

**LICENSE FOR A  
PRIVATE ROAD CROSSING**

***North Channel Bridge Recreational Trail***

This License for a Private Road Crossing ("Agreement"), made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2016, by and between the WISCONSIN CENTRAL LTD. (hereinafter referred to as "Railroad Company") whose mailing address is 17641 S. Ashland Avenue, Homewood, Illinois 60430-1345 CITY OF MENASHA, WISCONSIN (hereinafter referred to as "Licensee") whose mailing address is 140 Main St, Menasha, WI 54952.

W I T N E S S E T H:

IN CONSIDERATION of the mutual covenants and agreements herein set forth, Railroad Company, insofar as it lawfully may, does hereby grant unto Licensee a right or license to construct, maintain and use a private vehicular road upon, over and across the property or right-of-way of Railroad Company (including the track located thereon) at Railroad Milepost 207.00 of the Manitowoc Sub /Old FVW Mainline in Menasha, WI as shown on the print attached hereto as Exhibit A and made a part hereof,

Licensee shall pay to Railroad Company upon execution of this Agreement the sum of **\$750.00** for preparation and handling of this Agreement. The aforesaid sum is not refundable in the event Licensee elects not to enter upon Railroad Company's property or in the event Railroad Company elects to terminate this Agreement,

Licensee shall at all times conduct its work in accordance with any and all "Special Provisions" which may be appended hereto which, by reference hereto, are hereby made a part hereof.

UPON AND SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

1. DEFINITIONS.

- (a) Railroad Company's Property. "Railroad Company's Property" shall mean the property shown on the attached print, to the extent owned by Railroad Company, whether owned in full ownership or as a servitude, easement, or right-of-way, including Railroad Company's track, the land on which the track is situated, and any adjacent land of Railroad Company on either side of the track.
- (b) License. "License" shall mean the right granted by Railroad Company to Licensee to construct, maintain and use a private vehicular road, together with a private pedestrian walkway, under the terms and conditions set forth hereinafter.

- (c) License Area. "License Area" shall mean that portion of Railroad Company's Property over and across which the license is granted. The License Area extends from one edge of the Railroad Company's Property across the track to the opposite edge of the Railroad Company's Property and measures a distance of approximately 16 feet in width on either side of the center line of the roadway, all as more fully shown on the attached print.
- (d) Roadway. "Roadway" shall mean the roadway approaches on either side of the Crossing Proper within the License Area including that portion between tracks where multiple tracks exist.
- (e) Crossing Proper. "Crossing Proper" shall mean that portion of the License Area encompassing an area from end-of-tie to end-of-tie and from end-of-surface to end-of-surface, with a total surface width of approximately 16 feet.
- (f) Licensee's Property. "Licensee's Property" shall mean the property or estate of Licensee to and from which this Agreement provides ingress and egress for Licensee's benefit and use.
- (g) Cost. "Cost" shall mean the actual cost of labor, outside services, equipment and materials plus Railroad Company's then current customary additives for overhead and other indirect costs.

## 2. USE.

- (a) This Agreement shall only affect and burden the License Area and no other portion of Railroad Company's Property, and the Roadway and Crossing Proper shall be constructed, located, and maintained entirely within the License Area. Licensee shall have no right to use or cross any other portion of Railroad Company's Property or to use the Roadway and Crossing Proper for any purposes other than as expressly permitted herein, and Licensee, as a further consideration, cause, and condition without which this Agreement would not have been granted, agrees to restrict its and its employees', agents' and invitees' use to those purposes and then only to said location and no other for crossing the Railroad Company's Property, including the track.
- (b) Licensee shall not do or permit to be done any act which will in any manner interfere with, limit, restrict, obstruct, damage, interrupt, or endanger Railroad Company's operations or facilities.
- (c) Licensee shall require and shall take all steps necessary to ensure that all persons using the Roadway and Crossing Proper come to a complete stop, look carefully for approaching trains before fouling or crossing Railroad Company's tracks, and yield to any approaching train.

- (d) The Roadway and Crossing Proper shall be used only by Licensee and its employees, agents, contractors, patrons and invitees and then only for private ingress to and egress from Licensee's Property.
- (e) The Roadway and Crossing Proper shall not be used by vehicles of a size, configuration or weight that would damage the tracks, equipment, installations, or facilities of Railroad Company or any equipment, installations, or facilities located on Railroad Company's Property but belonging to third persons unless approved in advance in writing by Railroad Company and then only after suitable precautions have been taken to avoid any such damage.

### 3. TERM.

- (a) This Agreement shall become effective as of the date first written above and shall continue in effect thereafter until terminated in one of the manners set forth below:
  - (i.) Either party may at any time give the other party written notice of termination specifying the date on which termination shall be effective, provided that such notice shall be delivered at least thirty (30) days in advance of the proposed date of termination.
  - (ii.) Railroad Company shall have the right to terminate this Agreement immediately upon written notice to Licensee if Licensee at any time breaches or fails to perform any of the terms and conditions hereof;
  - (iii.) This Agreement shall terminate through non- use or in any other manner provided by law.
- (b) Unless the parties mutually agree in writing to leave the Roadway and Crossing Proper in place after termination, the termination of this Agreement shall not be effective until all removal and restoration is complete. Termination of this Agreement shall not release Licensee from any liability or responsibility and duty which accrued prior to such termination, removal and restoration.

### 4. CONSTRUCTION.

The construction of the Roadway, including the necessary grading, culverts and drainage on each side of the Railroad Company's track, shall be performed by Licensee at its own risk and expense, and to the satisfaction of the Railroad Company's authorized representative. Railroad Company will install the Crossing Proper over its track(s), from end-of-tie to end-of-tie, and make all adjustments required in Railroad Company facilities, if any, at Licensee's sole expense.

5. NOTIFICATION TO RAILROAD COMPANY.

At least ten (10) days prior to entering upon the Roadway for the purpose of performing any construction or maintenance work hereunder, Licensee shall notify Railroad Company in writing of the type of work to be performed and the date such work will commence. The notice shall be sent to the following address:

Regional Chief Engineer  
Wisconsin Central Ltd.  
17641 South Ashland Avenue  
Homewood, IL 60430

6. SIGHTING AT CROSSING.

Licensee shall arrange to keep each quadrant of the intersection of the Roadway with Railroad Company's track free of bushes, trees, weeds, vegetation, and all other obstructions of any kind that could interfere with a motor vehicle operator sighting an approaching train. If Licensee requires access to Railroad Company's property outside the Roadway to satisfy this requirement, Licensee shall obtain written permission from Railroad Company's authorized representative.

7. RAISING WIRE LINES.

If it should be necessary to raise any wires on Railroad Company's property to provide safe clearance for vehicles, Licensee shall make all arrangements therefor at its own sole risk and expense.

8. MAINTENANCE.

Licensee shall, at its own risk and expense, maintain said Roadway in good and safe condition commensurate with its intended use. Railroad Company shall, at the sole risk and expense of Licensee, maintain the Crossing Proper, however, Railroad Company shall have the right, but not the duty, to perform at Licensee's sole risk and expense, any repair or maintenance on the Roadway that Railroad Company considers reasonably necessary and Licensee shall pay the cost thereof upon receipt of a bill whether made at Licensee's request or otherwise.

9. CROSSING TO BE KEPT FREE OF DEBRIS.

Licensee shall at all times during the term of this Agreement, keep the Railroad Company's track and flangeway free of dirt, rocks or other debris or obstructions (including obstructions to proper drainage) of any kind, and will not permit any condition which might interfere with the safe and efficient operation of

trains over the Crossing Proper, or which might damage equipment or facilities belonging to Railroad Company or others, or which might constitute a safety hazard of any kind. If at any time Licensee shall fail to do so, Railroad Company may, at its option, remove any dirt, rocks, debris or obstructions, and Licensee will pay Railroad Company the cost thereof promptly upon receipt of bill therefor. If the continued or repeated presence of dirt, rocks, debris or obstructions should, in the opinion of Railroad Company, create an operating hazard, Railroad Company may provide protective services at Licensee's expense until such condition is corrected in a manner reasonably satisfactory to Railroad Company, or at its option may immediately terminate this Agreement.

#### 10. UNAUTHORIZED USE.

It shall be Licensee's responsibility and duty to prevent all unauthorized persons from using the License Area and nothing herein shall be construed to relieve Licensee of this responsibility and duty.

#### 11. GATES AND FLAGGING.

Licensee shall, at its own risk and expense, install and maintain any gate or other barrier which Railroad Company indicates is reasonably necessary and shall keep the gates closed when the License Area is not in actual use. Licensee shall, at its own risk and expense, provide whatever protective services Railroad Company shall indicate is necessary. Railroad Company shall have the right, but not the duty, to provide any such protection at Licensee's sole risk and expense and Licensee shall prepay the cost thereof. It is further understood and acknowledged by Licensee that Railroad Company has no obligation or duty to determine the need for any gate or other barrier or the need for protective services.

#### 12. SIGNS, SIGNALS AND WARNING DEVICES.

Railroad Company, at Licensee's sole cost and expense, shall provide, install and thereafter maintain not less than one (1) " PRIVATE CROSSING" sign and post, not less than one ENS sign and two (2) flanger signs and posts (if necessary). It is the Licensee's responsibility to notify Railroad Company of missing or damaged signs and those needing refurbishing.

Licensee acknowledges that Railroad Company has no obligation or duty to give audible warning of the approach of a train, nor erect whistle posts, nor reduce the speed of its trains, nor alter its operations in any manner, owing to the presence or existence of the roadway and crossing proper or other use or exercise of the right or license granted herein. Licensee assumes, at its own risk and expense, sole responsibility for determining if any additional signs, signals or other warning devices are necessary or appropriate for the safety of persons using the License Area and specifically acknowledges that Railroad Company has no obligation or duty whatever to make any such determination. If the installation of any signs,

signals or warning devices on the License Area is presently or hereafter required by Railroad Company, law or by competent public authority, or is otherwise requested by Licensee, same shall conform to any then currently applicable practices of the Railroad Company for such devices as to design, material and workmanship and all costs incurred by the Railroad Company related to the installation, operation, maintenance, renewal, alteration and upgrading thereof shall be solely borne by Licensee.

### **13. INDEMNITY.**

**AS A FURTHER CONSIDERATION FOR THE LICENSE HEREIN GRANTED, AND AS A CONDITION WITHOUT WHICH THE LICENSE WOULD NOT HAVE BEEN GRANTED, LICENSEE AGREES TO THE FULLEST EXTENT ALLOWED BY LAW, REGARDLESS OF ANY NEGLIGENCE OR OTHER LEGAL FAULT BY OR ON THE PART OF RAILROAD COMPANY OR ITS OFFICERS, EMPLOYEES OR AGENTS, FULLY TO DEFEND, INDEMNIFY AND SAVE HARMLESS RAILROAD COMPANY AND ITS OFFICERS, EMPLOYEES AND AGENTS, FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, ACTIONS AND CAUSES OF ACTION, AND TO ASSUME ALL RISK, RESPONSIBILITY AND LIABILITY (INCLUDING ALL LIABILITY FOR EXPENSES, ATTORNEY'S FEES AND COSTS INCURRED OR SUSTAINED BY RAILROAD COMPANY, WHETHER IN DEFENSE OF ANY SUCH CLAIMS, DEMANDS, ACTIONS AND CAUSES OF ACTION OR IN THE ENFORCEMENT OF THE INDEMNIFICATION RIGHTS HEREBY CONFERRED),**

- (A) FOR DEATH OF OR INJURY TO ANY AND ALL PERSONS, INCLUDING BUT NOT LIMITED TO THE OFFICERS, EMPLOYEES, AGENTS, PATRONS, INVITEES AND LICENSEES OF THE PARTIES HERETO, AND FOR ANY AND ALL LOSS, DAMAGE OR INJURY TO ANY PROPERTY WHATSOEVER, INCLUDING BUT NOT LIMITED TO THAT BELONGING TO OR IN THE CUSTODY AND CONTROL OF THE PARTIES HERETO, IN WHOLE OR IN PART ARISING FROM, GROWING OUT OF, OR IN ANY MANNER OR DEGREE DIRECTLY OR INDIRECTLY CAUSED BY, ATTRIBUTABLE TO OR RESULTING FROM THE GRANT OR EXERCISE OF THIS LICENSE, THE FAILURE OF LICENSEE TO CONFORM TO THE CONDITIONS OF THIS AGREEMENT, WORK PERFORMED BY RAILROAD COMPANY FOR LICENSEE UNDER THE TERMS OF THIS AGREEMENT, WORK PERFORMED BY LICENSEE UNDER THE TERMS OF THIS AGREEMENT, OR FROM THE CONSTRUCTION, INSTALLATION, MAINTENANCE, REPAIR, RENEWAL, ALTERATION, CHANGE, RELOCATION, EXISTENCE, PRESENCE, USE, OPERATION OR REMOVAL OF ANY STRUCTURE INCIDENT THERETO, AND**
- (B) FOR DEATH OF OR INJURY TO THE OFFICERS, EMPLOYEES, AGENTS, PATRONS, INVITEES AND LICENSEES OF LICENSEE**

**AND FOR ANY AND ALL LOSS, DAMAGE OR INJURY TO THEIR PROPERTY, AND TO ANY PROPERTY BELONGING TO OR IN THE CARE, CUSTODY OR CONTROL OF LICENSEE, IN WHOLE OR IN PART ARISING FROM, GROWING OUT OF, OR IN ANY MANNER OR DEGREE DIRECTLY OR INDIRECTLY CAUSED BY, ATTRIBUTABLE TO OR RESULTING FROM THE CONDUCT OF ANY RAILROAD OPERATIONS AT OR NEAR THE AREA IN WHICH THE HEREIN CONFERRED LICENSE IS GRANTED OR EXERCISED.**

**IT IS THE INTENTION OF THE PARTIES HERETO THAT LICENSEE SHALL BY SOLELY RESPONSIBLE FOR ALL SUCH DESTRUCTION OR DAMAGE TO PROPERTY OR FOR PERSONAL INJURY TO OR DEATH OF ANY PERSONS WHICH WOULD NOT HAVE OCCURRED IF SUCH PRIVATE ROAD CROSSING HAD NEVER BEEN CONSTRUCTED OR USED.**

**LICENSEE SHALL AT ITS SOLE EXPENSE JOIN IN OR ASSUME, AT THE ELECTION AND ON DEMAND OF RAILROAD COMPANY, THE DEFENSE OF ANY CLAIMS, DEMANDS, ACTIONS AND CAUSES OF ACTION HEREUNDER ARISING. THE WORD "RAILROAD COMPANY" AS USED IN THIS SECTION SHALL INCLUDE THE ASSIGNS OF RAILROAD COMPANY AND ANY OTHER RAILROAD COMPANY THAT MAY BE OPERATING UPON AND OVER THE TRACKS CROSSING THE LICENSE AREA.**

#### **14. INSURANCE.**

Licensee shall procure and maintain during the life of this Agreement COMMERCIAL GENERAL LIABILITY INSURANCE which will insure the indemnity undertaking hereinabove set forth. Such insurance shall have a minimum combined single limit of \$5,000,000 per occurrence with an aggregate limit of \$10,000,000 per annual policy period and said insurance shall be deemed primary as it relates to this Agreement. Licensee shall furnish the Railroad Company at the address shown below in this Section with a certificate evidencing that such insurance is in full force and effect and that the same will not be cancelled, terminated, or not renewed without at least thirty (30) days advance written notice by the insurance carrier to the Railroad Company. Such insurance shall include a complete waiver of subrogation by the insurer, a removal of any railroad exclusion through issuance of endorsement CG 24 17, and inclusion of the Railroad Company as an additional insured. In addition to other information, the certificate shall contain the following language:

Notwithstanding anything contained therein to the contrary, the Commercial Liability Insurance hereinabove referred to is extended to specifically insure the indemnity obligations assumed by **CITY OF MENASHA, WI** under Section 13 of an Agreement dated \_\_\_\_\_ with Wisconsin Central Ltd. covering use of Railroad Company's Property for a private road crossing. Insurer shall not

cancel, terminate, or allow to lapse by reason of nonrenewal the policy without providing Wisconsin Central Ltd. at least thirty (30) days' advance written notice, said notice to be sent via certified mail to:

Regional Chief Engineer  
Wisconsin Central Ltd.  
17641 Ashland Avenue  
Homewood, Illinois 60430-1345

15. REMOVAL OF ROADWAY AND CROSSING PROPER.

Prior to termination of this Agreement, Licensee shall remove its Roadway from Railroad Company's Property (except for the Crossing Proper located between the ends of ties) and restore the Railroad Company's Property, as near as may be, to its former condition insofar as such restoration may in the opinion of Railroad Company's duly authorized representative be practical, all at Licensee's sole risk and expense. If Licensee fails to so remove and restore, Railroad Company shall have the right, but not the obligation, to do so at Licensee's sole risk and expense. Upon termination, Railroad Company shall have the right, but not the duty, to remove the Roadway and Crossing Proper and to restore the Railroad Company's Property, all at Licensee's sole risk and expense. Licensee shall pay the cost of any work performed by Railroad Company upon presentation of a bill. Railroad Company shall have the right to require Licensee to deposit the estimated cost of any or all removal or restoration work involving the Roadway and/or Crossing Proper or to furnish an acceptable performance bond in such amount upon execution of this Agreement or at any time thereafter to assure complete performance under this Section.

16. ASSIGNMENT.

Licensee shall not have the right to assign this Agreement without first obtaining the consent in writing of the Railroad Company, which consent will not be unreasonably withheld.

17. TAXES.

The Licensee shall pay all taxes, general and special, license fees or other charges which may become due or which may be assessed against the premises of the Railroad Company because of the construction, existence, operation or use of said Roadway and Crossing Proper, or the business conducted in connection with said facility, and shall reimburse the Railroad Company for any such taxes, license fees or other charges which may be paid by the Railroad Company upon the presentation of bills therefor.

18. NON-CONVERSION TO PUBLIC USE.

Licensee agrees to take no action of any kind whatsoever or to allow any third person to take any action which would result in the conversion of this License Area from a private road crossing to a public road crossing over Railroad Company's Property. In the event of a breach of this condition by the Licensee, the Licensee shall be liable for all damages incurred by the Railroad Company as a result of such breach.

19. BILLS.

All bills submitted by the Railroad Company to Licensee pursuant to the terms of this Agreement shall be paid by Licensee within fifteen (15) days of receipt thereof.

20. ENFORCEABILITY.

In the event that any parts, sections or other portions of this Agreement are found unenforceable under the applicable law of any courts having jurisdiction over this Agreement, the remaining parts, sections or other portions thereof and the enforcement of same shall not be affected and shall otherwise remain in full effect and enforceable.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate as of the date first above written.

WISCONSIN CENTRAL LTD.

By \_\_\_\_\_  
Tom Bourgonje  
Regional Chief Engineer Regional Chief

CITY OF MENASHA

\_\_\_\_\_

By \_\_\_\_\_

Title: \_\_\_\_\_

## **SPECIAL PROVISIONS**

### **RELATIVE TO FLAGGING AND OTHER PROTECTION OF RAILROAD COMPANY TRAFFIC AND FACILITIES DURING CONSTRUCTION ADJACENT AND ABOVE, ON OR ACROSS, THE PROPERTY OF, OR ON, ABOVE AND BENEATH THE TRACKS OF THE WISCONSIN CENTRAL LTD.**

The Licensee shall, before entering upon the property of Railroad Company for performance of any work, secure a fully executed right of entry license from Railroad Company's Engineering Manager or their authorized representative for the occupancy and use of Railroad Company's property. Licensee shall confer with Railroad Company relative to requirements for railroad clearances, operation and general safety regulations.

Prior to any entry onto Railroad Company's property, employees and/or contractor(s) of Licensee doing work shall determine by the guidelines hereinafter provided and by the work to be performed the level of safety training to be required.

All employees and/or contractor(s) of Licensee not hired by Railroad Company that will work on CN property are required to have minimum [www.contractororientation.com](http://www.contractororientation.com)

- a. EXCEPTION: Railroad Company has exempted those it classifies as "Delivery Persons" from this training. This will include contractors such as UPS, FedEx, trucking companies, etc. who merely access the property to supply materials or equipment.

All employees and/or contractor(s) of Licensee hired by Railroad Company which will work on Railroad Company property are required to have minimum CN Safety and Security Awareness training, in addition to undergoing a background check. This training and background check must be obtained through the eRailSafe.com website. Minimum information required of the Licensee and/or their contractor when contacting e-RailSafe is Name, Address, Telephone, Contact Person for State Projects, DOT Contract Number, and the AAR/DOT Number. This training is good for a period of two years.

- a. EXCEPTION: Railroad Company has exempted those employees of contractors providing paving services at a road crossing under construction or repair from this requirement.
- b. EXCEPTION: Railroad Company has exempted those it classifies as "Delivery Persons" from this training. This will include contractors such as UPS, FedEx, trucking companies, etc. who merely access the property to supply materials or equipment.

All employees and/or contractor(s) of Licensee hired by Railroad Company, whose duties include and who are engaged in the inspection, construction, maintenance, or repair of railroad track, bridges, roadway, signal and communication systems, roadway facilities, or roadway machinery that will work foul of or have the potential to foul a live track are considered Roadway Workers under FRA regulations and CN Policy. They must complete the On-Track Safety Training course approved by Railroad Company and provided by R.R. Safety – AMR, P.O. Box 75, Lomira, WI 53048, telephone (920) 517-1677, email [rrsafetytraining@yahoo.com](mailto:rrsafetytraining@yahoo.com). This training must be repeated at least once each calendar year.

- a. EXCEPTION: Railroad Company has exempted those employees of contractors providing paving services at a road crossing under construction or repair from this requirement.

- b. EXCEPTION: Railroad Company has exempted those it classifies as "Delivery Persons" from this training. This will include contractors such as UPS, FedEx, trucking companies, etc. who merely access the property to supply materials or equipment.
- c. All the employees and/or contractor(s) of Licensee who will operate on-track machinery or those who will provide protection for other employees and/or contractor(s) of Licensee must also be trained on CN US Operating Rules pertaining to their duties. They must take and pass the required examination. This training is good for a period of two years.
- d. "Potential to foul a live track" is considered, at a minimum, to be working within twenty-five feet of the track; or as otherwise to be determined by CN Design & Construction Department.

The employees, contractor(s) , and/or agents of the Licensee and/or its contractor shall qualify for, and make available for inspection to Railroad Company's employees or other authorized personnel at all times while on Railroad Company property, a photo identification issued by [www.e-railsafe.com](http://www.e-railsafe.com), along with at least one other government-issued form of identification. Licensee and/or their contractor shall bear all costs of compliance with the requirements of this Section. Railroad Company reserves the right to bar any of employees or agents of Licensee and/or their contractor from Railroad Company's property at any time for any reason.

Licensee and/or any contractor engaged on their behalf, shall at all times conduct work in a manner satisfactory to the Engineering Manager of Railroad Company, or their authorized representative, and shall exercise care so as to not damage the property of Railroad Company, or that belonging to any other grantees, licensees, permittees or tenants of Railroad Company, or to interfere with railroad operations.

Engineering Manager of Railroad Company, or their authorized representative, will at all times have jurisdiction over the safety of railroad operations., The decision of the Engineering Manager or their authorized representative as to procedures which may affect the safety of railroad operations shall be final, and Licensee and/or their contractor shall be governed by such decision.

All work shall be conducted in such a manner as will assure the safety of Railroad Company. Railroad Company's authorized representative shall have the right, but not the duty, to require certain procedures to be used or to supervise the work on Railroad Company's property.

Should any damage occur to Railroad Company property as a result of the authorized or unauthorized operations of Licensee and/or their contractor and Railroad Company deems it necessary to repair such damage or perform any work for the protection of its property or operations, the Licensee and/or their contractor, as the case may be, shall promptly reimburse Railroad Company for the actual cost of such repairs or work. For the purpose of these Special Provisions, actual cost shall be deemed to include the direct cost of any labor, materials, equipment, or contract expense plus Railroad Company's current standard additives in each instance.

All work shall be conducted in such a manner as will assure the safety of Railroad Company. Railroad Company's authorized representative shall have the right, but not the duty, to require certain procedures to be used or to supervise the work on Railroad Company's property. Any accidents / incidents occurring on Railroad Company property, that result in or had the potential of causing serious injury, lost work days, vehicle or property damage must be

reported to the Railroad Company representative within 24 hours. All such incidents will be fully investigated by the Licensee and/or their contractor. The Licensee shall subsequently provide a written report to Engineering Manager of Railroad Company, or their authorized representative, within seven (7) days detailing the nature of the incident, the cause(s), regulatory authorities notified, and a specific action plan to prevent recurrence.

Licensee shall promptly notify Railroad Company of any releases of fuel or other equipment fluids from Licensee's activities hereunder that exceed five (5) gallons in volume. Releases of fuel or fluids amounting to five (5) gallons or less shall be documented by Licensee and reported to Railroad Company on a monthly basis. Licensee shall be solely responsible for reporting a) releases of hazardous substances, materials and wastes from Licensee's activities hereunder in excess of the reportable quantity, and b) releases of petroleum products from Licensee's activities hereunder causing a sheen on any water of the United States, to the appropriate governmental authorities and the Railroad Company.

If the work requires the construction of a temporary grade crossing across the track(s) of Railroad Company, Licensee and/or their contractor shall make the necessary arrangements and execute Railroad Company's temporary grade crossing agreement for the construction, protection, maintenance, and later removal of such temporary grade crossing. The cost of such temporary grade crossing construction and later removal shall be prepaid to Railroad Company. Additional costs for repairs, maintenance or protection will be paid within thirty (30) days upon receipt of bill(s) therefor.

Licensee and/or their contractor shall at no time cross Railroad Company's property or tracks with vehicles or equipment of any kind or character, except at such temporary grade crossing as may be constructed as outlined herein, or at any existing and open public grade crossing. Operation over such crossing shall be at the direction and method of Railroad Company's Engineering Manager or their authorized representative.

Railroad Company may, at Licensee's and/or their contractor's sole cost, risk and expense, furnish whatever protective services it considers necessary, including, but not limited to, flagger(s), inspector(s), and stand-by personnel. Flagging protection, inspection services, or standby personnel required by Railroad Company for the safety of railroad operations because of work being conducted by Licensee and/or their contractor, or in connection therewith, will be provided by Railroad Company and the cost of Licensee and shall be prepaid to Railroad Company by Licensee and/or their contractor. Flagging protection, inspection services, or standby personnel, necessary or provided in excess of prepayment amounts will be billed at the proper rates and will be promptly paid by overnight delivery.

In the event Railroad Company is unable to furnish protective services at the desired time or on the desired date(s), or if Licensee's prepayment for such services is exhausted and not replenished by Licensee and/or their contractor, Licensee and/or their contractor shall not perform any work on Railroad Company's property until such time and date(s) that appropriate Railroad Company services can be made available and/or appropriate prepayment is received. It is understood that Railroad Company shall not be liable for any delay or increased costs incurred by Licensee and/or their contractor owing to Railroad Company's inability or failure to have appropriate protective services available at the time or on the date requested.

Licensee and/or their contractor shall request and secure flagging protection by written notice to Railroad Company using CN's "Request for Flagging Services" form. This form must be submitted at least ten (10) working days in advance of proposed performance of any work or access to Railroad Company's property.

Flagging protection will be required during any operation involving direct and potential interference with Railroad Company's tracks or traffic. This may include but is not limited to fouling of railroad operating clearances, reasonable proximity of accidental hazard to railroad traffic, work within twenty-five (25) feet horizontally of the nearest centerline of any railroad track, any work over any railroad track, or in any other condition that Railroad Company deems protective services necessary, which may include work on or off Railroad Company's property more than twenty-five (25) feet from the nearest centerline of any railroad track, such as any equipment extension (including but not limited to a crane boom) that will reach or has the potential to reach within twenty-five (25) feet of any track.

Licensee and/or their contractor shall request, prepay, and secure Railroad Company signal facility locates by written notice to Railroad Company along with submission of CN's "Request for Flagging Services" form at least ten (10) working days in advance of proposed performance of any work or access to Railroad Company property. Notice to Railroad Company does not fulfill or satisfy any other notification requirements for utility locates for non-railroad facilities.

Railroad Company may require that prior to digging, trenching, or boring activities on or near Railroad Company property, or beneath any railroad track, an on-site meeting be conducted with Railroad Company's Signal Department representative. No digging, trenching or boring activities shall be conducted in the proximity of any known buried Railroad Company signal cables without Railroad Company's Signal Department representative being present.

The rate of pay for Railroad Company employees will be the prevailing hourly rate for not less than eight (8) hours for the class of labor at regular rates during regularly assigned work hours, and at overtime rates outside of regular hours and in accordance with Labor Agreements or Schedules plus Railroad Company's current standard additives in each instance.

Wage rates are subject to change, at any time, by law or agreement between Railroad Company and employees, and may be retroactive because of negotiations or a ruling by an authorized Governmental Agent. If the wage rates are changed, Licensee and/or their contractor shall pay on the basis of the new rates and/or additives.

No digging, trenching, or boring on Railroad Company property shall be conducted without Railroad Company's written approval of the plans that were furnished to Railroad Company's Engineering Manager at least thirty (30) in advance of the excavation.

The following temporary clearances are the minimum that must be maintained at all times during any operation on or adjacent to Railroad Company property:

- Vertical: 22'-0" (7.00 m) above top of highest rail within 12'-0" (3.81 m) of the centerline of any track
- Horizontal: 12'-0" (3.81 m) from centerline of the nearest track, measured at right angles thereto

If lesser clearances than the above are required for any part of the work, Licensee and/or their contractor shall secure written authorization from Railroad Company's Engineering Manager for such lesser clearances in advance of the start of that portion of the work.

No materials, supplies, or equipment will be stored within twenty-five (25) feet from the centerline of any railroad track, measured at right angles thereto.

Licensee and/or their contractor will be required upon the completion of the work to remove from within the limits of Railroad Company's property all machinery, equipment, surplus materials, false work, rubbish or temporary buildings, and to leave said property in a condition

satisfactory to the Engineering Manager of Railroad Company or their authorized representative.

Nothing in these Special Provisions shall be construed to place any responsibility on Railroad Company for the quality or conduct of the work performed by Licensee and/or their contractor hereunder. Any approval given or supervision exercised by Railroad Company hereunder, or failure of Railroad Company to object to any work done, material used, or method of operation shall not be construed to relieve Licensee and/or their contractor of any obligations pursuant hereto or under the License these Special Provisions are appended to.

Accepted: \_\_\_\_\_

Print Name: \_\_\_\_\_

## Pamela Captain

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**From:** Ken Horner <kah@cvmic.com>  
**Sent:** Wednesday, July 13, 2016 9:27 AM  
**To:** Pamela Captain  
**Cc:** Mike DeMoss  
**Subject:** Re: Insurance Premium Question

Good morning Pam - Mike forwarded your question regarding the attached agreement. The City's liability premium will not change as a result of this agreement. The crossing agreement does create a potential exposure to the City's self-insured retention because of the indemnification provisions, however, this is no different than many other situations the City encounters in the course of providing amenities for the public. As always, the exposure can be mitigated by ensuring the area around the crossing is properly maintained and periodically inspected (and documented). Let me know if you have any questions or need additional information.

Sent from my iPad

On Jul 13, 2016, at 7:54 AM, Mike DeMoss <[mld@cvmic.com](mailto:mld@cvmic.com)> wrote:

Ken: Can you help Pam with this question. Mike

**From:** Pamela Captain [<mailto:pcaptain@ci.menasha.wi.us>]  
**Sent:** Tuesday, July 12, 2016 4:18 PM  
**To:** Mike DeMoss <[mld@cvmic.com](mailto:mld@cvmic.com)>  
**Subject:** Insurance Premium Question

Good afternoon, Mike –

Menasha is working on a new walking/biking trail project which location requires that we secure a railroad crossing permit. The railroad has agreed to a ½ switchback crossing. Attached is the license contract provided by the railroad. At our last common council meeting an alderman asked to the effect, “How much will our liability insurance increase as a result of the railroad crossing?” and stated “I think we should put in a full switchback crossing.” Can you provide some input? If I can provide further details let me know. Thank you, Pam

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As a local governmental entity, the City of Menasha is subject to Wisconsin statutes relating to open records. Any e-mail received by anyone at the City of Menasha, as well as any e-mail sent

**895.519 DAMAGES, LIABILITY, MISCELLANEOUS COURT Updated 13–14 Wis. Stats. 30 PROVISIONS**

(5) Nothing in this section affects the assumption of risk under s. 895.525 by a person participating in a recreational activity including camping.

History: 2015 a. 293; s. 13.92 (1) (bm) 2.

**895.52 Recreational activities; limitation of property owners' liability. (1) DEFINITIONS.** In this section:

(ag) "Agricultural tourism activity" means an educational or recreational activity that takes place on a farm, ranch, grove, or other place where agricultural, horticultural, or silvicultural crops are grown or farm animals or farmed fish are raised, and that allows visitors to tour, explore, observe, learn about, participate in, or be entertained by an aspect of agricultural production, harvesting, or husbandry that occurs on the farm, ranch, grove, or other place.

(ar) "Governmental body" means any of the following:

1. The federal government.
2. This state.
3. A county or municipal governing body, agency, board, commission, committee, council, department, district or any other public body corporate and politic created by constitution, statute, ordinance, rule or order.
4. A governmental or quasi-governmental corporation.
5. A formally constituted subunit or an agency of subd. 1., 2., 3. or 4.

(b) "Injury" means an injury to a person or to property.

(c) "Nonprofit organization" means an organization or association not organized or conducted for pecuniary profit.

(d) "Owner" means either of the following:

1. A person, including a governmental body or nonprofit organization, that owns, leases or occupies property.
2. A governmental body or nonprofit organization that has a recreational agreement with another owner.

(e) "Private property owner" means any owner other than a governmental body or nonprofit organization.

(f) "Property" means real property and buildings, structures and improvements thereon, and the waters of the state, as defined under s. 281.01 (18).

(g) "Recreational activity" means any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "Recreational activity" includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle or utility terrain vehicle, operating a vehicle, as defined in s. 340.01 (74), on a road designated under s. 23.115, recreational aviation, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, participating in an agricultural tourism activity, sport shooting and any other outdoor sport, game or educational activity. "Recreational activity" does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place.

(h) "Recreational agreement" means a written authorization granted by an owner to a governmental body or nonprofit organization permitting public access to all or a specified part of the owner's property for any recreational activity.

(hm) "Recreational aviation" means the use of an aircraft, other than to provide transportation to persons or property for compensation or hire, upon privately owned land. For purposes of this definition, "privately owned land" does not include a public-use airport, as defined in s. 114.002 (18m).

(j) "Residential property" means a building or structure designed for and used as a private dwelling accommodation or private living quarters, and the land surrounding the building or structure within a 300-foot radius.

(2) NO DUTY; IMMUNITY FROM LIABILITY. (a) Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:

1. A duty to keep the property safe for recreational activities.
2. A duty to inspect the property, except as provided under s. 23.115 (2).
3. A duty to give warning of an unsafe condition, use or activity on the property.

(b) Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property or for any death or injury resulting from an attack by a wild animal.

(3) LIABILITY; STATE PROPERTY. Subsection (2) does not limit the liability of an officer, employee or agent of this state or of any of its agencies for either of the following:

(a) A death or injury that occurs on property of which this state or any of its agencies is the owner at any event for which the owner charges an admission fee for spectators.

(b) A death or injury caused by a malicious act or by a malicious failure to warn against an unsafe condition of which an officer, employee or agent knew, which occurs on property designated by the department of natural resources under s. 23.115 or designated by another state agency for a recreational activity.

(4) LIABILITY; PROPERTY OF GOVERNMENTAL BODIES OTHER THAN THIS STATE. Subsection (2) does not limit the liability of a governmental body other than this state or any of its agencies or of an officer, employee or agent of such a governmental body for either of the following:

(a) A death or injury that occurs on property of which a governmental body is the owner at any event for which the owner charges an admission fee for spectators.

(b) A death or injury caused by a malicious act or by a malicious failure to warn against an unsafe condition of which an officer, employee or agent of a governmental body knew, which occurs on property designated by the governmental body for recreational activities.

(5) LIABILITY; PROPERTY OF NONPROFIT ORGANIZATIONS. Subsection (2) does not limit the liability of a nonprofit organization or any of its officers, employees or agents for a death or injury caused by a malicious act or a malicious failure to warn against an unsafe condition of which an officer, employee or agent of the nonprofit organization knew, which occurs on property of which the nonprofit organization is the owner.

(6) LIABILITY; PRIVATE PROPERTY. Subsection (2) does not limit the liability of a private property owner or of an employee or agent of a private property owner whose property is used for a recreational activity if any of the following conditions exist:

(a) The private property owner collects money, goods or services in payment for the use of the owner's property for the recreational activity during which the death or injury occurs, and the aggregate value of all payments received by the owner for the use of the owner's property for recreational activities during the year in which the death or injury occurs exceeds \$2,000. The following do not constitute payment to a private property owner for the use of his or her property for a recreational activity:

1. A gift of wild animals or any other product resulting from the recreational activity.
2. An indirect nonpecuniary benefit to the private property owner or to the property that results from the recreational activity.
3. A donation of money, goods or services made for the management and conservation of the resources on the property.
4. A payment of not more than \$5 per person per day for permission to gather any product of nature on an owner's property.
5. A payment received from a governmental body.
6. A payment received from a nonprofit organization for a recreational agreement.

7. A payment made to purchase products or goods offered for sale on the property.

(b) The death or injury is caused by the malicious failure of the private property owner or an employee or agent of the private property owner to warn against an unsafe condition on the property, of which the private property owner knew.

(c) The death or injury is caused by a malicious act of the private property owner or of an employee or agent of a private property owner.

(d) The death or injury occurs on property owned by a private property owner to a social guest who has been expressly and individually invited by the private property owner for the specific occasion during which the death or injury occurs, if the death or injury occurs on any of the following:

1. Platted land.
2. Residential property.

3. Property within 300 feet of a building or structure on land that is classified as commercial or manufacturing under s. 70.32 (2) (a) 2. or 3.

(e) The death or injury is sustained by an employee of a private property owner acting within the scope of his or her duties.

(7) **NO DUTY OR LIABILITY CREATED.** Except as expressly provided in this section, nothing in this section, s. 101.11, or s. 895.529 nor the common law attractive nuisance doctrine creates any duty of care or ground of liability toward any person who uses another's property for a recreational activity.

**History:** 1983 a. 418; 1985 a. 29; 1989 a. 31; 1995 a. 27, 223, 227; 1997 a. 242; 2011 a. 93, 208; 2013 a. 20, 269, 318; 2015 a. 195.

**NOTE:** 1983 Wis. Act 418 contains a statement of legislative intent in section 1.

A municipality is immune from liability for a defective highway or public sidewalk only when the municipality has turned the highway or sidewalk over, at least in part, to recreational activities and when damages result from recreational activity. *Bystery v. Village of Sauk City*, 146 Wis. 2d 247, 430 N.W.2d 611 (Ct. App. 1988).

"Recreational activity" does not apply to random wanderings of a young child that are not similar to activities listed in sub. (1) (g). *Shannon v. Shannon*, 150 Wis. 2d 434, 442 N.W.2d 25 (1989).

The state's role as trustee of public waters is equivalent to ownership, giving rise to recreational immunity. *Sauer v. Reliance Insurance Company*, 152 Wis. 2d 234, 448 N.W.2d 256 (Ct. App. 1989).

Indirect pecuniary benefits constitute "payment" under sub. (6) (a). *Douglas v. Dewey*, 154 Wis. 2d 451, 453 N.W.2d 500 (Ct. App. 1990).

"Injury" under sub. (1) (b) includes death. *Moua v. Northern States Power Co.* 157 Wis. 2d 177, 458 N.W.2d 836 (Ct. App. 1990).

By providing a lifeguard a landowner does not assume a duty to provide lifeguard services in a non-negligent manner. *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 464 N.W.2d 654 (1991).

For purposes of sub. (4) (b), conduct is "malicious" when it is the result of hatred, ill will, or revenge, or is undertaken when insult or injury is intended. *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 464 N.W.2d 654 (1991).

Immunity is not limited to injuries caused by defects in property itself, but applies to all injuries sustained during use. *Johnson v. City of Darlington*, 160 Wis. 2d 418, 466 N.W.2d 233 (Ct. App. 1991).

A young child's inability to intend to engage in recreational activity does not render landowner immunity inapplicable when the activity is recreational in nature. *Nelson v. Schreiner*, 161 Wis. 2d 798, 469 N.W.2d 214 (Ct. App. 1991).

Illegal gambling conducted by a club occupying city park land placed the club outside the protection of the immunity statute. *Lee v. Elk Rod & Gun Club Inc.* 164 Wis. 2d 103, 473 N.W.2d 581 (Ct. App. 1991).

A party is not immune as an occupant when evidence unequivocally shows intentional and permanent abandonment of the premises had occurred. *Mooney v. Royal Ins. Co.* 164 Wis. 2d 516, 476 N.W.2d 287 (Ct. App. 1991).

Walking to or from a non-immune activity does not change a landowner's status. *Hupf v. City of Appleton*, 165 Wis. 2d 215, 477 N.W.2d 69 (Ct. App. 1991).

Sub. (2) (b) does not require a person injured by a wild animal to be engaged in a recreational activity for immunity to attach to the property owner. A captive deer is a wild animal. *Hudson v. Janesville Conservation Club*, 168 Wis. 2d 436, 484 N.W.2d 132 (1992).

A municipal pier was the type of property intended to be covered by the recreational immunity statute. *Crowbridge v. Village of Egg Harbor*, 179 Wis. 2d 565, 508 N.W.2d 15 (Ct. App. 1993).

A church that paid a fee to reserve park space, including a ball diamond, for a picnic where a "pickup" softball was played was not a sponsor of an organized team sport activity under sub. (1) (g). *Weina v. Atlantic Mutual Ins. Co.* 179 Wis. 2d 774, 508 N.W.2d 67 (Ct. App. 1993).

Whether a person intended to engage in recreational activity is not dispositive in determining whether recreational activity is engaged in. The nature and purpose of the activity must be given primary consideration. *Linville v. City of Janesville*, 184 Wis. 2d 705, 516 N.W.2d 427 (1994).

Recreational immunity does not extend to activities of the landowner acting independently of its functions as owner. Immunity did not apply to city paramedics pro-

viding service to an accident victim at a city park. *Linville v. City of Janesville*, 184 Wis. 2d 705, 516 N.W.2d 427 (1994).

Limited liability for nonprofit organizations is not unconstitutional on equal protection grounds. *Szarzynski v. YMCA, Camp Minikani*, 184 Wis. 2d 875, 517 N.W.2d 135 (1994).

Visiting a neighbor to say hello is not a recreational activity under this section. *Sievert v. American Family Mut. Ins. Co.* 190 Wis. 2d 413, 528 N.W.2d 413 (1995).

That a local firefighter's picnic generated profits that were used for park maintenance and improvements and the purchase of fire equipment did not result in the event being a commercial, rather than recreational, activity under this section. *Fischer v. Doylestown Fire Department*, 199 Wis. 2d 83, 549 N.W.2d 575 (Ct. App. 1995), 95-0796.

Land need not be open for recreational use for immunity to apply under this section. The focus is on the activity of the person who enters on and uses the land. Immunity applies without regard to the owner's permission. *Verdoljak v. Mosinee Paper Corp.* 200 Wis. 2d 624, 547 N.W.2d 602 (1996), 94-2549.

An activity essentially recreational in nature will not be divided into component parts, at one moment recreational and at another not, in applying this section. *Verdoljak v. Mosinee Paper Corp.* 200 Wis. 2d 624, 547 N.W.2d 602 (1996), 94-2549.

Recreational immunity does not attach to a landowner when an act of the landowner's officer, employee, or agent that is unrelated to the maintenance or condition of the land causes injury to a recreational land user. *Kosky v. International Association of Lions Clubs*, 210 Wis. 2d 463, 565 N.W.2d 260 (Ct. App. 1997), 96-2532.

A portable ice shanty located on a frozen lake does not qualify as recreational "property," and its presence on the lake is insufficient to establish its owner as an "occupant" of the lake entitled to recreational immunity. *Doane v. Helenville Mutual Insurance Co.* 216 Wis. 2d 345, 575 N.W.2d 734 (Ct. App. 1998), 97-1420.

Walking for exercise through a park on the way to do errands was a recreational activity. *Lasky v. City of Stevens Point*, 220 Wis. 2d 1, 582 N.W.2d 64 (Ct. App. 1998), 97-2728.

To find immunity under this section, the court must examine not only the plaintiff's reason for being on the property, but also the activity taking place on the property. While a spectator's presence at a school football game is recreational, the exception from landowner immunity for injuries incurred in recreational activities for sponsors of organized sports extends to spectators, not just participants. *Meyer v. School District of Colby*, 226 Wis. 2d 704, 595 N.W.2d 539 (1999), 98-0482.

An attendee at a fair who was injured while attempting to capture a runaway steer was engaged in recreational activity. There is no "Good Samaritan" exception to the recreational immunity provided by this section. *Schultz v. Grinnell Mutual Reinsurance Co.* 229 Wis. 2d 513, 600 N.W.2d 243 (Ct. App. 1999), 98-3466.

Immunity for nonprofit organizations is not limited to those that act in the public interest and gratuitously open their land to the general public. It is not a violation of equal protection to treat "non-charitable" nonprofit organizations differently than private property owners. *Bethke v. Lauderdale of LaCrosse, Inc.* 2000 WI App 107, 235 Wis. 2d 103, 612 N.W.2d 332, 99-1897.

Although individual condominium unit owners held title to an undivided interest in common areas, a condominium association was an occupant and therefore an owner under sub. (1) (d). *Bethke v. Lauderdale of LaCrosse, Inc.* 2000 WI App 107, 235 Wis. 2d 103, 612 N.W.2d 332, 99-1897.

The owner of property subject to an easement is an "owner" under sub. (1) (d). The plaintiff's walking across the easement to gain access to a boat was recreational as the walk was inextricably connected to recreational activity. The plaintiff user of the easement, who was granted the right to use it by a 3rd-person holder of the easement, was not a social guest of the land owner under sub. (6) (d) expressly and individually invited to use the property. The fact that the easement owner granted the right of use as part of the sale of the boat did not render the landowner exempt from immunity under sub. (6) (a). *Urban v. Grasser*, 2001 WI 63, 243 Wis. 2d 673, 627 N.W.2d 511, 99-0933.

An "owner" under sub. (1) (d) 1. includes an "occupant." A child who is an occupant is capable of extending an invitation that triggers the social guest exception under sub. (6) (d). A guest's continuous act that begins on an owner's property but propels the guest a few feet from the property where an injury occurs compelled the conclusion that sub. (6) (d) must be construed to allow for the extension of the social guest status to the injuries suffered. *Waters v. Pertzborn*, 2001 WI 62, 243 Wis. 2d 703, 627 N.W.2d 497, 99-1702.

This section is liberally construed in favor of property owners when the activity in question is not specifically listed but is substantially similar to listed activities or when the activity is undertaken in circumstances substantially similar to the circumstances of a recreational activity. *Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse*, 2001 WI 64, 244 Wis. 2d 290, 627 N.W.2d 527, 99-0327.

Because a child's subjective assessment of recreational activity could include every form of child's play, an objective, reasonable adult standard must be applied to determine whether a child's play is recreational. Crawling through stacks of baled paper at an industrial site while lighting matches and starting fires was not recreational activity. *Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse*, 2001 WI 64, 244 Wis. 2d 290, 627 N.W.2d 527, 99-0327.

The nature of property can be a significant factor in determining whether an activity is recreational, although it is not dispositive. That a commercial site is used only for a business purpose that is not open to the public, as indicated by a fence to keep people away, argues against children's mischievous conduct on the premises being substantially similar to a recreational activity. *Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse*, 2001 WI 64, 244 Wis. 2d 290, 627 N.W.2d 527, 99-0327.

A deer stand is a "structure" under sub. (1) (f). A structure or improvement need not be owned by the owner of the underlying land to constitute "property" under sub. (1) (f). *Peterson v. Midwest Security Insurance Co.* 2001 WI 131, 248 Wis. 2d 567, 636 N.W.2d 727, 99-2987.

A suit by an elementary school student injured while playing during a mandatory school recess was not barred by this section because the student did not enter the school property to engage in a recreational activity, but for education purposes in order to comply with the state's compulsory attendance and truancy laws. *Auman v. School District of Stanley-Boyd*, 2001 WI 125, 248 Wis. 2d 548, 635 N.W.2d 762, 00-2356.

**895.52 DAMAGES, LIABILITY, MISCELLANEOUS COURT Updated 13–14 Wis. Stats. 32 PROVISIONS**

Sponsorship under sub. (1) (g) contemplates a relationship between the person or organization paying for or planning the project or activity and the intended beneficiary and envisions a relationship between the sponsor and the activity resulting in financial benefits to the sponsor. That a city sponsored one soccer association did not mean it was a sponsor of all organized soccer team activities on city fields. *Miller v. Wausau Underwriters Insurance Co.* 2003 WI App 58, 260 Wis. 2d 581, 659 N.W.2d 494, 02–1632.

As long as one of the purposes for engaging in the activity is recreation the statute attaches and bars a claim. *Kautz v. Ozaukee County Agricultural Society*, 2004 WI App 202, 276 Wis. 2d 833, 689 N.W.2d 771, 03–3281.

That plaintiff's claim was she was injured when she became infected with E Coli as a result of climbing on farm equipment and not as a result of an activity on land or improvements to land was irrelevant. Whether or not the equipment was property within the meaning of this section, the injuring mechanism was not the farm equipment, but rather the bacteria from animal waste tracked onto the equipment from the defendant's real property and was directly related to the condition or maintenance of the defendant's real property. *Kautz v. Ozaukee County Agricultural Society*, 2004 WI App 202, 276 Wis. 2d 833, 689 N.W.2d 771, 03–3281.

An owner under sub. (1) (d) 1. includes a person who has the actual use of the property without legal title, dominion, or tenancy and encompasses a resident of land who is more transient than either a lessee or an owner. An owner under sub. (1) (d) 2. is a governmental body or nonprofit organization that has a written authorization granted by an owner permitting public access to the owner's property for any recreational activity. It would be unreasonable to allow a snowmobile association immunity if it were granted an easement directly, but disallowing it if the easement went first to a government entity, which then arranged with the association to manage, maintain, and construct the trails necessary for recreational access. *Leu v. Price County Snowmobile Trails Association, Inc.* 2005 WI App 81, 280 Wis. 2d 765, 695 N.W.2d 889, 04–1859.

Walking may or may not be a recreational activity under the statute, depending on the circumstances. Mere presence on property suitable for recreational activity when a plaintiff is injured does not, ipso facto, make this section applicable. Although the injured person's subjective assessment of the activity is pertinent, it is not controlling. A court must consider the nature of the property, the nature of the owner's activity, and the reason the injured person is on the property. A court should consider the totality of circumstances surrounding the activity, including the intrinsic nature, purpose, and consequences of the activity. *Rintelman v. Boys & Girls Clubs of Greater Milwaukee, Inc.* 2005 WI App 246, 288 Wis. 2d 394, 707 N.W.2d 897, 04–2669.

The legislature did not enact this section to stop landowners from engaging in negligent behavior, but to induce property owners to open their land for recreational use. Recreational users are to bear the risk of the recreational activity. *Held v. Ackerville Snow Club*, 2007 WI App 43, 300 Wis. 2d 498, 730 N.W.2d 428, 06–0914.

This section does not distinguish between active and passive negligence. Claims for passive negligence, such as a snowmobile club's alleged failure to retrieve grooming equipment from a trail, were no more viable than claims for active negligence, such as an alleged decision to leave the disabled equipment partially on the trail in a blind curve. All of the acts alleged were related to the condition or maintenance of the snowmobile trail. *Held v. Ackerville Snow Club*, 2007 WI App 43, 300 Wis. 2d 498, 730 N.W.2d 428, 06–0914.

Sub. (1) (c) does not define nonprofit by referencing the chapter under which corporations were incorporated, either ch. 180 or 181, so that factor is not dispositive of the question. It would be an absurd result to read this section as making a for-profit organization out of an organization that throughout its existence has been governed by articles of incorporation that define it as a nonprofit, has been documented by state agencies as a nonprofit, and has been in compliance with IRS regulations as a nonprofit. *De La Trinidad v. Capitol Indemnity Corporation*, 2009 WI 8, 315 Wis. 2d 324, 759 N.W.2d 586, 07–0045.

An occupant under sub. (1) (d) 1. includes persons who, while not owners or tenants, have the actual use of land. Occupant includes one who has the actual use of property without legal title, dominion, or tenancy. In order to give meaning to "occupies," the term should be interpreted to encompass a resident of land who is more transient than either a lessee or an owner. *Milton v. Washburn County*, 2011 WI App 48, 332 Wis. 2d 319, 797 N.W.2d 924, 10–0316.

By including "cutting or removing wood" within the definition of "recreational activity," the legislature made a policy choice that engaging in the activity of "cutting or removing wood" is a recreational activity. In cases in which an individual was injured while engaging in an activity specifically enumerated under the statute, the courts have determined that the activity is "recreational," without examining the various aspects or the purposes of the activity. *WEA Property & Casualty Insurance Company v. Krisik*, 2013 WI App 139, 352 Wis. 2d 73, 841 N.W.2d 290, 11–1335.

For purposes of this section, sub. (1) (d) 1. defines an "owner," as a person "that owns, leases or occupies property." It is not the rule that one occupies property for purposes of the recreational immunity statute only when there is express permission to enter the property. *WEA Property & Casualty Insurance Company v. Krisik*, 2013 WI App 139, 352 Wis. 2d 73, 841 N.W.2d 290, 11–1335.

Case law makes clear that the act of walking to or from an immune activity constitutes recreational activity. *Carini v. ProHealth Care, Inc.* 2015 WI App 61, 364 Wis. 2d 658, 869 N.W.2d 515, 14–1131.

Recreational immunity applies when a temporary condition is placed upon the land. The length of time the allegedly negligent unsafe condition is present does not matter. A temporary, artificial condition may constitute a "condition" of the land under sub. (2) (a) 3. *Carini v. ProHealth Care, Inc.* 2015 WI App 61, 364 Wis. 2d 658, 869 N.W.2d 515, 14–1131.

The defendant hot air balloon company was not entitled to recreational immunity because the defendant was not as an "occupier" of land under sub. (1) (d) 1. None of the prior cases interpreting this section has granted immunity to a 3rd party not responsible for opening up the land to the public. Defining the defendant as an "occupier" would not further the policy of opening as much property as possible for recreational use because the land was already open for public recreational purposes. *Roberts v. T.H.E. Insurance Company*, 2016 WI 20, 367 Wis. 2d 386, \_\_\_ N.W.2d \_\_\_, 14–1508.

The defendant hot air balloon company was not an owner of property under sub. (1) (d) 1. as the balloon was not a structure and not "property" under sub. (1) (f). The hot air balloon ride was not constructed on real property. It was transient, designed to be moved at the end of the day, and not designed to remain in one place. *Roberts*

*v. T.H.E. Insurance Company*, 2016 WI 20, 367 Wis. 2d 386, \_\_\_ N.W.2d \_\_\_, 14–1508.

Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges. 1991 WLR 491.

Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of LaCrosse: Why Property Owners Should Fear the Mischief of Boys at Play and Wisconsin Supreme Court Justices at Work. *Salva*. 2002 WLR 999.

Wisconsin's Recreational Use Statute. *Pendleton*. Wis. Law. May 1993.

**895.523 Recreational activities in a school building or on school grounds; limitation of liability. (1) DEFINITIONS.** In this section:

(a) "Governing body of a charter school" means the person that operates a charter school established under s. 118.40 (2) or (2m) or the entity that operates a charter school established under s. 118.40 (2r) or (2x).

(b) "Injury" means an injury to a person or to property.

(c) 1. Except as provided in subd. 2., "recreational activity" means all of the following:

a. Any indoor physical activity, sport, team sport, or game, whether organized or unorganized, undertaken for the purpose of exercise, relaxation, diversion, education, or pleasure.

b. Any outdoor activity undertaken for the purpose of exercise, relaxation, or pleasure, including practice or instruction in any such activity. In this subd. 1. b., "outdoor activity" includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting, and any other outdoor sport, game, or educational activity.

2. "Recreational activity" does not include any indoor or outdoor organized team sport or activity organized and held by a school district, school board, or governing body of a charter school.

(d) "Recreational agreement" means a written authorization granted by a school board or the governing body of a charter school to a person that permits public access to all or a specified part of the school grounds for the purpose of any recreational activity and that satisfies the requirements under sub. (5).

(e) "School board" means the school board or board of school directors in charge of the public schools of a school district.

(f) "School building" means a building designed for and used as a school by a school district, by a school board, or by the governing body of a charter school.

(g) "School grounds" means real property, and any school buildings, accessory buildings, structures, and improvements thereon, owned, leased, or rented by a school district, by a school board, or by the governing body of a charter school and used primarily for public school purposes.

(gm) "Spectator" means a person who attends or watches a recreational activity but does not engage or participate in or intend to engage or participate in the recreational activity.

(h) "Sport" means an activity requiring physical exertion and skill and which, by its nature and organization, is competitive and includes a set of rules for play.

(2) NO DUTY; IMMUNITY FROM LIABILITY. (a) Except as provided in sub. (3), no school district, no school board, no governing body of a charter school, and no officer, employee, or agent of a school board or of a governing body of a charter school, owes to any person who enters the school grounds of the school board or of the governing body of a charter school to engage or participate in a recreational activity held pursuant to a recreational agreement any of the following:

1. A duty to keep the school grounds safe for the recreational activity.

2. A duty to inspect the school grounds.