



CORY TOMCZYK
STATE SENATOR • 29TH SENATE DISTRICT

Testimony – SB 413

Senate Committee on Transportation and Local Government
Wednesday, January 17, 2023

Members of the Committee on Transportation and Local Government,

As many of you are aware, industry and state officials have had a number of disputes with the development and implementation of TRANS 233, the section of administrative code regarding subdivisions that abut a state highway, over the years. These disputes have led to confrontation and litigation between WisDOT and the public. Several court cases have resulted in portions of statute and administrative code being nullified, and ultimately - WisDOT believing that it has no authority to grant a variance or waiver within this area.

Under current practice, TRANS 233.08 implements a 100-foot setback requirement from any state truck or connecting highway. This effectively prevents any structure or improvement in that area, even temporary structures, regardless of the scope. Additionally, WisDOT has interpreted administrative code as preventing any type of variance or waivers within this 100-foot area. This is despite the fact that WisDOT may have no plans to ever develop that property.

As a result, myself and Representative Murphy have developed SB 413 which reforms WisDOT setback authority and distance, provides explicit waiver authority to the department, and specifies what may be considered a structure – omitting things like portable swing sets or moveable lawn sheds. These reforms will protect the rights of property owners while still maintaining WisDOT’s ability to regulate areas for



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the protection or long-term planning of our state's transportation infrastructure.

We are currently working on an amendment to address concerns raised by the Department including definitions for substantial evidence and improvements, revising variance procedures and timelines, and making other clarifications to ensure WisDOT is able to appropriately regulate areas abutting state highways as needed.

The Wisconsin Builders Associations will also be testifying today and can provide additional details on how we got to this stage and the technical changes currently being finalized with the Department.



DAVE MURPHY

State Representative • 56th Assembly District

SENATE BILL 413

TESTIMONY OF STATE REPRESENTATIVE DAVE MURPHY

Mr. Chairperson and members of the committee, thank you for the opportunity to testify on Senate Bill 413 today.

Senate Bill 413 was drafted to address the concerns of property owners, builders and the Department of Transportation regarding property near roads and highways.

Senate Bill 413 does several things:

1: The bill changes the size of setback areas along our state highways, reducing the setback area from 100 feet to 50 feet. The 50 foot setback area is a reasonable compromise between land-owners and DOT. A 50 foot setback protects property owners' interests in the free use of their own property. Property taxes in Wisconsin are high - this bill is fair to land owners, as it lets them use more of their property that is already being taxed. The bill does not impair DOT's ability to condemn additional property if needed for public safety or for future transportation needs.

2: Senate Bill 413 clarifies the types of structures that a landowner may place in the setback area. The type of structures vary from permanent to portable. This bill makes some technical changes that clarify the differences in these kinds of structures and which are or are not allowed in the setback area. In addition, the bill requires DOT to make decisions based on "substantial evidence." This requirement allows DOT to focus on public safety, but requires its decisions to be based upon scientific standards.

3: Finally, Senate Bill 413 sets forth a specific statutory variance process to correct confusion created by various court cases and conflicting Wisconsin Administrative Rules. It creates an appellate process and directs DOT to correct the errors currently present in its policies and on its website. There are also instructions for recording these variances so that future property owners are aware of their obligations.

Thank you for your time and consideration. I am happy to answer any questions.



660 John Nolen Drive, Suite 320
Madison, Wisconsin 53713-1469

DATE: January 17, 2024

TO: Members of the Senate Committee on Transportation and Local Government

FROM: Brad Boycks
Executive Director
Wisconsin Builders Association

SUBJECT: **Support for Senate Bill 413 (SB 413) relating to highway setback areas and the Department of Transportation's authority to approve subdivision plats**

I am writing on behalf of the 3,500+ members of the Wisconsin Builders Association (WBA) to express our support for Senate Bill 413 (SB 413), which we believe is crucial for the growth and prosperity of not only much-needed housing in our state, but the construction industry as well.

Senate Bill 413 addresses highway setback areas and enhances the Department of Transportation's authority to approve subdivision plats and has the potential to significantly benefit construction and housing across Wisconsin.

Collaboration

This bill demonstrates a thoughtful approach to collaboration with stakeholders, and we appreciate the efforts made to engage with our organization. Over the past several years, WBA has collaboratively engaged with officials from the Wisconsin Department of Transportation (WI DOT) to establish a clear framework for developers. This framework aims to facilitate the placement of specific improvements in the setback of a state highway, while acknowledging that developers may not be compensated for these improvements in the event of a highway expansion.

Additionally, since the introduction of SB 413 on September 8, 2023, WBA has actively collaborated with the bill authors, Senator Tomczyk and Representative Murphy, alongside various WI DOT officials. Our collective efforts have focused on refining the bill and incorporating changes that garner support from all involved parties. WBA extends its gratitude to Senator Tomczyk, Representative Murphy, and the WI DOT for their dedicated time and efforts in enhancing SB 413.

Reasons for Support

The provisions outlined in SB 413 represent a comprehensive process that developers can follow in coordination with WI DOT to obtain prior approval for placing improvements in the setback, and ultimately, easing the burden to build more needed housing.

The topic of a housing shortage across the state is one that has been well discussed and documented recently. In a 2019 report *Falling Behind: Addressing Wisconsin's Workforce Housing Shortage*, Wisconsin created 75 percent fewer lots and 55 percent fewer new homes than pre-recession averages, in the previous 11 years. This scarcity has been compounded by a series of other factors, such as lot and other local government restrictions, volatile interest rates, and inflated costs of materials.

Our members and others in the homebuilding industry participated in a research study in which the findings are included in the December 2022 study *Priced Out of House and Home: How Laws and Regulation Add to Housing Prices in Wisconsin*. Data has proven that government regulations add over \$88,000 to the average cost of a newly-built home in the Midwest. National and regional data are similar, with the cost of regulation representing more than a quarter of the cost of the average new home.

Additionally, when surveyed, our members reported that regulatory hoops are extensive, with the average development taking 14 months to even begin construction due to a tangled web of regulations where development can be stopped.

This bill is a step forward in solving some of these challenges and will lay out a well-defined process for both developers and the WI DOT to allow some flexibility for what can be placed in a highway setback that will cut down time needed to develop future housing options in Wisconsin.

Conclusion

We are optimistic that the discussions and changes made in collaboration with the bill authors and WI DOT will be encapsulated in a substitute amendment to SB 413. We look forward to its consideration for an executive committee vote soon.

You will also find additional information on SB 413 provided by Rebecca J. Roeker, Attorney from Attolles, Law, S.C. and a case study on the need for the provisions outlined in SB 413 provided by John Siepmann of Siepmann Realty Corporation in Waukesha.

Thank you for your time today and we would like to ask for your support of SB 413.

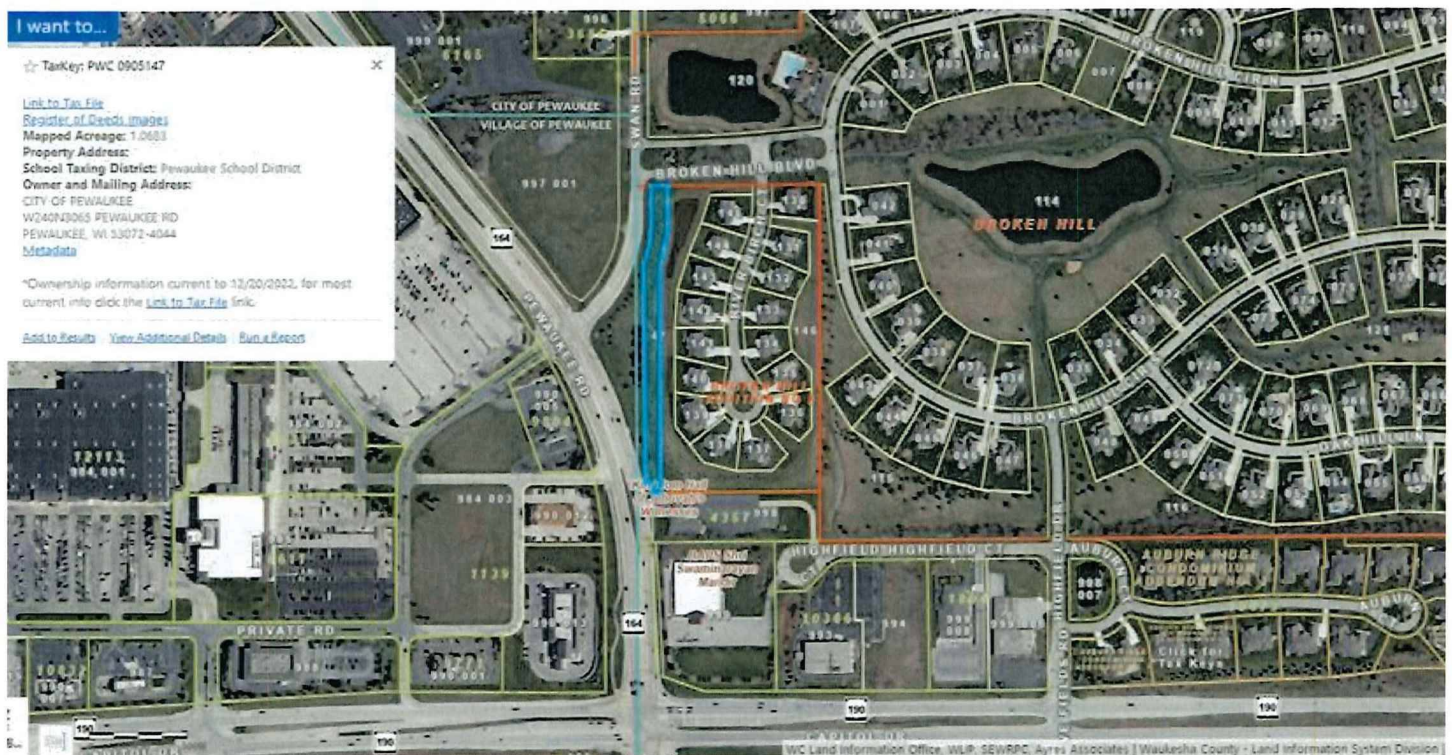
DATE: January 17, 2024

TO: Members of the Senate Committee on Transportation and Local Government

FROM: John Siepmann
Siepmann Realty Corporation

SUBJECT: Case study on the need for passage of Senate Bill 413 (SB 413) relating to highway setback areas and the Department of Transportation's authority to approve subdivision plats

This was a small addition to Broken Hill, a 3 phase, 138 lot single-family development that began in 2006. The last phase, Broken Hill Addition No. 2 was developed in 2015.



Background: [Wisconsin Statute Trans 233](#) governs the division of land abutting a state trunk or connecting highway. Our specific case involved structures and improvements in 233.08—Setback requirements and restrictions which gives WisDOT jurisdiction over all lands within 50' of the State right of way, or 110' from centerline of the state highway, whichever is greater. Following a 2009 Dane County Circuit Court judgement the 1999 & 2001 amendments were nullified. A later case in 2005 further invalidated portions of the law. As it stands, WisDOT will not approve or allow any new improvements within the setbacks; thereby rendering these areas useless.

During the entitlement process we ran into some issues with our approval when we asked WisDOT for approval of the plat. The area in question (Outlot 10—shown outlined in blue above) was to be landscaped with a privacy berm and related plantings.

At the direction of the City attorney, Stan Riffle, an alternative was devised by which the developer (Delafield Venture, one of our development entities) would deed the easement to the City in exchange for a landscape easement back to the Broken Hill HOA. Under Trans 233.11 Special exceptions, WisDOT cannot prevent an incorporated municipality from making an exception to the

WisDOT review. This allowed the proposed use without WisDOT holding up the project, yet it took several months to complete the agreement and related documents.

WisDOT continues to have rights over the easement area in the unlikely event that this area would ever require development for STH 164.

In the end, the improvements to the property were exactly as originally proposed with the exception of the property ownership; however, nearly 12 months passed before we came to this agreement. As you know, the market can change drastically in 12 months--we were lucky enough that the market was relatively strong at that time. For others it could be devastating.

SB 413 allows for improvements within the setback with the understanding that, should the DOT ever acquire the property, that the DOT will not compensate for any improvements. This was the DOT's stance early on but following the lawsuits no improvements have been allowed.



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TO: Members of the Senate Committee and Transportation and Local Government

FROM: Rebecca J. Roeker,
Attolles Law, s.c.

RE: Senate Bill 413 (SB 413) relating to highway setback areas and the Department of Transportation's authority to approve subdivision plats

DATE: January 16, 2024

Attolles Law, s.c. is legal counsel for the Wisconsin Builder's Association ("WBA") with respect to its support of Senate Bill 413 ("SB 413"). As counsel for WBA, we conclude that SB 413 will correct both legal deficiencies in the current application of law, and result in greater clarity and flexibility for both property owners and the Wisconsin Department of Transportation ("WisDOT") when regulating the use of highway setback areas.

The issues underlying the need for SB 413 date back several decades and involve several versions of Wis. Admin. Code Ch. TRANS 233, which addresses WisDOT's rights and obligations in approving land divisions along state truck highways ("STH"). Under current law, WisDOT has authority to review and approve subdivision plats that abut an STH. As part of that process, WisDOT will place a 100-foot setback restriction in which any structure or improvement is prohibited, including landscaping, in the 100 feet abutting an STH. There is no mechanism that allows WisDOT to grant a special exception¹ to the prohibition against placement of structures or improvements in the setback area.² This leaves property owners with little ability to use that stretch of land adjacent to the STH because WisDOT has no flexibility to grant a special exception regardless of the circumstances.

SB 413 grants statutory authority to WisDOT to approve structures or improvements in the highway setback area if deemed appropriate, and it also sets forth benchmarks for the special exception approval process. In addition, SB 413 accomplishes other key clarifications to existing law. These points are summarized below:

1. *Setback Reduction.* SB 413 modifies the highway setback area from 100 feet to 50 feet for subdivision plats approved after the legislation's effective date. An owner may still apply for a special exception to place an improvement or structure in an existing 100-foot setback area. SB 413 does not prohibit WisDOT from acquiring additional land for future transportation needs.

¹ In the original draft of SB 413, the term "variance" was used. However, after collaborations with WisDOT, it was determined that the term "special exception" is more appropriate.

² After a series of lawsuits involving Wis. Admin. Code Ch. TRANS 233 ("TRANS 233") addressing WisDOT's rights and obligations in approving land divisions adjacent to STHs, the version of TRANS 233 allowing WisDOT to grant a "special exception" to place a structure or improvement was eliminated.

2. *Defines Items Prohibited in a Setback Area.* SB 413 clarifies that non-movable items are prohibited in the setback area unless a special exception is granted. The amended definition allows WisDOT to focus on safety of keeping a setback area free of non-movable objects, yet allows WisDOT to use its future planning tools to determine whether a structure or improvement may be allowed in the setback area. Allowing WisDOT this flexibility will avoid absurd results.
3. *Establishes a Standard for Granting Special Exceptions.* SB 413 establishes a “substantial evidence” threshold when determining whether to grant a special exception. This requirement allows WisDOT to focus on public safety based on data, scientific standards, and future transportation plans. In addition, this standard will be applied across the state to achieve consistency in enforcing highway setback regulations.
4. *Establishes a Special Exception Process.* SB 413 establishes statutory authority for WisDOT to use a special exception process, thus correcting the confusion created by various court cases and conflicting Wisconsin Administrative Rules. The special exception process accomplishes the following:
 - a. WisDOT may still utilize its future plans, applicable data, and planning tools when considering a special exception request. This information is the best data available to WisDOT, and meets the “substantial evidence” requirement. WBA understands that highway safety is essential, and by focusing on future plans and facility improvements, WisDOT may prohibit structures or improvements in setback areas if the exception would adversely affect the safety of the entrance or departure from the STH, or adversely affect the public interest and investment in the STH system.
 - b. The investment into the STH system is further protected by requiring an owner to waive future compensation for removal of the structure or improvement within the setback area if WisDOT needs the area for its transportation facilities. This allows an owner greater use of their property while still protecting the traveling public and taxpayers from having to pay for the removal of structures if the land is needed for future transportation facilities.

Thank you for the opportunity to present our comments as legal counsel for WBA. We conclude that SB 413 will be effective legislation in correcting existing legal deficiencies and result in greater clarity and flexibility for both property owners WisDOT.



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Testimony of Wisconsin Department of Transportation
Assistant Deputy Secretary Joel Nilsestuen
Before the Senate Committee on Transportation and Local Government
December 5, 2023

Re: Senate Bill 413, relating to highway setback areas and the Department of Transportation's authority to approve subdivision plats.

Thank you, Chairman Tomczyk, and members of the committee for your consideration of the department's input on considering the department's input on Senate Bill 413, relating to highway setback areas and the Department of Transportation's authority to approve subdivision plats.

This bill limits WisDOT's authority on highway setback requirements by limiting the setback to 50 ft. and requires the department to provide a procedure for variances, and information on our website. It also only regulates structures.

WisDOT sees benefits in clarifying a setback area and having a consistent process that allows for orderly development along all state highways regardless of land division. The department recognizes that while safety decision factors are important, the main purpose of a setback area is to:

- Preserve the public interest and investment in those highways for future transportation facilities,
- Minimize public expenditures for transportation improvements,
- Provide for less disruption/impacts to adjacent property owners and businesses when improvements are made, and
- Continue to meet the needs of all highway users.

However, the bill as drafted may have contrary or unintended outcomes to the desired intent. Therefore, the Wisconsin Builders Association (WBA) and WisDOT have been working together on a forthcoming amendment. WisDOT believes the proposed amendment language will address and meet the needs of both WisDOT and WBA. WisDOT believes an amendment will address key items for WisDOT such as:

- Clarifying highway setback areas,
- Provide for a broader list of definitions,
- Grant flexibility with the use of special exceptions,

An amendment will also consider other items that will assist in addressing setback requests allowing WisDOT and WBA interests to be attained.

We appreciate the efforts of the bill author and WBA in working with WisDOT to create a balance between private property rights, highway safety, and preserving public investment in highways.

Thank you again for the opportunity to testify today. I would be happy to answer any questions you might have.