STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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July 31, 2008

Ms. Lucille Karstens
N9570 Old Highway 22
Pardeeville, WI 53594

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

BAO:ajw

Enclosures

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STATE OF WISCONSIN
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April 8, 1993

Ms. Julie Rappert
Deputy Clerk
Town of Menasha
Post Office Box 527
Menasha, Wisconsin 54952

Re: Applicability of open meetings law to road tours

Dear Ms. Rappert:

You indicate that the town of Menasha Board of Supervisors is considering obtaining a van to inspect problem roads. You request an opinion on whether such a tour would be subject to the open meetings law.

I assume that one-half or more of the members of the town board intend to ride together in the van to inspect the roads and discuss what should be done. Under those facts, the gathering of the town board members would constitute a meeting subject to the open meetings law.

The open meetings law applies to any "meeting" of a governmental body. Sec. 19.83, Stats. In State ex rel. Newspapers v. Showers, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987) the court held that a "meeting" occurs whenever: 1) There is a sufficient number of members of a governmental body present to determine the body's course of action and 2) the members gather for the purpose of exercising the responsibilities, authority, power or duties of the body. Anytime one-half or more of the members of a governmental body are gathered, there is a presumption that a meeting is being conducted. The presumption can be overcome if the members of the governmental body can show that they were not exercising the responsibility, authority, power or duties of the body. Sec. 19.82(2), Stats. Finally, the supreme court has made it clear that a meeting occurs even when members of the governmental body convene simply for the purpose of gathering information on a matter related to the governmental body's responsibility, authority, power or duties. State ex rel. Badke, et al. v. Village of Greendale, Case No. 91-0126, filed January 23, 1993. Thus, if one-half or more members of a town board gather in a van for the purpose of inspecting and discussing problem roads, that gathering is a "meeting" subject to the open meetings law.

The town board is, therefore, required to provide advance public notice of the meeting and to hold the meeting in a place that is accessible to members of the public. See secs. 19.83 and 19.82(3), Stats.

In my opinion, there 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.

Thank you for you inquiry about the requirements of the open meetings law. If you have any further questions, please feel free to contact me.

Sincerely,

Mary Woolsey Schlaefer

Mary Woolsey Schlaefer
Assistant Attorney General

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April 17, 2006

Mr. Greg Peck
Editorial Page Editor
The Janesville Gazette
Post Office Box 5001
Janesville, WI 53547-5001

Dear Mr. Peck:

I am glad that you were able to attend the public records/open meetings seminar at Blackhawk Technical College on March 8. The Department of Justice is pleased to be able to present these seminars around the state in recognition of the fact that a representative government is dependent upon an informed electorate.

You state that the question arose at the seminar whether meeting notices must be posted on a governmental body's web site if the governmental body operates a web site. Section 19.84 of the Wisconsin Statutes sets forth the public notice requirements of the open meetings law. The law provides that 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 or, if none exists, to a news medium likely to give notice in the area.

Sec. 19.84(1), Wis. Stats. This office has said that 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). As a general rule, this office has advised posting notices at three different locations within the jurisdiction that the governmental body serves. *Id.* 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 the body serves. 63 Op. Att'y Gen. 509 (1974). The short answer to your question, therefore, is that the law does not require that a governmental body post meeting notices on its web site. That is true because the law itself only requires notice to the public. The law does not require that the notice be posted in any particular place. Posting meeting notices on a governmental body's web site

would certainly be a service to the public and, to the extent it supplemented other notices, promote the law's goal of informing the public of the public's business.

The law does not require a governmental body to post its notices on its web site, and posting the notices on the web site should not be a substitute for other notices to the public. To the extent such web site postings supplement other public notices, they should be encouraged.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

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OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

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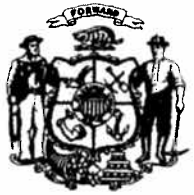
January 1, 1974 through December 31, 1974

ROBERT W. WARREN
(January 1-October 8)

VICTOR A. MILLER
(October 8-November 25)

BRONSON C. LA FOLLETTE
(November 25-December 31)

ATTORNEYS GENERAL



MADISON, WISCONSIN
1974

The recognition of the rights of unwed fathers and children born to unmarried persons is being litigated considerably in the courts today. See *Stanley v. Illinois* (1971), 400 U.S. 1020, 27 L.Ed. 2d 631, 91 S.Ct. 584. *State ex rel. Lewis v. Lutheran Social Services* (1973), 59 Wis. 2d 1, 207 N.W. 2d 826. *Rothstein v. Lutheran Social Services* (1972), 405 U.S. 1051, 31 L.Ed. 2d 786, 92 S.Ct. 1488. *Weber v. Aetna Casualty and Surety Co.* (1972), 406 U.S. 164, 31 L.Ed. 2d 768, 92 S.Ct. 1400. *Levy v. Louisiana* (1968), 391 U.S. 68, 20 L.Ed. 2d 436. *Hardy v. Hardy* (1973), 269 Md. 412, 306 A. 2d 244. *Slawek v. Stroh* (1974), 62 Wis. 2d 295, 215 N.W. 2d 9. And the Wisconsin legislature has recently recognized new rights of unwed fathers in enacting ch. 263, Laws of 1973. A *statutory* change of name(s) of a child born out of wedlock and not subsequently legitimized or adopted, must now be made by the natural mother and the natural father unless his rights have been legally terminated. Sec. 296.36, Stats.

The recent cases expanding the rights of fathers of illegitimate children concern an unwed father's rights to determine his paternity of an illegitimate child, and to notices of hearings involving the termination of the mother's custody, adoption or statutory change of name of the child. The care, custody, and control of the child is still, under Wisconsin law, entrusted to the mother of the child above all others if she is fit. *State ex rel. Lewis v. Lutheran Social Services* (1970), 59 Wis. 2d 1, 207 N.W. 2d 826. *Slawek v. Stroh* (1974), 62 Wis. 2d 295, 215 N.W. 2d 9 (Hallows, dissent). 34 OAG 72, *supra.* Sec. 48.425, Stats. See also *In re Dunston*, 18 N.C. App. 647, 197 S.E. 2d 560 (1973).

Therefore, it is my opinion that the rights of fathers of children born out of wedlock have not been expanded by recent court decisions and ch. 263, Laws of 1973, to the extent that they have the right to participate in the naming process of their children to the same extent as fathers of children born in wedlock. In the cases you mention, the young women can give their children the same surnames as the children's putative fathers or any other surnames, in accordance with Wisconsin and common law.

RWW:PM

Open Meeting; Meaning of "communication" in sec. 66.77 (2) (e), Stats., the open meeting law, discussed with reference to giving the public and news media members adequate notice.

October 7, 1974.

GERALD K. ANDERSON, *District Attorney*
Waupaca County

You request my opinion as to the meaning of "communication" as that term is used in sec. 66.77 (2) (e), Stats., as created by ch. 297, Laws of 1973.

Subsection (2) (e) defines "public notice" but does not define "communication" and provides:

> "(e) 'Public notice' means statutorily required notice, if any. If no notice is required by statute, it means a communication by the chief presiding officer of a governmental body or his designee, to the public and to the official municipal or city newspaper designated under s. 985.05 or 985.06, or if none exists, then to members of the news media who have filed a written request for such notice, which communication is reasonably likely to apprise members of the public and of the news media of the time, place and subject matter of the meeting at a time, not less than one hour prior to the commencement of such meeting, which affords them a reasonable opportunity to attend."

Section 990.01 (1), Stats., provides:

> "GENERAL RULE. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."

Webster's Third New International Dictionary defines "communication" as: "facts or information communicated; a letter, note, or other instance of written information; conversation, talk."

The same source defines "communicate" as "to make known; inform a person of; convey the knowledge or information of."

In order to conform with the public notice provisions of sec. 66.77 (2) (d), (e), Stats., it will be necessary for each governmental body to search for any statute or statutes other than the above section which requires notice. In some cases a statute may require notice in a specific form to both members and to the public. Where a statute requires notice, the special statutory method as to form, content and means of communication must be complied with. Statutes relating to some governmental bodies, as in the case of the county board of supervisors, require public notice but do not specify the method of communication. Section 59.04 (3), Stats., provides in part: "The board shall give adequate public notice of the time, place and purpose of each meeting." Under such a statute I recommend that, as a minimum, the method of communication contained in the second sentence of sec. 66.77 (2) (e), Stats., be complied with.

Subsection (2) (e), Stats., requires *communication* by the chief presiding officer or his designee, *to the public*, AND *to the official municipal newspaper, or if none exists to members of the news media* (newspapers, radio, television, press associations) *who have filed a written request for such notice.* The communication must be reasonably likely to *apprise members of the public* and of the *news media*, of the *time, place* and *subject matter* of *the meeting* and must be given *at a time*, not less than one hour prior to the commencement of such meeting, *which affords them* (members of the public and news media), a *reasonable opportunity to attend.*

Where subsec. (2) (e), Stats., is applicable, each governmental body and the chief presiding officer thereof will have to use their best judgments in determining the method of communicating to the public, official newspaper, or if none exists, to members of the news media who have filed written requests.

Whereas written or verbal communication could be used with respect to all three classes which may be entitled to notice, written notice would be most appropriate insofar as the public is concerned. A single verbal announcement outside the building or meeting place would not reasonably apprise the public or members of the news media in most cases so as to enable them to attend. Such public announcements in verbal form can serve as a supplementary method

of communication. Timely posting of a written notice in one or more readily accessible public places would serve to notify the public under the statute and will probably be the method most used. A paid notice published in a newspaper having circulation likely to give notice in the area and to people likely to be affected could also be used. The meetings of some governmental bodies are newsworthy and such bodies may be able to get the cooperation of newspaper editors to timely and adequately print articles, without charge, to notify the public. Such method can be used to supplement posting. The statute requires notification of the time, place, *and subject matter* of each meeting and although some newspapers carry a calendar of meetings as to body, time and place, they do not always refer to subject matter.

I am of the opinion that notice to the official newspaper, or if none exists, to news media members who have filed written requests, can be given by verbal communication (direct or by telephone) or in written form. Where there is an official newspaper, the timely publishing of a legal notice would in my opinion give adequate notice to the newspaper and to the public. Where there is no official newspaper, the timely publishing of an advertisement in a newspaper of general circulation in the area stating the time, place, and subject matter to be considered would be adequate notice to the public but would not be a substitute for the communication to which members of the news media, who have filed written requests for notice, are entitled.

Governmental bodies should have no difficulty in complying with the requirement of giving notice of the time and place of the meeting. Stating the subject matter is a more difficult problem. Whenever possible, specific subject matters upon which discussion or action is anticipated should be included in the notice. While sec. 66.77, Stats., does provide that the notice reasonably apprise of the "subject matter of the meeting," I do not construe the provision in subsection (2) (e) or any other provision of sec. 66.77, Stats., as precluding a governmental body from taking up business which they are authorized to conduct under other laws, even where specific reference is not made to such subject matter, if the notice contained an agenda item: "such matters as are authorized by law" or "regular business." This is especially true where the governmental body could not at the time of giving notice anticipate the introduction or discussion of such business. Many governmental bodies utilize a detailed agenda which

is in itself suitable for posting or delivering to any official newspaper or members of the news media. Whether adequate notice of the subject matter was given is best left to a determination on a case-to-case basis, considering the circumstances of each case. The intent of the law is clear and the giving of notice under this law should comply, insofar as possible, with that intent.

Governing bodies of some municipalities have designated official newspapers under secs. 985.05, 985.06, Stats. Since any municipality, as defined in secs. 985.01 (5), 345.05 (1) (a), Stats., which includes counties, may designate such an official newspaper, it may be desirable to so do in order to simplify compliance with sec. 66.77 (2) (e), Stats. I am of the opinion that subunits of municipalities, such as county board committees, do not have to separately designate official newspapers where the parent governmental body has acted. Where state governmental bodies are concerned, it is questionable whether communication to the official state paper will alleviate the necessity of notifying members of the news media who have filed written request for such notice since the section refers only to "official municipal or city newspaper." I recommend that state governmental bodies notify the state official paper in any event.

In essence you inquire, whether in case there is an official newspaper, the publishing of a one-time legal notice in January, listing the dates, times, places, and subject matter to be considered at the meetings of such body to be held during the entire year would suffice.

In my opinion, it probably would not in most cases.

In my opinion it would not be "*reasonably likely to apprise members of the public*" ... "of the time, place and subject matter of *the* meeting *at a time*, not less than one hour prior to the commencement of such meeting, *which affords them a reasonable opportunity to attend.*" (Emphasis added.)

It is difficult to imagine how any governmental body could with any accuracy predict what specific subject matters would be taken up at meetings many months or even one year in advance. There undoubtedly are some governmental bodies which hold regular meetings to take care of regular business without any formal agenda.

Other governmental bodies may occasionally have an agenda while still others will regularly operate from an agenda. When there is an agenda, even if it be an informal one drawn by the presiding officer or the clerk, this is the sort of information relating to subject matter of the meeting concerning which notice should be given. To say that the publishing of a once-a-year notice in a newspaper giving dates, times, places and general subject matter constituted compliance with the statute would be to relieve a governmental body and its presiding officer of any obligation to give notice of any particular subjects to be taken up at a meeting when such subject matter was scheduled and at least known to the presiding officer. Even where a governing body meets regularly without any agenda, taking up only such business as may properly come before it, and without any real advanced knowledge of what form that business may take, it is my opinion that the mere publication of a once-a-year notice in a newspaper would not constitute compliance with the statute. The statute clearly deals with specific meetings, even though they may be regular and routine meetings, and a separate notice as to each *such* meeting should be given. In terms of time, the statute makes it clear that less than one hour's notice is not acceptable. Beyond that, what constitutes reasonable notice in terms of time within the meaning of the statute must be judged on the circumstances surrounding each individual meeting. A once-a-year published notice designed to cover several or many meetings would not constitute compliance with the statute.

In seeking to comply with this statute, presiding officers and other members of governmental bodies should keep in mind that the public and the news media are entitled to reasonable notice of the time, place and subject matter of these meetings. Every effort should be made to comply with the spirit as well as the letter of this law.

RWW:RJV

Industrial Commission; Industry, Labor And Human Relations, Department Of; Licenses And Permits; Department of Industry, Labor and Human Relations may lawfully issue child labor permits to girls aged 12 and 13 to be employed as caddies on golf courses.

prepayment which exceeds 20 per cent of said original amount, provided the mortgage note makes express provision therefor.

"***

"(19) **Repayment of loans.** A borrower may repay his loan at any time by giving 30 days' written notice of his intention to do so, subject to sub. (11)."

It is my opinion that the two above quoted statutory provisions were designed to deal with separate but related lending situations and are therefore not in conflict with each other. One statute deals with loans generally, the other deals with loans by savings and loan associations.

Section 138.05(2), Stats., provides the right to prepay all loans which bear an interest rate in excess of 10 percent. The Legislature has provided that where the lender has received unearned interest payments, these payments should be returned to the borrower. Section 138.05(2)(a) and (b) provides methods for determining if any refund of interest is due to the borrower. The payment of unearned interest to the lender results under some types of precomputed loan transactions. Section 138.05(2), Stats., applies to all lenders, including those who precompute the interest on their loans with the result of receiving unearned interest in the early installment periods.

Although sec. 138.05(2), Stats., does not state whether a penalty can be attached to this right to prepay, a consideration of this question is not necessary here. Likewise, it is not necessary to consider here the Wisconsin Consumer Credit Act which gives to the consumer the right to prepay without a penalty certain loan transactions covered by the Act. Sec. 422.208, Stats.

Section 215.21(11), Stats., relating to mortgage loans from savings and loan associations, provides for a penalty upon prepayment of such a loan in certain limited circumstances, i.e., when the aggregate of principal payments made by the borrower during a twelve-month period exceeds 20 percent of the original amount of the loan and the mortgage loan expressly provides for such a penalty. Further, this penalty may not be imposed unless the mortgage note makes express provision therefor.

Additionally, sec. 215.21(19), Stats., enlarges the right to prepayment beyond that granted in sec. 138.05(2), Stats. One who borrows from a savings and loan association has the right, upon giving 30 days' written notice, to prepay all such loans, not only those which carry an interest rate in excess of 10 percent, and is subject to a prepayment penalty only if, and to the extent that, sec. 215.21(11), Stats., applies.

Even if one were to conclude that there is a conflict between these two statutory provisions which are designed to deal with two separate but related situations, any such conflict can be avoided by applying the following general rule of statutory construction:

> "... [W]hen both a general statute and a specific statute relate to the same subject matter, the specific statute controls." *Estate of Zeller*, 39 Wis.2d 695, 700, 159 N.W.2d 599 (1968).

In my opinion, the imposition of prepayment penalties for mortgage loans of savings and loan associations are limited to the circumstances of sec. 215.21(11), Stats. The legislative intent of sec. 215.21(19), Stats., is to give borrowers the right to repay mortgage loans at any time on 30 days' notice. This right is made subject only to sec. 215.21(11). Section 215.21(11) is specific as to the conditions precedent to the imposition of a prepayment penalty and the maximum size of the penalty. This specificity is also consistent only with the legislative intention that sec. 215.21(11) provides for the limited circumstances in which a penalty can be attached to a borrower's exercise of his right to repay his loan to a savings and loan association. *Expressio unius est exclusio alterius*, i.e., the expression of one thing is the exclusion of another.

Therefore, I conclude that savings and loan associations may exact prepayment penalties on mortgage loans only in conformity with sec. 215.21(11), Stats.

BCL:JEA

Anti-Secrecy; Collective Bargaining; Education, Board Of; Open Meeting; Schools And School Districts; Discussion of public notice requirements for meetings of city district school board under secs. 19.81-19.98 and 120.48, Stats. OAG 26-77

March 26, 1977.

MARSHALL H. BOYD, *District Administrator*
Portage Public Schools

Pursuant to sec. 19.98, Stats., you request my advice on a number of questions relating to the open meeting law as created by ch. 426, Laws of 1975.

I will answer the questions you pose on the basis of the facts stated in your request. However, since it appears that you are seeking advice to aid the school board in the proper conduct of its meetings, I suggest that the board seek and rely on the advice of its attorney who, in most cases, is in the best position to render legal advice in view of all of the special circumstances existing for each case. Your letter states that a "city district Board of Education" is involved, and this opinion assumes that it is a city school district operating under subch. II of ch. 120, Stats.

> "(1) Under 19.84 (1) (a) does a regular or special meeting of a city district Board of Education require posting of notices as well as newspaper and radio notices? If so, would the front door of the school constitute a reasonable public place and how many places are required?"

Section 19.84(1)(a) and (b), Stats., provides:

> "(1) Public notice of *all meetings* of a governmental body shall be given in the following manner:
>
> "(a) As required by any other statutes; *and*
>
> "(b) By communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under ss. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area." (Emphasis added.)

Section 120.48(1), Stats., as amended by ch. 426, Laws of 1975, provides:

> "(1) The school board in a city school district shall hold regular monthly meetings at such times as it prescribes by rule. Special meetings may be held under rules adopted by the school board. *The school board shall inform the public of its regular monthly meetings, either by publication of a class 1 notice, under ch. 985, with the specific exception that insertion thereof need not be at least one week before the meeting, or by other means which may include posting.* All school board meetings shall be open to the public except as provided in subch. IV of ch. 19 and except that the public shall be excluded from a hearing before the school board on charges against an employe, if requested by the employe against whom the charges are preferred."

There must be compliance with the provisions of both subsec. (1)(a) and subsec. (1)(b) of sec. 19.84, Stats.

I am enclosing a copy of an opinion, 63 OAG 509 (1974), which is concerned with the meaning of the word "communication," which was also used under former sec. 66.77(2)(e), Stats. In reading that opinion you should note that the provisions of present sec. 19.84(1)(b), Stats., are more extensive than those of former sec. 66.77(2)(e), Stats.

Posting is not required by subsecs. (1)(a) or (1)(b) of sec. 19.84, Stats. Posting may be a means of informing the public of regular or special meetings or as a supplement to the publication of a class 1 notice for a city school district regular monthly meeting. See sec. 120.48, Stats. The front door of the school, if reasonably accessible to the public, would constitute a proper place for posting of notices. The statutes do not specify a number of places where posting must occur. Since neither sec. 19.84(1) nor sec. 120.48, Stats., *require* publication of a notice in a newspaper, the provisions of sec. 985.02(2), Stats., which require, when posting is elected in place of publication, posting in "at least 3 public places likely to give notice to persons affected" are not applicable. However, three public places would be a prudent number to utilize. Where posting is to be relied upon, the number of places used might well vary depending on the size of the district, the number and location of schools and the place or places the board customarily holds its meetings.

> "(2) Is the Board limited to agenda items or can it revise or add to the agenda if that step is included as an agenda item, i. e. 'agenda revisions'?"

The board is not necessarily limited to agenda items. The use of an agenda item entitled "agenda revisions" is minimal compliance with the law unless it represents a subterfuge to avoid the law. However, this practice should be avoided. Where members know specific items in advance of the meeting, they should be communicated to the presiding officer who should give notice of the supplemental agenda in the manner described above. Matters of importance or of wide interest should be postponed until more specific notice can be given. See 66 OAG 68 (1977).

Section 19.84(2), Stats., refers to the content of the required notice:

> "(2) *Every public notice* of a meeting of a governmental body *shall set forth* the *time, date, place* and *subject matter of the meeting, including that intended* for consideration *at any contemplated closed session*, in *such form as is reasonably likely to apprise members of the public* and the news media thereof." (Emphasis added.)

The notice should be as specific and informative as possible. See discussion at 63 OAG 509, 511 (1974) and 66 OAG 68 (1977).

> "(3) Under 19.85 [1] (e) are negotiation strategies and topics for consideration by the Board allowable under this sub-section or does 'bargaining reasons' refer to purchase of properties, investments, and *other* specified public business?"

Where a board is meeting for the purpose of collective bargaining under subch. IV or V of ch. 111, it is not a "governmental body" within the meaning of sec. 19.82(1), Stats., and a board would not have to comply with the public notice requirements of sec. 19.84, Stats., when meeting for those purposes. The open session, required for final ratification or approval of a collective bargaining agreement would be subject to the notice requirements. See sec. 19.85(3), Stats. However, a city district school board must also comply with the notice requirements of sec. 120.48, Stats. Thus, where collective bargaining strategies are to be discussed at a regular meeting the board would have to comply with any public notice requirements contained in its rules applicable to special meetings, open or closed.

It is my opinion that a board could meet in closed session for the purpose of forming negotiation strategies. I recommend, however,

that the board give notice of a meeting as prescribed by secs. 19.84(1)(a), (b) and (2), Stats., specifying that an open meeting will be held for the purpose of taking a vote to convene in closed session for the purpose of discussing labor negotiation strategies citing the exemptions in sec. 19.85(1)(c) and (e), Stats.

The exemption in sec. 19.85(1)(e), Stats., provides:

> "(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session."

It is my opinion that the last two phrases are not limited to situations involving the purchasing of public properties or the investing of public funds.

> "(4) Can a city district school board vote to preliminarily approve bargaining proposals in closed session without violating sec. 19.85(3), Stats.?"

I am of the opinion that it can. A governmental body can vote to take action on matters discussed at a closed session if such action is an integral part of the reason for which the permitted closed session was convened. Some consensus is necessary, where closed sessions are utilized, before an open meeting duly noticed is convened. Members could, of course, change their votes at the open session when the matters of final ratification or approval were before the board.

Section 19.85(3), Stats., provides:

> "(3) Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. IV or V of ch. 111 which has been negotiated by such body or on its behalf."

I construe this section as requiring an open session, duly convened on notice, for the purpose of taking final action, whether it be in the form of final ratification or final approval.

> "(5) Closed session notice. Does naming the subject (i.e. purchase of property, public fund investment) satisfy the statute or must statutory reference such as Wis. Stat.

19.85 (1) (e) [be included] as part of the agenda reference?"

Section 19.85(1), Stats., provides in part:

"(1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. *No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business* to be considered at such closed session, *and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized.* Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. ..." (Emphasis added.)

I am of the opinion that stating the general subject of the closed session is not sufficient. There should be specific reference to the specific statutory exemption which is being relied upon as set forth in sec. 19.85(1), Stats. Where an open session is convened into closed session sec. 19.85(1), Stats., requires the chief presiding officer to announce to those present the nature of the business to be considered at the closed session and the specific exemption or exemptions in the subsection by which the closed session is claimed to be authorized. Procedure requires similar reference where notice of a contemplated closed session is given under sec. 19.84(2), Stats.

I am also of the opinion that a closed session cannot be held prior to an open session or as the first order of business. A governmental body can reconvene into open session if notice of such subsequent open session is given as required by sec. 19.85(2), Stats.

Section 19.83, Stats., provides:

"**Meetings of governmental bodies.** *Every meeting* of a governmental body *shall be preceded by public notice as provided in s. 19.84, and shall be held in open session.* At any meeting 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 s. 19.85.*" (Emphasis added.)

Section 19.85(2), Stats., quoted above, requires that notice be given of the *subject matter*, "including that intended for consideration at any contemplated closed session, *in such form as is reasonably likely to apprise members of the public and the news media thereof.*"

This provision is to be construed in *pari materia* with sec. 19.85(1), Stats., which contains provisions as to the specificity of the notice to be given where an action is taken in open session to reconvene as a closed session. These provisions require reference to the specific exemption or exemptions relied upon.

BCL:RJV

Bicycles; Cities; Licenses And Permits; Motor Vehicles; Municipalities; Ordinances; Villages; The licensing of bicyclists, the creation of bicycle courts and the impoundment of bicycles is a matter of statewide concern. Cities and villages cannot exercise such regulation in the absence of express legislative authorization. OAG 27-77

March 30, 1977.

JOHN RADCLIFFE, *Coordinator*
Office of Highway Safety Coordination

You have requested my opinion on four questions that relate to the control and regulation of bicycles and their operation. You have also indicated to me in a second letter that your concern is with local action, such as municipal ordinances, which authorizes such control and regulation. For the reasons given below, such local action is unauthorized by state law.

In order to keep the subject matter in proper context, some general principles will be discussed before answering your specific questions.

A bicycle is a vehicle within the meaning of the word "vehicle," as that word is used in the vehicle code, chs. 340 through 348, Stats. *Rasmussen v. Garthus*, 12 Wis.2d 203, 107 N.W.2d 264 (1960);