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August 9, 2018

Renee Lauber, DCTA Planner
Dane County Towns Association
1252 Morrison Court
Madison, WI 53703

**Re: 2017 Wisconsin Act 243**
**Developer's Bill**
**Recommendations**

Dear Ms. Lauber:

On April 5, 2018 the law known informally as the "Developer's Bill" took effect making numerous changes to State laws that revise and preempt local authority concerning several development-related issues that affect DCTA members. The changes touch on many areas of municipal regulation, too numerous and detailed to consider in this general opinion letter. Rather than attempt to describe every change in detail, I am writing with three goals in mind: (1) I am writing to make you aware of the subjects of these changes; (2) I will offer a few specific recommendations based on our early experience with these laws; and (3) I have taken this opportunity to update our generic model developer's agreement, and I am enclosing that document for your consideration.

## I. Preemptions

This legislation is not focused on any particular issue, but addresses numerous issues. The changes include:

- Condemnation. Increase the relocation benefits a municipality must pay for condemnation of property; and revise the compensation calculations.

- Zoning. Eliminate the protest petition certain neighbors previously could file to force a super-majority requirement for zoning changes.

- Levy Limit. Create a new levy limit exception for added affordable housing, provided that the added levy revenue must be designated solely for emergency services.

- Impact Fees. Change impact fees, by giving developers an ability to defer payment in some situations and by shortening the time by which impact fees must be spent or refunded in some situations, and increasing the time for appeal. The refund portion of this new law applies to impact fees adopted after the effective date of the legislation (April 5, 2018).

- Building. Preempt some local regulation of construction projects, including construction hours, and preempt ordinances that are more restrictive than the Uniform Dwelling Code, and require building inspections within 14 business days after receiving a request.

- Stormwater. Change stormwater regulation, to limit stormwater fees in some situations.

- Housing Reports. Require local reporting of progress on the housing element of the comprehensive plan and local reporting regarding residential development fees. This applies only to cities and villages with populations of 10,000 or more.

- Development. Reduce the costs that can be included in the calculation of the financial guarantee, impose restrictions on financial guarantees that municipalities can require, and obligate municipalities to issue permits to allow the commencement of construction in some situations.

## II. Recommendations: Construction, Land Division and Development Control

Again, the preemptions are too numerous and broad to discuss at length in this correspondence. If you have particular concerns regarding any of the foregoing issues, please contact me and we can consider those issues further. In the several weeks that have passed since the law was adopted, we have seen a few issues arise, and I note the following recommendations:

1. Construction hours. The legislation preempts municipalities from having narrower construction hours on Saturdays than they impose on weekdays. The statute says:

> **(2)** CONSTRUCTION PROJECTS; WEEKEND WORK. (a) A political subdivision may not prohibit a private person from working on the job site of a construction project on a Saturday. A political subdivision may not impose conditions that apply to a private person who works on a construction project on a Saturday that are inapplicable to, or more restrictive than the conditions that apply to, such a person who works on a construction project during weekdays.

**Recommendation:** If DCTA members regulate construction hours, they cannot be more restrictive on Saturdays than they are on weekdays. An ordinance amendment may be needed. Some of my clients are reducing weekday construction hours to match their Saturday hours, as the only way to maintain the intended Saturday limits.

2. Protest petition. For decades, property owners located within a certain proximity of a zoning change had an ability to file a protest petition, which would trigger a super-majority requirement for the zoning amendment to pass. Many zoning codes include language very similar to the former State law, describing this ability to protest and to create a super-majority requirement. The statutory protest petition language is now repealed. If you continue to describe a protest petition in your zoning code, be advised, there is no statutory basis for that provision. A significant legal dispute could arise about how many votes are required for a zoning ordinance to pass, if your code maintains that super-majority requirement that has been repealed from the statute.

   **Recommendation:** I recommend that DCTA members review their zoning code to determine whether it includes a protest petition or super-majority requirement, based upon the former statute. If so, I recommend that they repeal that provision of their zoning code, to maintain consistency with the statutory framework.

3. Park Dedication Fees. The new law requires that any fee to fund the acquisition and initial improvement of parks that is required by a land division control ordinance (per Section 236.45(6)(am), Stats.) must be adopted through the impact fee statute procedures (per Section 66.0617(3) to (10), Stats.). This interplay between park dedication fees and impact fees has been modified by the State legislature numerous times in the past several years. This latest revision means that the fees you charge developers for acquisition or improvement of parks cannot be enforced unless they were adopted pursuant to a needs assessment, and after a public hearing, as described in the impact fee statute.

   **Recommendation:** I recommend that DCTA members review their park dedication fees, to see whether they are imposed by a separate impact fee ordinance, or only in their subdivision control ordinance. If they are only imposed as part of the subdivision control ordinance, they probably were not adopted pursuant to the procedures that are now required, and they probably cannot be enforced. In that event, if they intend to continue to charge those fees, an impact fee ordinance, or a subdivision control ordinance amendment that follows the procedures of an impact fee ordinance, is required. This change must be made now, before a development application is received, if they want to impose the fee on any new development.

4. Financial Guarantee. As a result of this new legislation, coupled with changes made in the immediately prior legislative session, municipalities are severely limited in the financial guarantees that they can require of developers. Municipalities are required to let the developer choose between a bond or a letter of credit:

   > *§236.13(2)(am) 1m. a. If the governing body of the town or municipality requires a subdivider to provide security under subd. 1. a., the governing body shall accept a performance bond or a letter of credit, or any combination thereof, at the subdivider's option, to satisfy the requirement.*

   The bond can even be provided by the developer's contractor, but this requires our agreement:

> *The subdivider and the governing body of the town or municipality may agree that all or part of the requirement to provide security under subd. 1. a. may be satisfied by a performance bond provided by the subdivider's contractor that names the town or municipality as an additional obligee provided that the form of the contractor's performance bond is acceptable to the governing body of the town or municipality.*

If a bond is provided, municipalities are limited in their consideration of the form of the bond:

> *§236.13(2)(am) 1m c. Unless the governing body of a town or municipality demonstrates that a bond form does not sufficiently ensure performance in the event of default, the governing body of the town or municipality shall accept a performance bond under this subdivision if the person submitting the performance bond demonstrates that the performance bond is consistent with a standard surety bond form used by a company that, on the date the bond is obtained, is listed as an acceptable surety on federal bond is the most recent circular 570 published by the federal department of the treasury.*

If we object to the terms of the surety bond, we must "demonstrate" that our suggested changes are needed to ensure performance. There is no explanation in the statute of what this demonstration must include or to whom we must make this demonstration.

We have encountered situations when sureties have failed to pay when required, causing our client to sue the surety to recover payment. We have also encountered situations where sureties have engaged in protracted negotiation, with the sureties demanding that our clients enter a "takeover agreement" before the surety performs on the bond. If we have to engage in protracted negotiation, limit our rights, or sue to recover the funds, we do not have an adequate financial guarantee. As a result, we routinely recommend against allowing a bond to serve as the financial guarantee for a development project. Note that this is different from a municipal construction project, where we often allow bonds, because in such instances we have the additional overriding remedy of declining to make payment if we aren't satisfied with the work. When a developer builds public improvements intending to dedicate them to the municipality, such as new roads in a new subdivision, we have the same need to ensure the improvements are properly built, but we have no other remedy than the financial guarantee, so the guarantee must be more certain than a bond can provide.

**Recommendation:** I recommend that whenever a developer insists on providing a bond rather than a letter of credit, require the improvements to be completed before the final plat is recorded. That is the only way to ensure that the public improvements are completed to your satisfaction, without risks of protracted litigation. Ordinances may need to be updated before to apply this recommendation, because the ordinance needs to say that all work must be completed before the plat is recorded. The ordinance could include an exception to say that the municipality may allow the work to be completed after the plat is recorded if a letter of credit (not a bond) is provided as a financial guarantee.

## III. Generic Model Developer's Agreement

As you may know, we have maintained a model developer's agreement for our clients for many years. The model developer's agreement is offered to developers as a starting point for the consideration of their projects, to help focus on key areas. We ask developers to draft the developer's agreement for their project, for our review. Developers are told that they do not need to use our model, but they should expect that we will review what they provide in light of the terms in the model. We expect the agreement the developer provides to be as protective of the municipality as are the terms of the model.

Given the substantial changes made by this new State legislation, we have taken the opportunity to update our model agreement accordingly. These updates have been made with the intent of retaining as many protections that were in the prior model as the new legislation allows. Some local control has been lost, however, and we have therefore been required to remove and modify some municipal protections. The enclosed protects the municipal interests to the full extent current State laws allow.

The enclosed is a *generic* model. We have assisted many of our clients to prepare models based on our generic model, that apply only to their municipality, including some unique terms and conditions. The attached, therefore, may not be a replacement for your model, but may provide a starting point for updates.

You may choose to circulate this letter and the attachment to DCTA members, and members may circulate it further to their municipal Engineer, Director of Public Works, Building Inspector, and all persons and entities in the town who are involved with land development issues. This is not, however, legal advice to any member of the DCTA. DCTA members should consult their Town Attorney for legal advice. If you should have any questions or concerns regarding this matter, please do not hesitate to contact me. I would be happy to assist in drafting the necessary documents to accomplish your intent on request.

Yours very truly,

MUNICIPAL LAW & LITIGATION GROUP, S.C.

*Eric J. Larson*

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EJL/egm
Enclosure
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