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DEPARTMENT OF JUSTICE

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July 31, 2008

Ms. Lucille Karstens
N9570 Old Highway 22
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Dear Ms. Karstens:

Your July 2, 2008, letter to Attorney General J.B. Van Hollen has been referred to me for a response. You ask whether the meeting notice for the June 3, 2008, meeting of the Columbia County Planning and Zoning Committee ("Committee") that included "view sites" as a meeting subject was legally sufficient, whether the Committee gave the public proper notice of the June 3 meeting, and whether the site visit portion of the June 3 meeting was conducted in a manner consistent with the open meetings law. The analysis and conclusions contained in this response are based solely on the information you have provided. I have not conducted any investigation to determine the factual accuracy of that information. If an enforcement action were commenced, the parties would have an opportunity to develop a more complete factual record related to the issues you raise. A more complete factual record may or may not support the analysis and conclusions expressed in this letter.

Legal sufficiency of meeting notice content and distribution. *Assumed Facts.* You provided a copy of the meeting notice for the June 3, 2008, Committee meeting. The meeting notice identified the place of the meeting as "Community Room – Columbia County Law Enforcement Center." Item 8 on that meeting notice, designated for 1:30 p.m., provides: "View Sites." No further description of this item is included in the notice. You state that one of the sites viewed by Committee members was a parcel for which the property owner, Harold K. Jenkins, and the Kraemer Company, LLC, were seeking a conditional use permit ("CUP") that would allow the site to be used as a limestone quarry. You state that you and your neighbors have strongly opposed the approval of the CUP, that more than 300 people have signed petitions opposing the quarry, and that public meetings have been very well attended.

You state that no information about the site viewing was posted at the Committee's office at the Columbia County Courthouse or at the Columbia County Law Enforcement Center. You state that the information on the Columbia County website regarding the June 3 meeting indicated that a site viewing would occur at 1:30 p.m., but contained no other information about the site viewing. You state that the Portage Daily Register contained a notice that the Committee

would conduct a public hearing on a petition of Harold K. Jenkins, but contained no information about the site visit.

Analysis: meeting notice content. Section 19.84(2) of the Wisconsin Statutes provides that every public notice of a meeting must give the "time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof." No Wisconsin case, to my knowledge, has interpreted how a governmental body should give notice of the "place" of the meeting "in such form as is reasonably likely to apprise members of the public and the news media thereof." *Id.* The term "subject matter" has been construed, however. In order to give notice of a subject matter "in such form as is reasonably likely to apprise members of the public and the news media thereof[,]" *id.*, a meeting notice posted prior to June 13, 2007, could be no more general than the term "licenses" was to describe a city council's reconsideration of a previously denied application for a liquor license. *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71, ¶ 21, 301 Wis. 2d 178, 732 N.W.2d 804. Following the *Buswell* decision, a meeting notice must be "reasonably specific under the circumstances." *Id.* (footnote omitted). In determining whether a notice is reasonably specific considering all of the circumstances, a court must, after June 13, 2007, "analyz[e] such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate." *Id.*, ¶ 28.

In my opinion, based solely on the information made available to me, and in the absence of any contravening facts, a court could determine that the meeting notice for the June 3, 2008, Committee meeting was not in a form that was reasonably likely to apprise members of the public and the news media of the "place" or "places" where the portion(s) of the meeting designated by agenda item 8 would occur. A court could also determine that the meeting notice failed to reasonably apprise members of the public and the news media of the "subject" of agenda item 8, because the location of the site to be visited is an element of the subject matter of a site visit. The meeting notice implies that more than one site will be visited by the Committee, but does not identify the number of sites that will be visited, and does not identify the location of any of those sites. Nor does the meeting notice identify the order in which the sites will be visited.

Analysis: meeting notice distribution. The chief presiding officer of a governmental body, or the officer's designee, must give notice of each meeting of the body to: (1) the public, (2) any members of the news media who have submitted a written request for notice, and (3) the official newspaper, designated pursuant to state statute, or if none exists, to a news medium likely to give notice in the area. Sec. 19.84(1), Wis. Stats.

The chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public. 66 Op. Att'y Gen. 93, 95 (1977) (copy enclosed). As a general rule, the Attorney General has advised posting notices at three different locations within the jurisdiction that the governmental body serves. 66 Op. Att'y Gen. at 95. Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdiction area the body serves. 63 Op. Att'y Gen. 509, 510-11 (1974) (copy enclosed). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published. The Department of Justice has advised that meeting notices may also be posted at a governmental body's web site as a supplement to other public notices, but web posting should not be used as a substitute for other methods of notice. Peck Correspondence, April 17, 2006 (copy enclosed).

I am not able to determine from the information you provided whether the practice of the Committee is to give the public notice of its meetings by posting its meeting notices in one or more locations or whether the Committee gives public notice of its meetings by paid publication of its notices in the Portage Daily Register. It is not clear from the information you provided whether the documents posted at the Columbia County Courthouse and the Columbia County Law Enforcement Center were copies of the notice for the June 3 meeting you enclosed with your correspondence, or some other documents. Nor is it clear from the information you provided whether the Committee's notice for the June 3 meeting was posted in locations other than the Columbia County Courthouse or the Columbia County Law Enforcement Center. Therefore, I am only able to provide a general response to your concern about the adequacy of the manner by which the public was notified of the Committee's June 3 meeting. *If* additional facts were to demonstrate that the Committee generally provides notice to the public of its meetings through posting, and if additional facts were to demonstrate that the Committee failed to post notice of the June 3, 2008, meeting in one or more places likely to be seen by the general public at least 24 hours in advance of the June 3 meeting, a court could conclude that the Committee did not comply with the notice requirement of section 19.84(1). Alternatively, *if* additional facts were to demonstrate that the Committee generally provides notice to the public of its meetings through paid publication of its notices in a newspaper, and if additional facts were to demonstrate that the Committee failed to publish the meeting notice in the paper at least 24 hours in advance of the June 3 meeting, a court could conclude that the Committee did not comply with the notice requirement of section 19.84(1).

Conduct of the June 3 site visit to the Jenkins property. *Assumed Facts.* In April 2008, the attorney for the Kraemer Company sent a letter to the Director of the Columbia County Planning and Zoning Department, regarding a planned tour of the proposed quarry site by county board representatives. The letter provided, in relevant part:

> We next discussed reviewing of the site. The Kraemer Company will have vehicles that will be able to drive through the trails available for the Board

> Members. Obviously, this is a public meeting and others may come. If there is room in the vehicles, the public can come along. Alternatively, the public may have to walk as the trails are easily accessed. The vehicles can move slow enough so that the group can stay together during the tour.

You state that you went to the site of the proposed quarry on June 3, and that the five members of the Committee arrived in the same vehicle, approximately 40 minutes after 1:30 p.m. You assert that the presence of all five Committee members in a single vehicle, with no staff members or members of the public present, constituted an unlawful "meeting" under the open meetings law; and assert that "it is entirely unrealistic to believe that they [the Committee members] did not discuss among themselves the business of the committee, however cursorily."

You state that Committee members John Baumgartner and John Healy remained in the vehicle and did not participate in the site view. Three other Committee members—Douglas Richmond, Fred Tietgen ("Tietgen"), and Philip Baebler—got out of the vehicle in which they were riding and got into a vehicle driven by a Kraemer Company representative, Benny Stenner ("Stenner"). That vehicle, two other Kraemer Company vehicles, and your vehicle traveled a distance to an open field. You state that you and at least five other members of the public participated in the tour of the site. You state that the three Committee members remained in the Kraemer Company vehicle with the windows up until Kraemer representative Bob Jewell ("Jewell") approached the front passenger door. At that time, Committee member Tietgen rolled down the window and discussed a map with Jewell. The other passengers in the car did not roll down their windows. You stood behind Jewell, but could hear only part of the conversation.

You state that the tour participants got back in the vehicles and proceeded to the far end of the field near a lane. Stenner indicated that only his vehicle would make the trip up the hill because of the limited turn-around space. The vehicle traveled a short distance, Jewell and the driver spoke for some time, and the driver and the Committee members then sped up the hill. Jewell indicated to the other tour participants that he was walking and that they could either walk or possibly the vehicle could come back down to pick up another load of passengers. You state that Jewell walked rapidly up the hill, and that you followed him. When the two of you reached the top of the hill, the front and rear passenger windows opened, and Jewell began speaking to the Committee members. You stood behind the right rear passenger door and looked over Jewell's shoulder as he discussed and referred to documents he was carrying. The other tour participants had not reached the top of the hill when the discussion began. The discussion continued as the other tour participants walked up the hill. It took some time for the slowest of them to reach the top.

As some of the tour participants arrived, they conversed with the Committee members. You heard one participant ask a Committee member what the member had hoped to learn from the site visit, but did not hear the Committee member's response. At some point thereafter,

Stenner told the Committee members that they did not have to sit there and listen to this any more, and asked if they had heard enough. Thereafter, the vehicle proceeded back down the trail and disappeared out of sight. The tour participants walked back down the hill. You were the first to arrive at the field where you left your vehicle. By then the Committee members had left the property.

You state that the public hearing on the CUP for the proposed quarry site convened later that afternoon. The Committee permitted comments from you and others. You state that you had no opportunity to rebut anything that the Kraemer representatives may have discussed with the Committee members in the vehicle, or anything that the Committee members may have discussed among themselves while traveling to or from the site. You state that at the conclusion of the public hearing, the Committee members unanimously approved the CUP, with very little discussion of the merits of the project or the objections raised by the project's opponents.

Analysis: The Committee's travel to and from the site, and the Committee members' vehicular travel on the proposed quarry site. Section 19.82(2) defines a "meeting" subject to the open meetings law as:

> [T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter . . . .

Section 19.83(1) provides that "[a]t any meting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in [sec.] 19.85 [Wis. Stats.]." An "open session" is defined as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." Sec. 19.82(3), Wis. Stats.

Applying these principles to the facts you have asked me to assume, the physical presence of all five Committee members in the vehicle that traveled to the proposed quarry site, and the physical presence of three Committee members in the Kraemer Company vehicle as it traveled during the tour of the proposed quarry site invoke the presumption that the members were in the vehicles for the purpose of exercising their responsibilities, authority, power, or duties. A vehicle moving down a highway is not "a place reasonably accessible to members of the public." *Id.* Similarly, a vehicle moving across a field or down a lane with its window up and at speeds faster than members of the public reasonably can walk is not "a place reasonably accessible to members of the public." *Id.* Thus, the law would presume that the five Committee

members violated the open meetings law on June 3, 2008, when they traveled together in a vehicle to the site of the proposed quarry, and the three Committee members who toured the proposed quarry site violated the open meetings law when they traveled together in a closed vehicle and at speeds faster than walking. The burden would be on the Committee members in each instance to establish that they were not gathered for the purpose of exercising the Committee's powers, duties, or authority; *i.e.*, that they did not discuss any governmental business that was within the realm of the committee's authority during the travel to and from the site. Unless additional information were to establish that the Committee members discussed no aspect of the Committee's business during those periods of travel, a court could find that the members violated the open session requirement of sections 19.82(3) and 19.83(1).

In actions to enforce the open meetings law, the complaining party and/or the district attorney have the burden to prove the basic fact that one-half or more members of the Committee were present at a gathering on a particular day. Once that basic fact has been proved, the statutory presumption and Wisconsin's rules of evidence impose on every member who was present at the gathering and who has been charged with an open meetings violation the burden of proving that the nonexistence of the presumed fact (*i.e.*, that he or she was *not* present for the purpose of exercising the Committee's responsibilities) is more probable than the existence of the presumed fact. Sec. (Rule) 903.01, Wis. Stats.

The amount of evidence that a Committee member would need to establish that he was not present for the purpose of exercising the Committee's responsibilities, authority, power, or duties cannot be stated with certainty. It is up to the trier of fact—a judge or a jury—to determine where the greater weight of the evidence lies. For example, if a Committee member were to deny that any governmental business was discussed during the travel and a complaining party or a district attorney presented no evidence to controvert that assertion, a trier of fact might decide that the Committee member had rebutted the presumption. However, a trier of fact could also decide, based on the Committee member's demeanor on the witness stand or other evidence that casts doubt on the member's credibility, that the presumption has not been rebutted, even if there were no direct evidence controverting the member's assertion that no governmental business was discussed. Similarly, if a Committee member were to deny that any governmental business was discussed during the travel, but another Committee member were to testify that he overheard the other members discussing a particular item of governmental business, or if a witness were to testify that a Committee member told the witness about a discussion of Committee business that occurred during the travel, a trier of fact might well decide that the Committee member had not rebutted the presumption.

Analysis: The Committee members discussions during the site visit while the vehicle was stopped with its windows rolled down.

The facts you have asked me to assume describe three conversations that occurred while Committee members were inside the Kraemer Company vehicle. The first occurred at the near end of the field, when Tietgen rolled down the window and discussed a map with Jewell. The second occurred when the Kraemer Company vehicle was traveling up the lane and Jewell spoke to the driver. The third occurred at the top of the hill when Jewell discussed the documents he was carrying.

The open meetings law requires open sessions to be "reasonably accessible to members of the public." Sec. 19.82(3), Wis. Stats. Prosecutors and courts must consider all of the relevant facts and circumstances in order to determine whether any of the conversations were reasonably accessible to the public. For example, a prosecutor or a court might find it useful to know where the other tour participants were during the first two conversations, or how long it took for the tour participants to walk up the hill. The factual uncertainties make it possible to provide only a general response to your concern about the public's access to the Committee members' conversations while the Kraemer Company vehicle was stopped.

The Department of Justice has provided guidance to local governmental bodies about how to comply with the requirements of the open meetings law when those bodies conduct tours or inspections of public works. In an April 8, 1993, letter to Town of Menasha Deputy Clerk Julie Rappert (copy enclosed), the Department of Justice advised:

> [T]here are a number of options a town board has for conducting road inspections in compliance with the open meetings law. One option would be to designate an individual town employe or member of the board to inspect the roads and ask that person to report on the inspection at a properly noticed, regular town board meeting. I understand that some towns have arranged to have an employe or board member video tape road sites and present the video tape at a regular town board meeting. Another option would be for each member of a town board to individually inspect the road sites and then discuss their inspections at a properly noticed regular town board meeting. The town board could also tour the sites together in a van. The town board must, however, provide advance public notice of its meeting to inspect the road sites. In addition, the town board should follow one of two procedures. The first is to list each road site in the order that the town board intends to inspect the sites in the public notice to enable members of the public to follow the town board members to each site. The board members should discuss town board business only while they are at a site and accessible to the public. The board members should not discuss any town board business while traveling from site to site. The second procedure is to arrange to permit citizens

interested in attending the meeting to ride in the van along with the town board members.

Although the letter is specifically directed to road inspection traveling tours, the general principles expressed in it are useful in the analysis of your concerns about the reasonableness of the public's access to the portions of the meeting where the Committee members failed to take affirmative steps to assure that the public would have access to the members' conversations or the information the members received from the Kraemer Company representatives. In my opinion, based solely on the information made available to me, and in the absence of any contravening facts, a court could determine that some portions of the tour of the quarry site were not reasonably accessible to the public.

The potential claims identified in this letter involve questions of predominantly local, rather than statewide, concern. Enforcement actions raising such claims are more appropriately handled by a local district attorney, rather than by the Attorney General's Office. You should be aware that the decision to seek a forfeiture penalty against conduct believed to be an open meetings violation is one entrusted to the broad discretion of the prosecutor. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). Your letter does not indicate that you have brought your concerns to the attention of the Columbia County District Attorney. If you do so, and if the district attorney (or a special prosecutor from another county) declines to take formal action on the violations you assert within 20 days, you can initiate your own action pursuant to section 19.97(4). If you prevail in such an action, the court may award your actual attorney fees and other necessary costs.

Thank you for your interest in assuring full compliance with the open meetings law.

Sincerely,

Bruce A. Olsen
Assistant Attorney General

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Enclosures

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