSTANTIAL CHANGE BETWEEN PRELIMINARY AND FINAL**].

CONDOMINIUM PLATS

WISDOT Agreement in bold:

1. Exempt from Trans. 233 existing buildings that are later converted into condominiums [**WISDOT AGREES, BUT BUILDING MUST EXIST FOR SPECIFIED PERIOD OF TIME AND HAVE TRAFFIC IMPACT CHARACTERISTICS SIMILAR TO CONDOMINIUM**]; and
2. As discussed above, grandfather condominium plats in existence prior to February 1, 1999 [**WISDOT AGREES**].

20-DAY REVIEW PERIOD

WISDOT Agreement in bold:

1. State that a request for review will be entitled to a certificate of non objection if WISDOT fails to act within the 20-day time period for reviewing land divisions [**WISDOT AGREES UNLESS EXTENSION MUTUALLY AGREED**].

NOISE BARRIERS

WISDOT Agreement in bold:

1. Revising the section to state that WISDOT is not responsible (rather than making the land divider responsible) for any noise barriers to abate excessive noise from existing state trunk highways or connecting highways [**WISDOT AGREES - OWNER RESPONSIBILITY**]; and
2. Clarifying that WISDOT is responsible, not the land divider, for abatement of excessive noise resulting from WISDOT's expansion of an existing highway, in accordance with Wis. Admin. Code sec. Trans. 405 (?) [**WISDOT AGREES - TRANS 405 IS CORRECT**].

VISION CORNERS

WISDOT Agreement in bold:

1. Deleting the dedication requirement from the rule (WISDOT is able to achieve the same level of public safety through easements) [**WISDOT AGREES THAT ALTERNATIVES ACHIEVE SAME PURPOSE.**]

DRAINAGE PROVISIONS

WISDOT Agreement in bold:

1. Clarifying that the land divider will NOT be asked to guarantee that anticipated discharge ("estimate") is correct. (The intent is to eliminate any liability resulting from an incorrect estimate that was made in good faith.) [**WISDOT AGREES THAT "GUARANTEE" IS WRONG WORD.**]

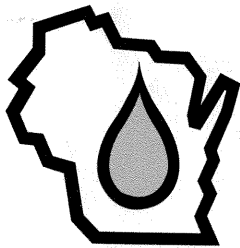
"DESIRABLE TRAFFIC ACCESS PATTERN"

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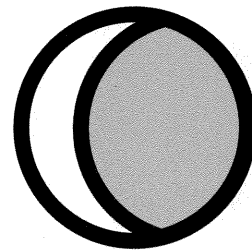
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Attachments:

July 13, 1999 Letter and Memorandum from Secretary to Realtors
January 24, 2000 Memorandum from Tom Larson of Realtors



PMAW



WACS

February 8, 2000

Representative David Brandemuehl
Chair, Assembly Transportation Committee
Wisconsin State Capitol
P.O. Box 8952
Madison, WI 53708

Dear Representative Brandemuehl,

Thank you again for forming a subcommittee on Trans 233. The *Coalition to Reform Trans 233* very much appreciates the opportunity to discuss our concerns about this rule.

Attached please find a memo by the *Coalition*, detailing our understanding of issues raised and agreements reached during the January 27th Assembly Transportation Subcommittee meeting. Please feel free to call me with any questions on this document.

We look forward to additional meetings on this issue. Sheri Krause of your office informed me that the next meeting is scheduled for Thursday, February 17, 2000. If there is anything else I can do, in preparation of this meeting, please let me know.

Sincerely,

Jennifer Badeau
Director of Government Affairs

PETROLEUM MARKETERS
ASSOCIATION OF WISCONSIN

WISCONSIN ASSOCIATION
OF CONVENIENCE STORES

Representing Independent Businesses

121 S. PINCKNEY STREET • SUITE 210 • MADISON, WISCONSIN 53703-3338 • (608) 256-7555 • FAX: (608) 256-7666



MEMORANDUM

TO: Charles H. Thompson, Secretary

FROM: James S. Thiel, General Counsel, State Bar #1012582
John Haverberg, Director, Bureau of Highway Development

DATE: February 14, 2000

RE: Trans 233 Agreement with Wisconsin Realtors, Coalition and Others

BACKGROUND. On July 13, 1999, you responded to the initial concerns of the Wisconsin Realtors Association (Realtors) with revised Trans 233, Wis. Admin. Code, regarding land divisions abutting state trunk and connecting highways. The Realtors expressed a number of initial concerns shortly after these revisions went into effect on February 1, 1999. Your July 13, 1999 letter expressed your gratitude for the Realtors' willingness to cooperatively refine the implementation of the new provisions of Trans 233 for mutual private and public benefit. You also pledged a four step approach to address the Wisconsin Realtors' concerns on a continuing basis. In brief:

1. **Education, Training, and Meetings with Interested Groups.**
2. **Specific Responses to Specific Questions.**
3. **Uniform Implementation.**
4. **Then, Refine Rule As Necessary.**

Your letter also included a memorandum from WISDOT responding to specific legal and operational concerns expressed by the Realtors in Tom Larson's 12-page memo of February 19, 1999. William Malkasian, Executive Vice President of the Realtors, sent us a copy of this memo on March 30, 1999. A copy of your letter with the accompanying memorandum is attached.

On January 24, 2000, as a follow-up to this continuing cooperative process, you reached further agreement with the Realtors. Tom Larson of the Realtors has summarized our progress, discussions and the Realtors' understanding of our mutual conceptual solutions. The purpose of this memorandum to you is to confirm this agreement with the Realtors, with comments and corrections for clarification, as requested by the Realtors. This memorandum also represents what WISDOT agreed at committee and subcommittee meetings, e.g. January 27, 2000, and discussions with Legislators, the Coalition and other interested groups participating in this process. It also serves as a response to the Coalition's memo of November 22, 1999 and the Realtors' memo by Tom Larson of November 24, 1999. The following page summarizes all the agreements in principle on all the general issues to date:

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Attachments:

July 13, 1999 Letter and Memorandum from Secretary to Realtors
January 24, 2000 Memorandum from Tom Larson of Realtors

February 14, 2000

William Malkasian
Executive Vice President
Wisconsin Realtors Association
4801 Forest Run Road, Suite 201
Madison, Wisconsin 53704 - 7337

Dear Mr. Malkasian:

Thank you once again for continuing to work with us to address mutual concerns of the Wisconsin Realtors Association (Realtors) and Wisconsin Department of Transportation (WISDOT) regarding the revisions to Trans 233, Wis. Admin. Code, that first went into effect February 1, 1999.

I and WISDOT staff appreciate the many follow-up contacts and meetings we have had with you, your staff and members, and, most recently, the conceptual agreement at our meeting of January 24, 2000.

WISDOT will continue the steps I first outlined in my letter to you of July 13, 1999. I am now very pleased to forward you the attached memorandum that expressly confirms our agreement with the Realtors, with comments and corrections for clarification, as Tom Larson of your staff requested January 24, 2000. This attached memorandum also reflects what WISDOT agreed at committee and subcommittee meetings and discussions with Legislators, the Coalition and other interested groups participating in that process, including the Realtors.

As you know, the rule change process itself takes at least 6 months. Please be assured that we will initiate that process, continue to work with you on details in that process, and make the agreed changes. In the interim, we will also work with the Realtors and others to accomplish the other steps that are quicker and will allow all of us to make better choices for the safety of entrance upon and departure from state trunk highways and preserve the public interest and investment in the highways.

Sincerely,

Charles H. Thompson
Secretary
CHT/jst

Attachment: WISDOT Memorandum of February 14, 2000

MEMORANDUM

TO: Charles H. Thompson, Secretary
FROM: James S. Thiel, General Counsel, State Bar #1012582
John Haverberg, Director, Bureau of Highway Development
DATE: July 13, 1999
RE: Trans 233, Wisconsin Realtors Association Initial Concerns

The Department of Transportation recently revised Trans 233, Wis. Admin. Code, regarding land divisions abutting state trunk and connecting highways. The Wisconsin Realtors Association (Realtors) expressed a number of initial concerns shortly after these revisions went into effect on February 1, 1999. This memorandum responds to those specific legal and operational concerns expressed by the Realtors in Tom Larson's 12-page memo of February 19, 1999. William Malkasian, Executive Vice President of the Realtors, sent us a copy of this memo on March 30, 1999. You may recall that we discussed these issues and pledged continuing cooperation with the Realtors at our meeting April 7.

The Realtors **GENERAL CONCERNS** are expressed in three categories in **Part 1** of its memo. For convenience, we are responding in the same order, i.e. (1) Statutory Authority, (2) Excessive Restrictions, and (3) Ambiguities.

1. **STATUTORY AUTHORITY**. The Realtors question whether WISDOT has statutory authority to adopt a rule providing for WISDOT review of all new land divisions that may affect the safety of entrance to and departure from or public investment in state trunk highways and connecting highways. The Realtors, however, also agree that the policy underlying the scope of the rule makes good sense.

Answer: We appreciate the Realtors support for the common sense scope of the rule and their good faith in not challenging the legal bases of the rule. Due to the seriousness of their concerns, however, we carefully reviewed the Realtors' legal observations and remain convinced WISDOT does have the statutory authority to back up this rule as follows:

- a. **Independent Review Confirms Statutory Authority.** An independent, legislative agency reviewed the proposed rule and concluded WISDOT has statutory authority for the rule, the Wisconsin

Legislative Council Rules Clearinghouse of the Wisconsin Legislature. A copy of its independent analysis is attached. **Attachment A.**

b. **WISDOT Has Statutory Authority For All State Trunk Highways.** We also reexamined the statutory authority issue in light of the Realtors observations. Some background may be useful to put the question of statutory authority in perspective because the Realtors raise questions about only some highways covered by the rule. As of January 1, 1997, there were 111,500 miles of highways in Wisconsin. The total includes **11,813 miles of State Trunk Highways** (10.6%). The Realtors do **not** question WISDOT's statutory authority to adopt rules relating to land divisions abutting **State Trunk Highways** where WISDOT is the maintaining authority. What the Realtors did not know is that WISDOT is the maintaining authority for **all** State Trunk Highways. Section 84.07(1), Stats., reads in part: "The state trunk highway system shall be maintained by the state at state expense." As the maintaining authority, WISDOT has statutory authority to control all access to and work on all **State Trunk Highways** under sec. 86.07(2), Stats.¹

c. **WISDOT Has Statutory Authority to Review Subdivision Plats Abutting All Connecting Highways Outside the City of Milwaukee and Unincorporated Lands in Milwaukee County.** The Realtors concern really focuses on **Connecting highways**. **Connecting highways** are marked routes of the state trunk highway system **over the streets or highways in municipalities** which the department has designated as connecting highways. They are marked routes over the streets or highways of a local unit of government; they are **not** part of

the state trunk highway system. Section 84.02(11), Stats.² To put the connecting highways issue in perspective, as of January 1, 1997 there

¹ Section 86.07(2), Stats., reads in part:

"(2) No person shall make any excavation or fill or install any culvert or make any other alteration in any highway or in any manner disturb any highway or bridge without a permit therefor from the highway authority maintaining the highway. Such permit shall contain the statement and be subject to the condition that the work shall be constructed **subject to such rules and regulations as may be prescribed by said authority** and be performed and completed to its satisfaction, and in the case of temporary alterations that the highway or bridge shall be restored to its former condition, and that the permittee shall be liable to the town or county or state, as the case may be, for all damages which occur during the progress of said work or as a result thereof. **Nothing herein shall abridge the right of the department or the county board or its highway committee to make such additional rules, regulations and conditions not inconsistent herewith 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 such permit conditional thereon.**" (Emphasis added.)

² Section 84.02(11), Stats., reads:

"(11) Connecting highways. The state trunk highway system shall **not** include the marked routes thereof over the streets or highways in municipalities which the department has designated as being connecting
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were only **520 miles** of **Connecting highways** in the entire State. The Realtors are only concerned with WISDOT review of land divisions other than subdivision plats abutting **Connecting highways**. The Realtors are **not** concerned with WISDOT review of subdivision plats abutting **Connecting highways** because there is express statutory authority for WISDOT to review these plats. Section 236.13(1)(e), Stats., authorizes subdivision plat review "rules of the department of transportation relating to provision for the safety of entrance upon and departure from the abutting **state trunk highways or connecting highways** and for the preservation of the public interest and investment in such highways." (Emphasis added.) The Realtors are also **not** concerned with reviews of land divisions, including subdivision plats abutting connecting highways in the City of Milwaukee or unincorporated lands in Milwaukee County because the rule does not apply to any connecting highways in these areas. Section 236.12(1), Stats. See letter to Milwaukee. **Attachment B.**

- d. **The Realtors Are Correct Regarding Limits or Differences in WISDOT Authority Regarding Land Divisions Other Than Subdivisions Abutting Connecting Highways; But WISDOT Has Other Statutory Authority Over These Land Divisions.** The Realtors are correct that WISDOT is not the maintaining authority for these 520 miles of connecting highways and therefore does not have the same direct statutory role under sec. 86.07(2), Stats., over land divisions other than subdivisions abutting this **relatively** small number of miles of connecting highways outside Milwaukee. However, WISDOT has several other bases for authority over these other land divisions abutting **Connecting highways**. **First**, some of these connecting highways were designated as controlled access highways by WISDOT under sec. 84.25(1), Stats., in the 1940s and 1950s when they were rural portions of the State Trunk Highway System before they ever became connecting highways. For example, there are very urban parts of East Washington Avenue in Madison and Hastings Way in Eau Claire over which WISDOT has access control under the controlled access highway statute. These controlled access areas are recorded in the register of deeds office in each County. WISDOT still has authority to control access to these areas even though they are connecting highways and WISDOT is not the maintaining authority. **Second**, traffic control on connecting highways is subject to "review and approval" by WISDOT, under sec. 86.32(1), Stats., and WISDOT may designate connecting highways as through highways under sec. 349.07(1), Stats. See **Attachment C** for additional statutory authority of WISDOT over operations on connecting highways. What this means in practice is that local governments generally consult with WISDOT before making changes that affect the safety of entrance

highways. Those municipal streets or highways so excluded as state trunk highways but marked as such and designated as connecting highways are further described and the aids determined therefor under s. 86.32." (Emphasis added.)
DOT/jst/jh/13 July 1999

upon or departure from or the public investment in these highways. **Third**, not infrequently the property for these highways was originally acquired by WISDOT or was acquired by a local unit of government for WISDOT. (Until 1931, WISDOT did not have authority to acquire property in its own name. All property for state highways was acquired in the name of a local government prior to that date.) Some of our standard real estate acquisition forms, including those for small strip acquisitions for expansion of existing highways, and some of the local forms, contain language indicating that the property right acquired includes "all existing future or potential common law or statutory easements or rights of access between the right of way of the highway as described above (currently designated as) and all of the abutting remaining real property, whether acquired by separate conveyance or otherwise" The Courts have determined that this language is a property right that when acquired takes away any right of the owner to even ask for access to the highway. **Narloch v. Department of Transportation**, 115 Wis.2d 419, 340 N.W.2d 542 (1983). **Finally**, WISDOT is statutorily responsible for the construction and reconstruction of **Connecting highways**.³ WISDOT pays for construction of through lanes, but subject to local cost sharing agreements. Therefore, WISDOT and local units of government share in the cost of construction and reconstruction of connecting highways, and local units must pay for parking lanes.⁴ Appropriations available to WISDOT for construction of connecting highways include state, local, and federal funds, so WISDOT is in a position to negotiate as to the relative shares to be paid. Moreover, local governments are expressly granted authority to reach agreements with WISDOT for cooperative work on highways under local jurisdiction under secs. 86.25(1) and (2), Stats.⁵ Hence, WISDOT can and does put into these agreements that

³ Section 84.03(10), Stats., reads as follows:

"(10) Improvement of connecting highways. All connecting highways shall be constructed or reconstructed by **the state** in the same manner as portions of the state trunk highway system. **It shall not be compulsory for the state to construct or reconstruct any such highway to a greater width than those portions of the state trunk system connecting therewith.**" (Emphasis added.)

⁴ Section 86.32(4), Stats., reads as follows:

"(4) **Municipalities may arrange to participate in the cost of improvement projects on connecting highways. When a connecting highway is reconstructed the municipality shall be required to pay to the department the construction cost of that part of the connecting highway on which parking is to be permitted.** However, if lanes on which parking is permitted are required for through traffic and parking is no longer allowed, the department shall reimburse the municipality for the remaining life of those lanes based on a pavement life of 25 years and the original municipal cost for the lanes." (Emphasis added.)

⁵ Sections 86.25(1) and (2), Stats., read as follows:

"(1) Any county, city, village or town may by any lawful means provide funds to match or supplement state or federal aid for the construction, reconstruction or improvement, under ch. 84, of any highway, street or bridge

the local unit of government that is the maintaining authority will not grant access to the connecting highway or do other things without the approval of WISDOT. The Wisconsin Court clearly indicated WISDOT has the authority to do this when it chose to do so. See Russell Dairy Stores v. Chippewa Falls, 272 Wis. 138, 147 (1956). Municipalities already coordinate these and many similar activities with WISDOT regarding connecting highways.

- e. **WISDOT's Definition of "Abutting" Is Reasonable and Within the Bounds of Law.** The Realtors also raise concerns regarding what land divisions may be considered "abutting" state trunk or connecting highways and therefore are subject to review. The word "abutting" is used in the subdivision plat approval statute, sec. 236.13(1)(e), Stats., as follows:

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

....

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

Hence, it is entirely appropriate for WISDOT to define the phrase "abutting" in WISDOT rules to achieve the purposes of this statute. WISDOT has done so in TRANS 233.017, Wis. Admin. Code. The Realtors do raise the question whether WISDOT's authority over land divisions other than subdivision plats extends to those that are separated by only unplatted lands owned or controlled by the same owner. TRANS 233.017(2). Section 86.07(2), Stats., in our view, provides that authority on its face because it allows WISDOT to make additional rules for the safety of the public and protection of the highways.⁶ The purposes of these laws cannot be achieved unless

which it is authorized to construct, reconstruct or improve, and to pay such funds to the department or state treasury as provided in s. 84.03 (1) (b)."

"(2) Any county, city, village or town, through its governing body or a committee which it may designate, may enter into agreements with the department providing for the construction, reconstruction or improvement with state or federal aid, of highways, streets or bridges which such county, city, village or town is authorized to construct, reconstruct or improve, **providing for the subsequent maintenance by such county, city, village or town of any such highway, street or bridge improved with state or federal aid which it has authority to maintain**, and providing for the subsequent regulation as to the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings and traffic signals on any such highway, street or bridge improved with state or federal aid." (Emphasis added.)

⁶ Section 86.07(2), Stats., reads in part:

"Nothing herein shall abridge the right of the **department [of transportation]** or the county board or its highway committee to make such additional rules, regulations and conditions not inconsistent herewith as DOT/jst/jh/13 July 1999

WISDOT reviews this type of "abutting" land division where the contiguous property to the highway and land division are held or controlled by the same entity or individual. Review by WISDOT does not mean disapproval. In fact, a conceptual review may easily satisfy WISDOT that the land division has no effect warranting WISDOT suggested revisions, but a review is warranted because it well could. That is the reasoning and legal justification underlying this portion of TRANS 233.017(2). The Realtors also raise the issue of the appropriateness of review of land divisions that are separated from the highway by a "service road" under TRANS 233.017(3). This concern probably results from a misunderstanding or lack of definition in the rule itself as to what is a "service road." Under sec. 84.25(10), Stats., WISDOT has express authority to construct and exercise jurisdiction over "service roads" as follows:

"Local service roads. In connection with the development of any controlled-access highway, **the department** and county, city, town or village highway authorities are **authorized to plan, designate, establish, use, regulate, alter, improve, maintain, or vacate local service roads and streets or to designate as local service roads and streets any existing roads or streets, and to exercise jurisdiction over local service roads in the same manner as is authorized over controlled-access highways under the provisions of this section, if, in their opinion, such local service roads or streets shall serve the necessary purposes.**"

Section 340.01(57m), Stats., also defines "service road" as "every highway that runs generally parallel to but is separated from the main roadway by a physical barrier and primarily intended to provide access to the abutting property and not for use of through traffic." For the same reason, i.e. achievement of the purpose of the law, we believe secs. 84.25(10) and 86.07(2), Stats., on their face, provide authority for the rule as it relates to abutting service roads.

Finally, the Realtors suggest that the decision of the Wisconsin Court in **Russell Dairy Stores v. Chippewa Falls**, 272 Wis. 138 (1956) limits governmental authority under sec. 86.07(2), Stats., to proposed activities that **physically** "alter" or "disturb" a highway or **connect directly** to a highway under sec. 86.07(2), Stats. We do not believe the case supports such a limitation on the plain reading of the statute. This case involved a situation where a local unit of government issued a permit allowing a property owner to install a private driveway to a connecting highway. After the driveway was installed, the local unit of government rescinded its approval because some neighbors

complained. The local unit of government argued that it was justified in rescinding its approval because the State of Wisconsin owned the real estate underlying the highway. The Court simply concluded that was not a valid excuse for the local government's action since (1) the local government was the maintaining authority for the highway and accordingly had permit authority under sec. 86.07(2), Stats., and (2) the State [WISDOT] had not only not prohibited driveways at the location in question, either in fact or in the terms of its transfer agreement with the local unit of government, but had also approved a driveway about a block away before it transferred jurisdiction of the highway to the local government as a connecting highway. WISDOT was not only not a named party to the action, it refused to participate. The Wisconsin Court actually made the following statement that, if anything, we believe may expand, rather than limit the express scope of authority under sec. 86.07(2), Stats.:

"The city maintains that under its police power and in the interest of public safety it may **regulate** access to public highways. **Granting that the city has such power**, nevertheless it may not exercise it arbitrarily." Id, p. 148 (Emphasis added.)

2. **EXCESSIVE RESTRICTIONS.** What follows now, in the same order as presented, are responses to the Realtors more operational concerns.

- **Noise Abatement** - The purpose of this section is to inform land owners and prospective buyers of land adjacent to an existing highway facility that noise levels on some or all of the divided lands exceed federal standards and to inform them that WISDOT is not responsible for mitigating the noise. It makes clear that the burden of any mitigation remains upon the owner. This note is only required on land divisions where WISDOT knows of a problem or knows there will shortly be a noise problem. The rule does not say that noise barriers must be built. Whether or not they are provided will depend upon whether the land divider, prospective buyers or people who have already bought lots feel they are necessary and also upon whether any of those people are willing to pay for them. The intent of this section is to inform all concerned that WISDOT will not construct or finance noise barriers for new land divisions next to **existing highways**. The developer retains the risk on his own behalf or on behalf of subsequent buyers if they choose to develop close to an existing highway which may now or in the future adversely affect owners of the created land divisions. However, if noise levels increase due to adding lanes to the highway, WISDOT will perform a noise analysis and if there is substantial noise impact, WISDOT will install noise barriers if it is practical to do so. Generally it is only practical on highways that are freeways.
- **Required dedication without compensation.** Vision corners are generally required at locations where local roads intersect with highways. Vision corners are required as a safety necessity. They are necessary to

provide an unobstructed sightline of on-coming vehicles for both the internal traffic exiting the land division and for vehicles on the mainline. They are required if the land divider wants to provide a highway connection to the highway. They do not need to do this if they do not connect to the highway. If there is alternative access WISDOT strongly encourages its use instead of directly accessing the highway. If the highway speeds are low and visibility is adequate without the need for the dedication it will not be required. Vision corners may not always be necessary for connections to the highway. If they are not, the land divider will not be asked to dedicate vision corners. Unlike the DNR case cited, the land divider is the initiator of the action (dividing the property) and is receiving something of value (a connection to the highway) in return for the dedication. Also the land divider can avoid this by connecting to a road other than the highway or by not dividing the property. It is noteworthy that a vision corner could also be required as a condition for a permit for direct access to a highway under sec. 86.07(2), Stats. Section 236.34(1)(e), Stats., also allows the use of a certified survey map to dedicate property for public highway use. It reads as follows:

"A certified survey map may be used for dedication of streets and other public areas when owners' certificates and mortgagees' certificates which are in substantially the same form as required by s. **236.21(2)(a)** have been executed and the city council or village or town board involved have approved such dedication. Approval and recording of such certified surveys shall have the force and effect provided by s. **236.29.**"

- **Setbacks** are necessary to provide light and air and space between a development and the highway, but also to preserve the public investment in the highway. Highways are a resource for the State of Wisconsin. Before development in an area occurs, the highways are constructed to meet the needs of the area. The extent of development is frequently unpredictable over the period of time a highway is intended to last. Many communities do not have master plans in place that adequately preserve corridors for probable future needed highway improvements and as a result, many times WISDOT must look to a relocation of a highway in order to meet the expanding needs of a community or region. It is becoming more difficult to bypass a community due to concerns over the environment and agriculture of an area and also to the lack of available area due to expanding cities. In order to provide for a facility to serve the future communities and regions, the setbacks need to be in place. They are not blanket along all highways. They are restrictions placed upon developing land and only as the development occurs through land divisions. Without setbacks the future is bleak as communities have to live with a substandard highway facility because it makes no sense to relocate half of the business district of a community someplace else in order to provide for an expanded highway facility. All practical uses of the area within the setback are not being denied. Just those that may

preclude a future highway facility. If the cost of additional right-of-way is too great in terms of disruption of the community, families, and businesses and environmental and monetary costs, either a needed project will not be built or the highway will be relocated. In either case property owners adjacent to the highway, particularly businesses, will be adversely impacted.

3. **AMBIGUITIES.** The Realtors are concerned that the rule contains many ambiguities. Chapter 236, Stats., states what happens if WISDOT fails to act on a subdivision plat review within the 20 day time limit. If WISDOT does not act within 20 days or request and receive a time extension, a submittal is considered to be certified. We intend the same result if WISDOT does not act within the 20 day limit on other land divisions. In order to make this clearer, we will include a statement to this effect in our draft administrative guidelines that we propose to develop by this September or October. In addition, at the appropriate time in the future, we will clarify this result in a revision to the rule itself.

The Realtors **SPECIFIC CONCERNS AND RECOMMENDATIONS** are raised in **Part 2** of its memo. For convenience, we will respond in the same order and format.

- Trans 233.012 **Applicability.** The 1st and 2nd sentences are to be considered as the whole description of items to which the rule applies. Granted taken alone the first sentence, if read in isolation, might be taken as all land divisions, but in context it applies only to those land divisions which abut a state trunk highway, connecting highways or service roads.
- Trans 233.017 **Other abutments - Questions.**
 1. The beginning of section 233.015 states that words are used in the same manner as defined in sec. 340.01, Stats., unless a different definition is specifically provided in the rule. The definition of "highway" is found in sec. 340.01(22), Stats. It matches the definition you quote but expands it further.
 2. It is considered an assemblage when an owner owns several abutting pieces of property. When an owner divides a portion of its property, the remainder is also a portion of that land division. It is now a smaller piece than before. That is how WISDOT arrived at the interpretation that any assemblage of abutting land must be reviewed; it is part of that land division. As stated above, it is necessary to review the land division to determine what effect it may have upon safety and public investment in the highway. Certainly access may or may not be impacted on the remainder, but the property is developing and future access to the remainder is of great concern to WISDOT. We believe this type of review will be helpful to both owners and WISDOT.

3. Other Abuttals or "abutting" is being defined in this section. The word "abut" in TRANS 233.017(2) is used in the sense of contiguous or touching in this subsection rather than the broader constructive sense of abutting. It could have been more artfully worded.
- Trans 233.03 - **Procedures for review.** Some history here is in order. Under the previous system, the first time the WISDOT would generally see a subdivision would be when the developer was seeking final approval from the local approving authority. Some communities require that a preliminary plat be created and reviewed by WISDOT while others do not. In fact some communities required that the infrastructure of a land division be constructed completely to their standards before the community will approve the final plat. But in those cases where the WISDOT did not see the division until the final was submitted, a large amount of engineering work had usually been completed. If the developer had come to the WISDOT very early in the process many of the redesigns required by the previous rule could have been eliminated. The wording of the conceptual review language in the revised rule was an attempt to focus on the need to come to the WISDOT early. By making it mandatory but without an assessed penalty for noncompliance WISDOT was trying to make that point. We were attempting to save the developers unneeded expense and emphasize the need for early review by WISDOT. A developer certainly may engage in both a conceptual review and submit a preliminary plan. The rule is simply stating that the land divider accomplish at least one of the two.
 - Trans 233.03(2) - **Preliminary and final plat review.** The formal request is a new requirement and it establishes the difference between a conceptual review and a preliminary or final review.
 - Trans 233.03(5) - **Time to complete review. Questions.**
 1. If the WisDOT fails to act in the 20 days then sec. 236.11, Stats., applies. We believe the same result should occur regarding all land divisions. This will be clarified.
 2. The day WISDOT receives the request is the date that a land division is considered to have been submitted. The review period will expire 20 calendar days later.
 - Trans 233.04 - **Required Information - Questions.**
 1. See #2 under Other Abuttals above. WISDOT is attempting to avoid having more access points than necessary, spacing too close between successive accesses, and access points being planned at unsafe locations. These frequently occur when lands are divided a small portion at a time. Both the land divider and WISDOT need to plan for an

appropriate ultimate number and location of accesses and to establish initial accesses to fit that plan.

2. Proper location means to scale. The drawing must be generally accurate in terms of locating the items requested.

➤ **Trans 233.05 - Direct Access to State Trunk Highway or Connecting Highway**

➤ Trans 233.05(1) WISDOT required restrictions on a land division may be modified through an affidavit of correction upon concurrence of WISDOT, the current owner and the approving authority following a public hearing on the matter. It has been the experience of WISDOT that many times when restrictions are placed on the first deed following a division, subsequent deeds may not show the restriction. By placing the restriction on the land division document, it becomes part of the legal description of that division and any title search should recognize the restriction. WISDOT does not review deeds unless that is the method used to create the land division. Thus WISDOT would have no assurance that the restriction would be placed upon the deed. If the deed contained the restrictions as well as the dividing document WISDOT would have no objection, but we do not want to review every deed.

➤ Trans 233.05(2). The WISDOT district office in conjunction with the approving authority and with input from the divider determines whether the traffic access pattern is desirable by basing these decisions on its expertise with highway operational efficiency and safety and by applying logic and common sense and generally accepted traffic engineering principles.

➤ Trans 233.05(3).

1. The term "highway" does not include private roads.

2. The role of municipalities has not been limited. Permits for public roads have always been issued to the maintaining authority.

➤ Trans 233.05(4)

1. In the case cited the WISDOT could possibly issue a permit for a temporary connection which would expire and require removal when the scheduled highway was built.

2. "Reasonable and adequate". WISDOT would again use logic and common sense in establishing what is reasonable and adequate. It is difficult if not impossible to prescribe general rules to fit all possible situations.

- Trans 233.07 - **Temporary Connections.** Circumstances for closure or alteration of temporary connections is a generally a negotiable item between the WISDOT, the approving authority and the developer unless the connection becomes a safety problem. WISDOT would strive toward rectifying promptly any safety problems that may arise.
- Trans 233.08 - **Setback Requirements and Restrictions.** The intent of the notation required by 233.08(5) has nothing to do with noise. It is intended to inform the owners of the types of improvements that may not be placed within the setback. We do not object to its placement on deeds; however, we want it on the land division map.
- Trans 233.105(1) **Noise**
 1. Generally, the land divider's responsibility for noise abatement expires when the lots are sold. If and when an owner feels noise abatement is necessary regarding an existing highway, it remains the owners responsibility to provide it.
 2. For noise purposes an existing highway would be the roadway in place at the time the land division is created or the roadway resulting from the future rehabilitation or reconstruction if done substantially along the same alignment and containing an equal number of travel lanes. If the highway is subsequently revised so that it is moved significantly closer to the land division or the number of travel lanes is increased, there could be a noise impact to adjacent properties due to the change. In that case WISDOT would no longer consider it to be the "existing" highway for purposes of 233.105(1). In those situations WISDOT will evaluate the changed noise levels on those properties and, if practical and effective, mitigate the effects of increased noise levels significantly affecting the properties. Mitigation may consist of measures other than constructing noise barriers. Noise barriers are not effective where there are many openings such as driveways, thus they are typically only installed along freeways.
 3. The land divider is not necessarily responsible for noise abatement. That is because 233.105(1) does not mandate that noise barriers be built. It merely says that the land divider is responsible for "any" noise barriers. Only the owner of a lot, be it the land divider or subsequent purchaser, will ever desire noise abatement. If any of them feels a noise barrier is necessary, it will be their own responsibility to provide it. It could be worded better.
- Trans 233.105(2) **Vision Corners**

1. WISDOT is responsible. See sec. 80.01(3), Stats., and Walker v. Bignell, 100 Wis.2d 256, 272 (1981).
2. See previous answer regarding notations.
3. Attached is a copy of the required dimensions for vision corners. **Attachment D.**
4. No compensation is required. The land divider is dedicating the land in exchange for allowing a new or upgraded public road or street access to the highway.

> Trans 233.105(3) **Drainage**

1. No, it would have been better to use the correct phrase "land divider." We suspect we inadvertently used the word "owner" as a carryover from sec. 88.87(3), Stats., that does impose a duty on any "owner or user of land" to maintain drainage to protect the highway from flooding or water damage. In this context, however, we do mean "land divider."
2. The owner must have some idea of what may be planned based upon zoning alone. We are requesting land dividers contact the district before they expend resources on drainage plans. The district can work with the developer to determine the extent of this requirement.
3. WisDOT will determine whether a commonly employed method was used and will review the assumptions to ensure they are reasonable and the computations to ensure they are correct.
4. Same as 3.
5. We have not estimated these costs; they would vary.
6. This provision in the rule is to inform the land divider of its responsibilities regarding storm drainage. Computing storm water runoff rates is not an exact science. Various methods may be used for estimating runoff. The land divider will not be asked to guarantee that the estimate is accurate.
7. Downstream properties may be any publicly or privately owned lands through which the runoff flows.
8. That would be up to the courts to decide. However we expect that WISDOT would attempt to recover costs for any damage

done to its facilities if the flow rates were greatly underestimated. See sec. 88.87(3)(b), Stats.

- Trans 233.11. **Variations.** No, the intent is not to get property on the cheap, but to prevent unwise and imprudent location of structures or improvements within the setback that will be unsafe or disruptive currently or when any highway work or expansion takes place. One purpose of this provision is to assure that there will be an area available to expand the highway or locate other transportation facilities or modes when development or the public interest requires a needed improvement. WisDOT pays fair market value for the land it acquires. In a partial taking situation, WISDOT is required by law to determine the value of property before the partial taking, the value after the partial taking, and pay the property owner the difference. This does not change. What WISDOT is trying to avoid, in the interest of the public and the property owner, is the complete disruption of a business or residence by a partial taking within the setback. For example, if all the parking for a new grocery store is proposed to be located within the setback and WISDOT takes a substantial portion of the parking area for the project, the grocery store may no longer be viable and have to be relocated in its entirety. It may also be the case that reasonable safety measures are sacrificed or the project cannot proceed in that location. We believe it is detrimental to the owner, to WISDOT, to the community and society in general to remove development for a highway or other transportation project when it can be avoided by preserving space for such transportation related facilities. The purpose is to provide for the safety of entrance upon and departure from the highway and the public investment in the facility.
- Trans 233.13 - **Fees.** District 6 had been reviewing all land divisions at the time of the rewrite of the rule and they estimated what their costs were on a per review basis. The fee of \$110 is an average based upon the amount of time required for them to perform the review and respond to the appropriate party.

Attachments:

- A. Independent Legislative Council Analysis of Statutory Authority of WISDOT
- B. Letter to Milwaukee Regarding Nonapplicability Within City & Unincorporated
- C. Additional Statutory Authority of WISDOT over Connecting Highways
- D. Required Dimension for Vision Corners

July 13, 1999

William Malkasian
Executive Vice President
Wisconsin Realtors Association
4801 Forest Run Road, Suite 201
Madison, Wisconsin 53704 - 7337

Dear Mr. Malkasian:

Thank you for giving us an opportunity to respond to the concerns of the Wisconsin Realtors Association with the revisions to Trans 233, Wis. Admin. Code, that first went into effect February 1, 1999. We appreciated meeting with you on April 7, 1999 and the various follow up contacts we have had with your staff and members following that meeting. I want to express my gratitude once again for your willingness to cooperatively refine the implementation of the new provisions of Trans 233 to our mutual benefit. We are taking the following steps:

Education, Training, Meetings. We will continue to meet and make presentations to your organization and other interested groups to explain Trans 233, listen and learn how to make it work together. Examples of recent efforts are our enclosed new informational brochures, and meetings with and presentations to the Wisconsin Builders Association, Wisconsin County Code Administrators, Municipal Attorneys, Town Attorneys, and Surveyors.

Specific Responses. We will continue to respond to specific questions. Enclosed are specific responses to the legal and operational concerns raised in Tom Larson's thoughtful memo to you dated February 19, 1999. Another specific response that may be of potential interest is our attached letter to Milwaukee regarding the limited inapplicability of Trans 233 in that area.

Uniform Implementation. We will continue to provide internal training and guidance to our statewide staff on Trans 233. We have reserved some decisions to our central office staff, for example, granting variances, until we have developed sufficient experience to provide written guidance, blanket situation variances, and delegation of variance granting authority to our District Offices. Our target for this written guidance is October. It is our intent to share this guidance with your organization at an earlier date to make sure it is workable and understandable for all concerned.

William Malkasian
February 14, 2000
Page 2

Refine Rule As Necessary. Trans 233 has the full force and effect of law. The rule change process itself takes at least 6 months. When we together identify specific parts of the rule that need to be revised or clarified, please be assured that we will initiate that process and make the changes. Right now, however, I'd prefer that we work our way through the other steps outlined above that are quicker and will allow all of us to make better choices for revising the rule as necessary together.

Sincerely,

Charles H. Thompson
Secretary

CHT/jst

Enclosures:

WISDOT Informational Brochures
WISDOT Response to Tom Larson's Memo dated February 19, 1999
WISDOT Letter to City of Milwaukee

November 8, 1999
FAX THEN MAIL
(608) 257-5882

Edward Huck, Executive Director
Wisconsin Alliance of Cities, Inc.
PO Box 336
Madison, WI 53701-0336

Re: Chapter TRANS 233, Wis. Admin. Code

Dear Mr. Huck:

This confirms our telephone conversation last week. Thank you for giving us an opportunity to respond to some city concerns with the revisions to Trans 233, Wis. Admin. Code, that first went into effect February 1, 1999. I want to express my gratitude for your willingness to cooperatively refine the implementation of the new provisions of Trans 233 to our mutual benefit. We are taking the following steps:

Delegation of Review and Approval to Cities. Trans 233 applies to land divisions abutting state trunk highways and connecting highways. "Connecting highways" are marked routes of the state trunk highway system **over the streets or highways in municipalities.** There are connecting highways in 116 municipalities in Wisconsin. Out of the 116 municipalities in which there are connecting highways; 112 are cities and 4 are villages. As of January 1, 1997 there were 519.97 center-line miles of connecting highways. WISDOT wants to delegate land division review for lands abutting connecting highways to the affected cities and villages, or to transfer full jurisdiction if that makes sense to all concerned. I very much appreciate and would like to work with appropriate City Attorneys or others your membership may wish to designate to develop a uniform delegation agreement for WISDOT and cities and villages.

Setbacks. The setback distances in Trans 233 are the same as when the rule was initially promulgated in 1956. We have simply tried to clarify the existing rule.

Education, Training, Meetings. We will continue to meet and make presentations to your organization and interested cities to explain Trans 233, listen and learn how to make it work together. Enclosed with the mailed copy of this letter are some of our informational brochures.

Specific Responses. We will continue to respond to any specific questions.

Implementation. We will continue to provide internal training and guidance to our statewide staff on Trans 233. As I mentioned, we have at first reserved some decisions to our central office staff, for example, granting variances, until we have developed sufficient experience to provide written guidance, blanket situation variances, and delegation of variance granting authority to our District Offices and local governments. Our target for this written guidance is December 1999 to January 2000. It is our intent to share this guidance with your organization at an earlier date to make sure it is workable and understandable for all concerned.

Refine Rule As Necessary. Trans 233 has the full force and effect of law. The rule change process itself takes at least 6 months. If we together identify specific parts of the rule that need to be revised or clarified, please be assured that we will initiate that process and make the changes. Right now, however, we'd prefer that we work our way through the other steps outlined above that are quicker and will allow all of us to make better choices for revising the rule as necessary together.

Sincerely,

James S. Thiel
General Counsel

February 12, 1999

Mariano A. Schifalacqua, City Engineer
Room 612 Zeidler Municipal Building
841 N. Broadway
Milwaukee, WI 53202

Dear Mr. Schifalacqua:

Mark Mansfield of WISDOT informs me that you expressed very strong surprise and displeasure with Trans 233, Wis. Admin. Code, on February 3, 1999, at a meeting of the Local Roads and Streets Council. I want to respond to the City's concerns as soon as possible because I believe there is a fundamental misunderstanding as to the applicability of the new rule in the City of Milwaukee. In summary, there is no change in setback requirements. The setback distances from state trunk and connecting highways are the same as they have been since 1956. The new rule does not require WISDOT to approve any new building in the City of Milwaukee due to new setback requirements and access control. There is no change to WISDOT's authority to grant, deny or condition permits for new or changed access to state trunk highways in the City of Milwaukee. The misunderstanding is probably in the details as follows:

CITY CONCERN REGARDING SETBACKS.

There is no change in setback requirements. The setback distances from state trunk and connecting highways are the same as they have been since 1956. The setback requirements went into effect in September 1956, as Ch. Hy 33, Wis. Admin. Code, renumbered without change to Trans 233 in 1996. The impetus for the original 1956 rule was Ch. 570, Laws of 1955. The 1956 law created Ch. 236, Stats., regarding subdivision plat approvals. It created in pertinent part sec. 236.12(2)(a), Stats. (1955) that said if the proposed subdivision plat "abuts or adjoins a state trunk highway or connecting street," copies had to be sent to the "state highway commission" for review based upon rules of the "state highway commission relating to provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting streets and for the preservation of the public interest and investment in such highways or streets." Section 236.13(1)(e), Stats. (1955). As promulgated in 1956, the Highway Commission's (WISDOT's) rule referred to the statutory purpose of Chapter 236 and established the following setback requirements from 1956 up through the time of the change that went into effect February 1, 1999:

"Hy 33/Trans 233.08 Setback requirements. (1) There shall be a minimum building setback 110 feet from the centerline of the state trunk highway or 50 feet outside the nearer right-of-way line, whichever is more restrictive. However, if the local unit of government has a uniform setback ordinance which requires a minimum building setback for state trunk highways equal to or greater than 100 feet from the centerline or 42 feet from the nearer right-of-way line, whichever is more restrictive, the local ordinance shall govern for the sake of

consistency; provided that the local unit of government shall allow no variances or exceptions for platted areas abutting state trunk highways without prior approval of the [state highway] commission. There shall be no improvements or structures placed between the highway and the set back line.

(2) The setback requirement shall be shown on the plat and shall be a restriction for the benefit of the public under s. 236.293, Stats.

(3) The [state highway] commission may require that a frontage road be set back from the present highway to allow for future highway improvement. When this is the case, the area between the highway and the frontage road shall be marked "Dedicated for highway purposes," and shall be deemed so dedicated." (Emphasis added.)

Section 236.12(2)(a), Stats., (1997-98) is the same as in 1956. It says if the proposed subdivision plat "abuts or adjoins a state trunk highway or connecting highway," copies have to be sent to the state "department of transportation" for review based upon rules of the state "department of transportation relating to provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways and for the preservation of the public interest and investment in such highways." Section 236.13(1)(e), Stats. (1997-98). The new rule now recreates the same setback requirements as Trans 233.08 and reads as follows:

"Trans 233.08 Setback requirements and restrictions. (1) Except as provided in this section or in s. Trans 233.11 [Variances] or, with respect to connecting highways, as provided in s. 86.16(1), Stats. [utilities subject to WISDOT approval on state trunk highways and subject to local approval with respect to connecting highways], no person may erect, install or maintain any structure or improvement within a setback area determined under sub. (2) or (3).

(2)(a) Except as provided in par. (b), the setback area is the area with **110 feet of the centerline of a state trunk highway or connecting highway or within 50 feet of the nearer right-of-way line of a state trunk highway or connecting highway, whichever is furthest from the centerline.**

(b) If an applicable ordinance allows structures or improvements to be located closer to the right-of-way of a state trunk highway or connecting highway than is provided under par. (a), the setback area is the area between the right-of-way and the more restrictive of the following:

1. **The distance allowed under the ordinance.**
2. **42 feet from the nearer right-of-way line.**
3. **100 feet from the centerline.**" (Emphasis added.)

The setback distances from state trunk and connecting highways are the same as they have been since 1956.

CITY CONCERN REGARDING WISDOT APPROVAL OF NEW BUILDINGS.

The new rule does not require WISDOT to approve any new building in the City of Milwaukee due to new setback requirements and access control. New buildings in the City of Milwaukee are not subject to WISDOT approval. Subdivision plats abutting on state trunk highways and connecting highways in the City of Milwaukee are not now and never have been subject to WISDOT approval. Section 236.12(1)(a), Stats. (1955) and (1997-98), both read as follows:

1955: "236.12 **Procedure for Approval of Plats.** (1) This section shall not apply to cities of the first class nor to land outside of municipalities in a county having a population of 500,000 or more." (Note: "Municipality" means an incorporated city or village. 236.02(1), Stats. (1955))

1997-98 "236.12 **Procedure for Approval of Plats.** (1) This section shall not apply to cities of the first class nor to unincorporated land in a county having a population of 500,000 or more."

The statutory State plat approval procedures do not apply to the City of Milwaukee.

The statutes and Trans 233 do apply in full to all state trunk highways and connecting highways in all 72 counties, except in Milwaukee County, they apply to all other incorporated municipalities, except the City of Milwaukee, and they apply to any unincorporated lands in that County. For convenience I have attached a listing and map that shows and distinguishes all state trunk highways and connecting highways in Milwaukee County. **Attachments A and B.**

In the City of Milwaukee itself, other restrictions do apply now and have applied in the same way in the past. For example, the City of Milwaukee is now and has been responsible for allowing utilities within connecting highways under sec. 86.16(1), Stats. and for allowing other work within connecting highways by City permits under sec. 86.07(2), Stats. The reason is that connecting highways are not part of the state trunk highway system. Section 84.02(11), Stats., provides as follows:

"Connecting highways. The state trunk highway system shall not include the marked routes thereof over the streets or highways in municipalities which the department has designated as being connecting highways. Those municipal streets or highways so excluded as state trunk highways but marked as such and designated as connecting highways are further described and the aids determined therefor under s. 86.32."

Similarly, section 86.32(1), Stats., gives responsibility for maintenance of connecting highways to the City. It reads in part as follows:

"The department may designate, or rescind the designation of, certain marked routes of the state trunk highway system over the streets or highways in any municipality for which the municipality will be responsible for maintenance and traffic control and the maintenance and operation of any swing or lift bridge. Such maintenance, operation and traffic control of the connecting highways and swing and lift bridges shall be subject to review and approval by the department."

However, as in the past, if any land division or, for that matter, any other development in the City of Milwaukee that abuts a state trunk highway contemplates or affects direct access to or work in a state trunk highway, then a permit must be obtained from WISDOT. For that reason, as a matter of common sense, all land dividers in the City of Milwaukee that are creating new land divisions in the City of Milwaukee of land that abuts state trunk highways would be wise to submit their land divisions to WISDOT for conceptual review.

The location or conditions necessary for safety of entrance or departure from the state trunk highway that WISDOT would need to impose as a condition to granting its permits for access to the state trunk highway or work in the state trunk highway under sec. 86.07(2), Stats., could be taken into account by the land divider at that time. This avoids incurring unnecessary additional surveying, monumenting, mapping or design expenses for any layout changes that may be needed

without this review. There is no charge for this conceptual review. Section Trans 231.01(9), Wis. Admin. Code, reads as follows:

"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 the effective date of this section (February 1, 1999) or the department determines that the land division meets the requirements of ch. Trans 233."

Although WISDOT is not directly involved in issuance of permits for access to connecting highways, the City's maintenance, operation and traffic control of connecting highways is subject to WISDOT review and approval. As a matter of policy and for all practical purposes, however, the authority and responsibility with regard to connecting highways reside with the City.

The new rule, Trans 233, does not require WISDOT to approve any new building in the City of Milwaukee due to new setback requirements and access control. New buildings in the City of Milwaukee are not subject to WISDOT approval. However, for highways under its jurisdiction, WISDOT does retain authority to provide for the safety of entrance upon and departure from the state trunk highways and to preserve the public interest and investment in such highways in the City of Milwaukee, just as the City does as to its highways. WISDOT believes these rules are necessary and proper for the preservation of highways, and for the safety of the public.

Perhaps I have overreacted or missed the point of this second hand report of your comments, or need additional information from you. Please feel free to contact me if this letter does not adequately address your concerns.

Sincerely,

James S. Thiel
General Counsel

Attachments: A. List of Connecting and State Trunk Highways in Milwaukee County
B. Map of Connecting and State Trunk Highways in Milwaukee County

cc: Les Fafard, District Director
Jim Gruendler
Dan Pritchard
Ed Friede
Bob Bovy
Bonnie Tripoli
Mark Mansfield
Sandy Beaupre
Tanace Matthiesen

Milwaukee County

CONNECTING HIGHWAY LIMITS AND STATE TRUNK HIGHWAY LIMITS

WISDOT District 2

<u>City</u>	<u>Highway</u>	<u>Location</u>
Milwaukee &	18 (W)	West City Limits of Wauwatosa (0.22 mile west of North Suburbs 121st St.
	24 (SW)	45th St. and West Forest Home Ave.
Milwaukee & Suburbs	32 (N)	North Village Limits of Fox Point (233 feet north of Dear Rd.)
	32 (S)	South City Limits of South Milwaukee (Forest Hill Ave.)
	36 (SW)	0.30 mile west of USH 41 in Milwaukee (end of median)
	38 (S)	Grange Ave. and S. Howell Ave.
	41 (S)	Howard Ave. in Milwaukee and S. 27th St.
	41 (NW)	North 76th St. (STH 181) and W. Appleton Ave. (see notes)
	41	Jct. Stadium Freeway and W. National Ave.
	41	Stadium Freeway and N. 47th St.
	45	All STH
	57 (N)	West Marne Ave. in Glendale
	59 (W)	100th St. extended in West Allis
	62	All connecting street
	94	All STH
	100, *119 43 & Park Freeway	All STH
	145 (NW)	0.11 mile northwest of Hampton Ave. in Milwaukee
	145 (W)	South curb of W. Walnut St.
	145 (E) NB	North curb of E. Ogden St. at N. Milwaukee
145 (E) SB	North curb of E. Knapp St. at N. Broadway	
175	All STH	
181 (N)	Grantosa Dr. and N. 76th St.	
190 (W)	W. Capitol Dr. and N. 108th St.	
894 & 794	All STH	

Attachment A

MEMORANDUM

TO: ASSEMBLY COMMITTEE ON TRANSPORTATION
FROM: THE COALITION TO REFORM TRANS 233
DATE: FEBRUARY 8, 2000

**RE: ISSUES RAISED AND AGREEMENTS REACHED DURING THE
JANUARY 27TH ASSEMBLY TRANSPORTATION
SUBCOMMITTEE MEETING**

This memorandum describes the Coalition's remaining concerns with Wisconsin Administrative Code Trans 233 as well as our understanding of changes WisDOT agreed to make to the rule. It is our further understanding that we will be given draft revision language from WisDOT before the department begins promulgation of a revised Trans 233. However, it is our strong preference that once a final agreement is reached, the department be directed to revise Trans 233 as an Emergency Rule.

COALITION'S REMAINING CONCERNS WITH TRANS 233

1) **DOT's Statutory Authority.** WisDOT cites two primary sources of enabling authority for the promulgation of the revised Trans 233. The first source is Chapter 236, Wis. Stats., and the second Sec. 86.07(2), Wis. Stats. Neither, however, supplies sufficient authorization for such a rule change.

Chapter 236, Wis. Stats., specifically limits its application to subdivision. Sec. 236.03(1), Wis. Stats. The term subdivision is further defined at Sec. 236.02(12), Wis. Stats., and limited by the legislature to the following:

"Subdivision" is a division of a lot, parcel or tract of land by the owner thereof or the owner's agent for the purpose of sale or of building development, where;

- (a) The act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area; or
- (b) Five or more parcels or building sites of 1 1/2 acres each or less in area are created by successive divisions within a period of 5 years.

Therefore, this particular legislation offers little to WisDOT beyond subdivisions under Chapter 236, and fails to cover land divisions by Certified Survey Map, condominium plat or "other means not provided by statute".

Similarly, WisDOT's reliance on Sec. 86.07(2), Wis. Stats., is inappropriate. Sec. 86.07 reads as follows:

86.07 Digging in highways or using bridges for advertising.

(1) Any person who draws, paints, prints or pastes upon any culvert, bridge or guard rail on any highway shall be fined not less than \$10 nor more than \$200 or imprisoned for not more than 30 days or both.

(2) No person shall make any excavation or fill or install any culvert or make any other alteration in any highway or in any manner disturb any highway or bridge without a permit therefore from the highway authority maintaining the highway. Such permit shall contain the statement and be subject to the condition that the work shall be constructed subject to such rules and regulations as may be prescribed by said authority and be performed and completed to its satisfaction, and in the case of temporary alterations that the highway or bridge shall be restored to its former condition, and that the permittee shall be liable to the town or county or state, as the case may be, for all damages which occur during the progress of said work or as a result thereof. Nothing herein shall abridge the right of the department or the county board or its highway committee to make such additional rules, regulations and conditions not inconsistent herewith 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 such permit conditional thereon. If any culvert is installed or any excavation or fill or any other alteration is made in violation of the provisions of this subsection, the highway may be restored to its former condition by the highway authority in charge of the maintenance thereof; and any person who violates this subsection shall be punished by a fine of not less than \$5 nor more than \$100, or by imprisonment not exceeding 6 months, or both.

The subject of Trans 233, has nothing to do with digging or excavating in a highway, nor are we dealing with the disturbance of a highway or bridge. We are dealing with the property rights of individuals and businesses who happen to own property near state highways, connecting highways or service roads. WisDOT's reliance on this statutory provision is tenuous, at best.

WisDOT's "leap" from old Trans 233 to new 233, has the effect of drastically expanding its authority. However, WisDOT has shown no authority for such an expansion, nor for its redefinition of what can be permitted in setback areas. WisDOT also lacks any authority to support its creation of a procedure which completely abrogates property rights. What authority, for example, can WisDOT cite for its requirement that property owners "trade" their rights to taking compensation for a variance.

2) **Setbacks.** As stated above, the Coalition does not believe WisDOT has the broad power over setbacks that it now asserts under Trans 233. Specifically, we do not believe WisDOT has the power to regulate setbacks on land divisions other than subdivisions that meet the Chapter 236 definition. Specifically, WisDOT lacks any authority to regulate condominium plats, and developments that do not abut STHs and do not directly access STHs.

Further, even when the department does have legitimate authority to regulate a setback area, private property is being taken! In other words, although there is a public benefit to rational setback regulations, it must be balanced against the private property rights of the land owner. It is a clearly understood principal of our existing laws that the property of no person shall be taken for public use without just compensation. See *Zealy v. City of Waukesha*, 20 Wis. 2d 365, 548 N.W.2d 528 (1996).

Yet, Trans 233.105 (2) states "*The department may not grant a variance authorizing 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 the 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.*"

We disagree with this position and urge the department to return to its pre-February 1, 1999 policy regarding setbacks. Prior to then, Trans 233 was interpreted to limit "structures" and "improvements" within the setback area. And, this term was commonly understood to mean buildings. Now, under the revised Trans 233, WisDOT broadly defines the term "structures and improvements" and strictly prohibits both unless the property owner agrees to waive any rights for compensation in the event of a WisDOT condemnation.

The Coalition asks that WisDOT return to its previous policy; pre-February 1, 1999. Specifically, the following should be allowed within setbacks: air pumps, catch ponds, drainage facilities, driveways, parking lots, pay phones, septic systems, signs, storm water systems, retaining walls, and vacuum stations.

But, perhaps the better solution for regulation of setbacks, would be to require WisDOT to follow already established procedures for the expansions of state trunk highways. These procedures are found at Wisconsin Statutes 84.295(10), ESTABLISHING LOCATIONS AND RIGHT-OF-WAY WIDTHS FOR FUTURE FREEWAYS OR EXPRESSWAYS. Under this law, the department is directed to conduct investigations and studies as to the future development needs of a state trunk highway. If the department finds that an expansion is warranted, it must then provide *abundant* notice and adequate opportunity for public input.

Specifically, under section 84.295(10), Wis. Stats., the department shall hold a public hearing regarding the proposed STH expansion. If the department conducts a survey of the proposed expansion, that survey map must be placed in the register of deeds office. Notice of this map shall be published as a class 1 notice. And most importantly, notice of the recording shall be served, by registered mail, to the affected property owners.

The statute goes on to state that after such adequate notice, a property owner can place an improvement or structure in the setback area *only* if he first gives WisDOT at least 60 days prior notice. This gives WisDOT the opportunity to acquire the right of way.

Section 84.295(10), Wis. Stats., concludes by stating, "*When the right of way is acquired, no damages shall be allowed for any construction, alterations or additions in violation of this paragraph.*" We read that to mean WisDOT must affirmatively take the right of way before it can completely regulate setback areas, and before it can refuse to compensate for taking property in this area.

The existence of this statute means that the legislature has already addressed the conflict between expansion of state trunk highways and private property rights. Presumably much discussion was involved in enacting this statute. We certainly believe the legislature carefully balanced the conflicting interests involved. Therefore, WisDOT should be directed to follow these statutory procedures rather than those it unilaterally developed as part of Trans 233.

3) **Condominium Plats.** As discussed more generally above, WisDOT lacks any statutory authority to review condominium plats, other than those addressed in Ch. 236, Wis. Stats. However, Chapter 236 Wis. Stats., is very limited in application, and only involves "subdivisions" which are defined as "a division of a lot, parcel or tract of land by the owner thereof or the owner's agent for the purpose of sale or of building development, where (a) the act or division creates five (5) or more parcels or building sites of 1 ½ acres or less in area; or (b) five or more parcels of building sites on 1 ½ acres each or less in area are created by recessive divisions within a period of five (5) years," Sec. 236.02(12), Wis. Stats. No other valid authority has been cited by WisDOT to review condominium plats. WisDOT's expansion of authority clearly requires legislative action.

4) **Retroactive Impact of Rule Change.** In the event TRANS. 233 is altered by the legislature as a result of this process, we will need to consider the impact such alteration will have on those properties which have been forced to comply with the post-February 1, 1999, version of TRANS. 233. At the most recent Subcommittee meeting, WisDOT indicated that more than 250 variances have already been granted under the new TRANS. 233. In the event the impact of TRANS. 233 is lessened, the legislature will need to address those individuals and businesses that have already been harmed by the rule, particularly any of those who have signed away compensation rights in exchange for variance.

WISDOT'S AGREEMENTS TO REVISE TRANS 233

1) **WisDOT's Approval Process for Land Divisions.** The department agreed to make several changes to its process for approving land divisions. First, the department agreed to revise Trans 233 so that district offices will be given authority to review and approve land divisions.

Second, the property owner will be given a right to appeal this decision to the central office and that appeal process will be clarified in the rule.

Third, if WisDOT does not review the requested division within 20 days of submittal, it is deemed non-objectionable. The department shall, within three (to five) days of receiving the application, review it for completeness, and shall at that time request any additional information needed. Upon receipt of that additional information, the 20-day clock will again start ticking. This timeline must be clarified in the revised rule rather than in the department's guidelines to Trans 233.

Fourth and finally, it is understood that WisDOT has valid reason to periodically review district decisions. However, if the central office disagrees with district decisions, land division approvals made by the district will not be rescinded. Rather, the department's recourse is to better educate the district office as to appropriate decision making criteria and, when necessary, temporarily assume control of district level decision making authority.

- 2) **Grandfather Structures and Improvements, as well as Approved Plats, Existing prior to February 1, 1999 (the effective date of Trans 233.)** WisDOT agreed to revise Trans 233, explicitly stating that existing structures and improvements, as well as those having received final plat approval prior to February 1, 1999, are grandfathered and deemed approved under the new rule.
- 3) **Exclude Condominium Developments from Trans. 233.** As discussed above, we dispute WisDOT's authority to review condominium plats. In addition, recall that, at the meeting, WisDOT suggested an automatic approval process for new condominium developments whereby no review fee would be charged.
- 4) **Finalize and Reference Departmental Guidelines.** WisDOT has drafted guidelines for Trans 233, entitled *Implementing Procedures*. These guidelines are to be used as further clarification of the rule and as a procedural manual for district offices. WisDOT agreed to reference and include these guidelines in the revised Trans 233. Further, it is understood that these guidelines can not be subsequently revised without legislative approval.
- 5) **Agreements with the Wisconsin Realtors Association.** WisDOT stated that agreements it made with the Wisconsin Realtors Association (in previous meetings) would be incorporated into their revision of Trans 233. These include: **a) Noise Barriers** – clarifying that the landowner, and not the land divider, is responsible for erecting noise barriers. However, if WisDOT expands an existing highway, then the department is responsible for erecting necessary noise barriers; **b) Vision Corners** – changing Trans 233 so that land owners will only be required to grant an easement for a vision corner. WisDOT will NOT require the land owner to dedicate land for this purpose; **c) Drainage** – clarify that the land divider will NOT be asked to guarantee that anticipated discharge (“estimate”) is correct. The intent being that the land divider can not be held liable for incorrect estimates; and **d) Desirable Access Management Drainage** – reference in Trans 233 the *Transportation Facilities Development Manual*, as the standard WisDOT can use to reject a land division proposal if it finds a “desirable traffic access pattern” does not exist.

COALITION TO REFORM TRANS 233

*LSLA – Lake States Lumber Association · MEDA – Midwest Equipment Dealers Association ·
NFIB – National Federation of Independent Businesses · OAAW – Outdoor Advertising
Association of Wisconsin · PMAW – Petroleum Marketers Association of Wisconsin · TLW –
Tavern League of Wisconsin · TPA – Timber Producers Association of Michigan & Wisconsin ·
WACS – Wisconsin Association of Convenience Stores · WACTAL – Wisconsin Auto Collision
Technicians Association · WATA – Wisconsin Automotive Trades Association · WATDA –
Wisconsin Automobile & Truck Dealers Association · WATSO – Wisconsin Association of Truck
Stop Operators · WBA – Wisconsin Builders Association · WEDA – Wisconsin Economic
Development Association · WFA – Wisconsin Fireworks Association · WFC – Wisconsin
Federation of Cooperatives · WGA – Wisconsin Grocers Association · WMC – Wisconsin
Manufacturers & Commerce · WMF – Wisconsin Merchants Federation ·
WRA – Wisconsin Restaurant Association*
