



FDM 18-15-1 Overview and Statutory References

December 30, 2004

During the utility coordination process, it is important to know the rights of utility companies which have land interests within existing or proposed highway rights of way. In most cases utilities do not have any land interests in the existing right of way and are allowed there by permit. Early recognition of these rights by all parties involved will provide a basis to determine how the costs of relocating utility facilities will be shared between the highway agency and the utility company.

This section only highlights briefly the legal principles and policies which establish these rights and obligations. Although these principles will generally apply in most cases, there may be exceptions and each case must be considered on its own merits.

Some of the more significant state laws governing utility coordination on highways are:

- s.59.965(g) Relocation of municipal utilities
- s.59.965(h) Private occupancy of street; relocation
- s.66.0831 Interference with public service structure
- s.66.24(5)(b) Metropolitan sewerage; Powers & Duties, Construction, Roads
- s.84.06(4) Special Contracts with Railroads and Utilities
- s.84.063 Utility facilities relocation (TRANS 220)
- s.84.065 Railroad and utility alteration and relocation loan program (TRANS 30)
- s.84.08 Franchises
- s.84.295(4m) Municipal Utility Relocation; Freeway Construction
- s.86.07(2) Digging in highways
- s.86.16 Utility lines on highways; place of poles; penalty
- s.182.017 Transmission lines; privileges; damages
- s.182.0175 Damage to transmission facilities

The Federal Aid Policy Guide (FAPG) in Subchapter G, Part 645 - Utilities, Subpart A provides regulations found in 23 CFR (Code of Federal Regulations) which apply for payment of utility relocations and adjustments on federal-aid projects. Subpart B, Accommodation of Utility, outlines regulations for the accommodation of utilities on federal-aid projects.

FDM 18-15-5 Utility Occupancy of Highway Lands

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Utility facilities occupying existing highway right of way are usually there at the sufferance of the highway authority. The utility owner by statute cannot, through continued use or occupancy (whether authorized by permit or not), acquire a land right within the highway right of way.

The highway agency has the authority to designate where utility facilities may occupy the right of way. The agency may require the relocation of the facilities within the right of way or off the right of way when these facilities interfere with the construction, operation, maintenance or safety of the highway. Except for the following situations, the expense of relocating utility facilities within existing highway right of way must be borne by the utility owner:

1. Where a utility owner was allowed, at the time the right of way was acquired, to retain a prior land right within the right of way, the utility owner may be eligible for reimbursement of costs to relocate facilities from or within that land.
2. Where utility facilities located within the right of way are required to be relocated because of construction of a county expressway system in any county having a population of 500,000 or greater, the utility owners may be eligible for partial reimbursement for relocation costs. (s. 59.965 g&h Wis. Stats.)
3. Where utility facilities located within the right of way are required to be relocated because of the construction of a state-owned freeway, municipal utility owners may be eligible for partial reimbursement for relocation costs. (s. 84.295 [4m] Wis. Stats.)

4. Where a utility owner has a land interest that pre-dates the highway right of way, the utility may be eligible for partial reimbursement for relocation costs.

If the highway agency disposes of a parcel of excess highway right of way for use for non-highway purposes, the future status of utility facilities occupying the land should be considered. A thorough investigation should be made to determine the extent of each utility owner's rights. A utility owner may have occupancy rights which need to be preserved in the disposal process. This possibility is routinely addressed with the following clause inserted in excess land deeds:

"All public and private utilities located upon, over or under the above-described lands, whether by permit or easement, shall have the continued right of occupancy and the continued right of ingress and egress for personnel and equipment for the purpose of maintaining or improving their transmission and/or distribution facilities located wholly or partially within the above-described lands as of the date of this instrument."

FDM 18-15-10 Utility Occupancy and Private Lands

February 28, 2007

Utility facilities occupying private land are generally there with the approval of the landowner. Either prior to occupying the land or as the result of continuous occupancy for a period of time, the utility owner will acquire a land interest in the property. This land interest continues as the ownership of the land changes.

The land interest may be acquired in any one of the following ways:

1. Purchase of the land in fee.
2. Purchase of an easement, either singularly or jointly with another utility company.
3. Occupancy of a dedicated utility easement.
4. Service connection agreement.
5. Prescriptive rights through adverse possession of user (s. 893.28(2) stats.).

Although land interests acquired by purchase in fee or easement are generally recorded and can be found as part of a title search, there may be no recorded evidence of these land interests. The only evidence may be physical occupancy of the land with or without a supporting document in the files of the utility owner. Whether or not a land interest document is recorded does not detract from its validity.

When private property is being acquired for highway right of way, any valid land interests of the utility owner must also be acquired. The utility owner is generally eligible for compensation for releasing their land interests. Where the utility facilities on the property being acquired need to be relocated, the cost of relocating the facilities is generally an acceptable measure of compensation.

A thorough investigation should be made to determine the extent of the utility -owner's rights to use the property and the extent of their eligibility for compensation.

FDM 18-15-15 Negotiations for Utility Company Land Interest

December 30, 2004

The highway project design and construction staff generally arranges for and implements the relocation of all utility facilities that are in conflict with the construction and operation of the highway improvement project. However, when these utilities are on lands where the utility company has prior land rights, the objective is to negotiate for and acquire the utility company's land rights within the highway project area. This must be done before the highway construction work can be awarded.

The process of acquiring the utility's land rights involves negotiation of a reimbursement agreement with the company. Under this agreement, the state (or other public highway agency, when appropriate) agrees to reimburse the utility for the net costs of necessary modifications of its facilities. In exchange, the utility agrees to accept the dollar value of the facility relocation costs for its loss of or reduction in interest to the private land rights previously enjoyed. The utility further agrees to furnish a signed release of rights document to the highway authority.

The negotiation of this agreement may be a lengthy and complex process and is generally the responsibility of the Region Utilities Coordinator on state highway projects. For local highway projects, this is the responsibility of the local highway officials.

The following is a brief summary of the steps involved in the utility parcel negotiation process. It is provided so that project designers have some perspective of how it relates to their project development activity.

1. After it has been determined during the right of way plat preparation process that the utility company has a land right that must be acquired, a utility parcel is established on the plat and a utility project is

set up.

2. A formal notice is sent to the utility company along with the latest right of way plat, highway plans and draft copies of a contract agreement and a release of rights document.
3. After meetings and discussions between the utility company and highway agency staff concerning the proposed utility relocation plans, the utility company prepares and submits to the highway agency their plans, cost estimates and the signed copies of the reimbursement agreement. The release of rights documents may be furnished at this time or at any time prior to payment of the utility's final bill for the work.
4. For state highway projects, the Region Utilities Coordinator reviews the utility company's submittal and submits it to the Design Services Section for further review and approval.
For local highway projects, local agency officials review the submittal before they approve the agreement.
5. Administration of the agreement on state highway projects is generally the responsibility of the Region Projects Section. This administration responsibility includes:
 - Monitoring the utility relocation work to verify that the work is being done in accordance with the intent of the agreement, and that it is compatible with the highway construction.
 - Reviewing billings from the utility company to verify that their charges are reasonable and reflect the work performed and then forwarding the billings to central office for payment.
6. Billings from the utility company are processed through the Design Services Section and payment is made by the Bureau of Financial Services (BFS).
7. On some projects, BFS will audit the records of the utility company to verify that the charges included in the company billings are in agreement with the company's detailed records and acceptable accounting practice.
8. The signed release of rights document is recorded with the Register of Deeds in the county where the project is located and becomes a permanent part of the land title record. Temporary releases of rights are not recorded.

FDM 18-15-20 Premises and Practices

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Utility land interests acquired for highway purposes are negotiated under replacement of facility procedures which give due consideration to the high degree of public interest that utility owners are endowed by law. Based upon the statutory requirement that a utility must stand ready to serve all qualified applicants in its service area, it is usually necessary to replace the minimum function of the facilities affected by the highway improvement.

20.1 Acquisition of Lands Used for Utility Purposes

The value of damages suffered by a utility when its land interest is acquired for highway purposes is the expense incurred by the utility for the necessary modification of its facilities to accommodate the highway improvement upon such lands.

The state may enter into a conveyance contract whereby it agrees to accept the dollar value of a facility relocation as an equitable measure of damage for the loss of or reduction in interest to the private land right previously enjoyed by the utility.

Damages may be defined as reparation in money for injury sustained, and the true measure so applied to utility relocation work is that cost which the utility actually incurred in accommodating the highway improvement. The damage is not what it might cost the state or an individual to perform this work but what it actually costs the utility, and must then be developed as if the utility were doing the work of its own volition.

20.2 Adverse Possession of User

Utilities occupying private lands with utility structures for periods of time in excess of ten years acquire a user right thereto for utility purposes. The utility must be in continuous use of the real property for ten years to acquire prescriptive rights. After the passage of the appropriate time period, the private landowner cannot oust the utility for trespass and may not be able to use inverse condemnation. The landowner has lost the occupied land by adverse possession (s. 893.28(2) stats).

The department accepts utility occupancy as proof of rights to private land use providing the utility has established occupancy in excess of ten years and such right does not constitute a terminable privilege under license, permit, or other form of sufferance.

20.3 Work by Utility Forces- Reimbursement Premise

The reimbursement concept in negotiating for utility and railroad lands with functional facilities located thereon is to provide a work by utility forces agreement and payment procedure that will leave the company in the same relative position after the property taking that they enjoyed before, with their financial condition neither enhanced nor worsened and with their ability to serve unimpaired.

20.3.1 Expended Service Life (Used Life Credit)- General

In recognition that utilities must render a continuing service and that the facilities utilized for providing these services have limited lives and thus must be retired and replaced or their functions in service restored in some other fashion, the companies have, with the approval of the Public Service Commission (PSC), set up certain depreciation schedules to recapture from the rate payer the original investment in these facilities. The expended service life or "used life credit" is in essence the accumulated depreciation assigned to a specific unit of property. This amount can be calculated by multiplying the original cost of the facility's components by the certified depreciation rate and age for each class or property. This value can, if desired, be further refined by adjusting it to offset any affect of negative or positive salvage included in the depreciation rate and by considering the probable life or percent condition of the individual units as obtained from the appropriate family of survivor curves.

A used life credit is required for a utility facility being replaced, such as a building, pumping station, filtration plant, power plant, substation, or any other similar operational unit. Used life credit shall not be required for a segment of the utility's service, distribution, or transmission lines. If accomplishing such work of its own volition and at its own expense, the utility would assign cost to the depreciation accruals to offset the replacement costs, it is only equitable that the state also follow this procedure.

The justification for requiring a utility to provide a used life credit based upon original cost is to assure that the utility's capital structure is neither enhanced nor worsened after the land taking. The net cost of replacing a particular unit of utility property should not vary whether paid for by the state or utility.

The utility has an obligation to provide services and must construct, maintain, and operate facilities for this purpose as long as such are required. The utility obligation can therefore be interpreted to include the responsibility to relocate, replace, and restore such of those facilities as must be moved because of a conflict in location with other public needs.

The state's responsibility in these matters is limited to reimbursement by statute or as a right-of-way damage. The state obligation can therefore be interpreted to be a reimbursement consideration for the utility cost in replacing in kind the company's present interest in the affected facility at a value not to exceed that which it would cost the utility to accomplish the work in its normal course of business.

The utility's present interest in any partially depreciated, partially worn out facility could be said to be the depreciated book value of the facility (remaining life) which is the original cost minus the accrued depreciation.

This remaining life is the only portion of the facility that can be damaged, as the expended portion of the service life has already been used up and paid for by the rate payer through depreciation accruals. Therefore, by replacing the remaining life of the facility, the utility's present interest would be replaced.

When the existing facilities can be relocated with no new material replacing old material, there can be no assignment of used life credit. Similarly, when the utility chooses not to bill for new replacement material even though some is used, no used life or salvage credits are due.

The usual situation however requires that the existing facility be kept in operation until the new one is ready to be cut over. Thus a new segment built of brand new materials replaces the older and partially worn out segment. It must be assumed that it is impractical to obtain used material of the identical age of the existing facility. New material can be assumed to have a longer expected service life; should require less maintenance; and as most utility lines are replaced piecemeal as individual items wear out, should be of more value to the utility than was the replaced segment. In addition, were the older line to be removed or rebuilt, this newer material would probably be salvaged and reinstalled elsewhere in the system to serve out its full service life.

The used life credit will normally increase with the age of the facility, and the utility's interest (depreciated book value) will correspondingly decrease. Were this credit not provided, a utility having a very old facility replaced at state expense would obtain a greater financial advantage than a utility having a similar but fairly new facility replaced. As the older facility would have a lower salvage value, the net cost to the state would be greater.

20.3.2 Betterment

A betterment, in its broadest sense, is any improvement in the new facility that did not exist in the facility being replaced, relocated, or adjusted. To determine whether or not a betterment is present requires a comparison of the new and old segment of line. If the new segment has greater capacity, better materials, longer expected

service life, is stronger, safer and less subject to natural hazards or requires less maintenance and service, a betterment is indicated.

Once a betterment has been observed to exist, it must be determined whether the betterment is inherent in or primarily necessitated by the requirements of the highway project, or whether it is being provided at the option of the utility solely for utility purpose. This will entail a consideration of what alternate solutions are available and their comparative costs.

In general, betterments necessitated by the highway project and that represent the most economical adjustment of facilities are compensable to the same extent as the non-betterment utility work. Similarly, betterments constructed solely for utility purposes at the option of the utility are not compensable. In certain cases a portion of the betterment will be required for highway purposes while another portion will be for utility purposes. This will require an evaluation to determine the betterment credit.

20.3.3 When Required for Highway Construction

Betterments that result from the most economical adjustment of utility facilities required to accommodate highway construction usually will not require a betterment credit. This type of betterment generally consists of taller poles; additional guying, conduit, and encasement pipe; granular backfill within highway right-of-way; etc. When these betterments require no credit, it is because it has been agreed that these facility improvements are reasonable and necessary for highway purposes. It should be demonstrated that the protective measures meet code and local ordinance requirements and are representative of the utility's normal practices in similar situations. Extra-heavy-duty type construction for protection from highway hazards will require a credit from the utility for the excess costs.

1. When Required by Codes or Ordinances Applying to New Construction Only

When a highway project requires a compensable utility relocation¹ and the resulting agreed upon new utility construction must meet higher standards because of legal codes or ordinances currently in effect, such betterment may not require a credit. When an existing facility in good condition with an expected remaining service life of many more years must be relocated to accommodate a highway project, and this timing results in a legal requirement that the new construction be built in a more substantial and safer way, such improvement would not normally require a betterment credit unless specific benefits to the utility can be determined. This is a somewhat nebulous area, however, and requires that each situation be considered on its own merits.

2. When Less Expensive Than Replacement in Like Kind

With improvements in technology and materials in the utility industry, it is often possible to construct a new replacement facility containing certain inherent betterments at a lesser cost than replacement in like kind.

When the betterments have a minimal effect on capacity and are of a relatively indeterminate nature, no detailed analysis of the situation is required. This would involve minor cost items such as insulator, pole hardware, down guys, anchors, etc., which are considered to be better but are cheaper and have no readily determinable betterment value to the utility.

When the betterments produce an increase in capacity in the new facility over the facility being replaced at a lesser cost than replacement in kind, an analysis of the situation is necessary to see if a credit is required. On occasion, it may prove more economical to replace an obsolete item or one that is no longer kept in stock with a readily available item having more capacity. This situation often occurs when a standardization program has reduced the number of various sizes of items being stocked by the utility. If the total cost difference between the available and the replacement in kind item is minor, and it can be shown that a special order and acquisition would be more costly, no betterment credit will be required.

20.3.4 When Made At the Utility's Option

When it is concluded that a betterment exists, it is necessary to consider whether it was made at the option of the company for utility purposes.

Since the preliminary engineering, plan development, and estimate preparation are accomplished by the utility, it is obvious that the utility has exercised judgment as to route, type of construction, and other engineering details. It is therefore incumbent upon the utility to furnish support data for review of a betterment. In consultation with the utility, agreement should be reached as to what items constitute a betterment for company purposes and how the betterment credit is to be determined.

¹ See [FDM 12-10-1](#) for descriptions of the three types of compensable utilities.

When the betterment consists essentially of a single item of material, it can often be agreed that the betterment credit is the difference in cost between the betterment material and the replacement in like kind material. This approach is applicable only when labor, associated material, and installation costs are the same for both materials as shown by utility records.

Some betterments made at the option of the utility will be so thoroughly intermixed with the reimbursable portions of the work that the costs cannot be readily segregated. In this case it may be necessary for the utility to estimate, by the same method, the cost of the replacement in like kind facility.

The ratio of the estimated cost of the betterment segment can then be applied to the cost of the facility as built to obtain the reimbursable portion. It should be noted that in a case such as this any departure from the agreed upon work will modify the ratio of compensable to non-compensable work and must be thoroughly documented.

20.3.5 Salvage Credit

Salvage values of materials recovered from a compensable utility facility adjustment represent the value of the "unused life" of the installation and must be credited to the job. The salvage values are to be determined and calculated in the same manner and by the same methods normally used by the utility in performing work without cost participation by others.

Most utilities value reusable material returned to stores at present-day, new material prices. This method, while it may increase the portion of salvaged material that is scrapped or junked, has the advantage of avoiding the necessity of determining the value of such material by individual year of installation. It also allows some increase in the utility's capital accounts without additional cash outlay.

If the utility returns salvaged material to stores at present-day, new material prices, it will under acceptable accounting procedures later install these used items in its system at these same prices. In the event the utility returns reusable salvage material to its stores at a value other than present-day price, it should be noted in the estimate and some explanation provided in support of the method used.

It should be noted that the state does not require the utility to value salvaged materials at present-day prices of equivalent new material unless the utility normally does this in its own everyday operations.

As salvage credit is a measure (however arbitrary) of the remaining life of the facility and "used life" credit is a measure of the expended life of the same facility, the amount of the salvage credit has no effect on whether or not a "used life" credit will be required.

The subtraction of the "used life" credit from the salvage credit, the use of a special method of valuing salvaged items that results in a credit less than the utility gives itself on similar items, or the providing of a depreciated salvage value without adequate support and explanation will not be acceptable. Federal procedure requires that the utility advise the state of the time and place where recovered materials will be available for inspection prior to their disposal by sale or scrap. This requirement will be satisfied by the utility providing such information in writing. This should not be considered as prohibiting the junking of material in the field (i.e., old poles given to adjacent landowners), but notice to the state is still required.

20.3.6 Plant Loss

The acquisition of a compensable utility land interest for highway purposes may cause the premature retirement of the facilities located thereon without any replacement of their function. Under these conditions a determination of the damages to the utility caused by the highway taking in excess of the raw land value is required so that the amount of just compensation can be established.

$$\text{Original cost} - \text{depreciation} - \text{salvage} + \text{removal cost} = \text{Plant Loss}$$

Normal utility bookkeeping procedures utilize the concept of "plant loss." This item represents the actual net dollar loss to the utility resulting from the premature retirement of the facility. It is calculated by reducing the depreciated book value (original cost less accrued depreciation) by the amount of any salvage and increasing this result by the cost of removal. It is a simple, readily ascertainable figure that is in accord with basic accounting principles.

Alternate appraisal methods would utilize the "cost to cure" or the "before and after" approaches. Either of these methods would require the evaluation of the utility plant without the benefit of comparable sales, would be more expensive and time-consuming, and would probably result in a larger damage figure than obtained by plant loss.

20.4 Scheduling Utility Negotiations

The negotiations for utility interests may be lengthy and time-consuming. It is therefore necessary that the negotiations be started at the earliest date when the general details of the takings can be determined.

All utility negotiations must be completed, with all permits, agreements, and conveyance documents executed

and distributed prior to awarding the associated highway construction contract. These requirements will establish the performance schedules for accomplishment of the various phases of utility negotiations.

20.4.1 Jurisdictional Offer for Utility Land Interest

When a review of the status of negotiations indicates the possibility that the utility land interests may not be acquired by the committed schedule date, consideration must be given to completing the acquisition, including force work, under eminent domain proceedings. In the event this type of action is deemed advisable, a report of the circumstances leading to this conclusion shall be prepared and forwarded to the Chief of the Acquisition & Services Section, Bureau of Technical Services for approval.

When a jurisdictional offer has been approved and served on the utility the region staff should continue to negotiate with the company and attempt to reach an amicable solution by agreement. A jurisdictional offer merely establishes a statutory starting point for award proceedings in the event such becomes necessary to meet a committed highway schedule.

20.5 Land Interests to be Acquired

The interest to be acquired in company lands for highway purposes shall be sufficiently broad to allow the highway to be adequately constructed, operated, and maintained. This is usually accomplished by using a standard instrument of conveyance, either the "Conveyance of Rights" (Form [DT1660](#)) or "Quit Claim Deed" (Form [DT1661](#)). Refer to [Attachment 20.1](#) at the end of this procedure for a flow chart showing which conveyance form to use for acquisition of land rights. If special conditions are encountered, the standard form may be modified accordingly or a special form may be prepared.

20.5.1 Conveyance of Rights in Land, Form DT1660

1. General

Whenever a partial conveyance of rights is acquired and the utility still retains some interest (usually restricted to utility purposes only), the lands will be subject to joint use. The conveyance of rights under these circumstances shall be carefully considered to include provision for all reasonably anticipated future highway interest (enlargement or improvement of the highway) to avoid future conflict of use. The partial conveyance of rights is acceptable in situations where existing utility land use is not affected by the contemplated highway construction or the planned future expansion of the highway.

When a utility has an easement drawn in general terms, it must be assumed that once its facility is constructed across the lands, such structures establish the specific location of the easement. Form [DT1660](#) "Conveyance of Rights in Land" should be used to transfer a utility's land rights to the state in such situations.

2. For a Highway Crossing

A partial conveyance of rights will be acceptable for highway purposes whenever the utility facility (aerial or buried) will clear span the highway right-of-way with acceptable clearances and acceptable access thereto, and maintenance thereof can be provided.

3. For a Utility Parallel to Roadway

A partial conveyance of rights will be acceptable for highway purposes whenever a parallel utility land interest must be incorporated into highway lands and:

- The utility has existing facilities located thereon that do not need to be relocated for the planned highway construction.
- The utility has facilities that will have to be adjusted for highway purposes but can be relocated within the limits of its present land interest within the highway right-of-way.
- No planned highway need will require the relocation of the utility facility in the foreseeable future.

4. For Freeway Use

The partial conveyance of rights on or across lands used for freeway purposes will be acceptable if the retained rights are subservient to the highway interests being obtained for freeway operation, including full access control to the property.

The utility access rights affecting freeway lands shall be acquired by instrument of conveyance. For this purpose the following provision may be used:

The grantor releases all its rights of access to the above-described lands except as may be required

and permitted for the installation, maintenance, or repair of its permitted utility facilities located over, under, or across the said lands. Said access shall, however, be derived from other than the live lanes of the interstate (freeway) highway or the ramps and loops of its interchanges, except that in the case of emergency, temporary access may be permitted following authorization by the grantee at such defined time and under such positive controls as the said grantee shall specify.

When it is determined that the utility crossing can be installed, serviced, and maintained from outside the highway right-of-way, and the utility retains a utility purpose easement, control of such use shall be covered by separate utility permit. All utility property rights for future installations shall be terminated and this need reviewed under the Department's permit procedure. All reference to future installations on the conveyance form shall be deleted.

20.5.2 Quit Claim Deed, Form DT1661

A Quit Claim deed will be required whenever the utility facility will be relocated permanently outside the limits of its land right being incorporated into the highway right-of-way. Use Form [DT1661](#), "Quit Claim Deed by Utility " for this purpose. Value of this conveyance shall be equated at the value necessary to purchase like kind replacement land interests.

20.5.3 Unrecorded Utility Interest

Utilities often obtain their land rights for a distribution type facility through agreement to supply service to the local land owner. These rights are usually stated in general terms and give the utility the right to extend its facilities through the owner's land to service other customers. These easements are generally not recorded. Land rights for aerial transmission facilities are usually definite as to dimensions and covered by written instrument but are not always recorded. A non-recorded land interest is as valid as a recorded one and requires that region personnel determine by inspection and contact with the utilities if a utility land interest is involved.

20.5.4 Joint Occupancy- Permits and Leases

Joint use of land or facilities by two or more utilities is not uncommon and is generally covered by some form of written agreement between the parties, spelling out their rights and obligations. The region will determine the basic landowner interest, what its obligations are to the joint user (permitted or leased), and the compensation due each, if any, for utility relocation. If the owner of the land interest has no obligation to the joint user other than to advise them that it is selling out and moving, the joint user has no compensable land interest.

If the owner of the land interest could exercise its option to order the joint user off the lands but declines to do so for the highway use, the joint user may have a right to compensation by claim under s. 32.19 stats.

LIST OF ATTACHMENTS

[Attachment 20.1](#) Flow Chart