



## MEMORANDUM

Date: March 28, 2014

To: Common Council  
From: Pamela A. Captain, City Attorney

RE: City of Kaukauna et al. v. Village of Harrison et al.  
Calumet County Case No. 2013CV159

City of Menasha v. Waverly Sanitary District et al.  
Calumet County Case No. 2016CV189

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City of Kaukauna et al. v. Village of Harrison et al.  
Calumet County Case No. 2013CV159

A hearing was held on March 14, 2014, for a court order on motions to compel discovery and for a protective order. The court reviewed the parties briefing on the matters and after oral argument issued an order granting the motion to compel in part and for protective order with respect to the documents in the privilege log on the basis of claimed lawyer/client privilege.

The parties will now continue preparing briefs and compiling documentation in support of motions for summary judgment. Plaintiff's briefs are due by June 30, defendant's briefs by August 18 and reply briefs by September 8. The court will hear oral arguments on the motions scheduled for October 3, 2014.

City of Menasha v. Waverly Sanitary District et al.  
Calumet County Case No. 2013CV189

On March 21, 2014, I filed Menasha's Brief in Support of Declaratory Judgment and a Supplemental Filing in Support of Temporary Injunctive Relief in the matter. For your reference a copy of the brief is attached. Response briefs are due April 21<sup>st</sup>, reply briefs are due May 2 and oral argument will be heard by the Court on May 6, 2014. The parties decided to stage briefing in this matter limiting initial briefing to a few dispositive issues and depending on how the court rules, move into subsequent briefing as needed.



CITY OF MENASHA,

PLAINTIFF,

v.

WAVERLY SANITARY DISTRICT and  
CITY OF APPLETON and  
TOWN OF HARRISON and  
VILLAGE OF HARRISON,

CASE NO. 13-CV-189  
Case Code: 30701

AUTHENTICATED COPY  
Case # 13CV189

MAR 21 2014

Calumet County Clerk of Courts  
Barbara VanAkkeren

DEFENDANTS.

CITY OF MENASHA BRIEF IN SUPPORT OF DECLARATORY JUDGMENT

STATEMENT OF FACTS

In 1972, the Town of Harrison town board created Waverly Sanitary District, a town sanitary district, which became operational in 1984. The statutory framework creating Waverly Sanitary District is §60.71, Wis. Stats. Waverly Sanitary District (Sanitary District) provides sanitary sewer and water services to users in the City of Menasha (City), the City of Appleton (Appleton), the Village of Harrison (Village), and the Town of Harrison (Town).

Pursuant to §60.71(5), Wis. Stats., the Sanitary District consists of territory only within the Town. The district boundaries of the Sanitary District prior to March 8, 2013 are shown in **EXHIBIT A**. Effective March 8, 2013, part of the Town incorporated as the Village. As a result of the partial incorporation, the district boundaries of the Sanitary District shrunk. The Sanitary District's boundaries effective March 8, 2013 are shown in **EXHIBIT B**. Prior to March 8, 2013, the Sanitary District served: 1003 Town of Harrison patrons; 898 City of

Menasha patrons; and 67 City of Appleton patrons. *Affidavit of Greg Keil*. Effective March 8, 2013, the Sanitary District served: 898 City of Menasha patrons; 763 Town of Harrison patrons; 240 Village of Harrison patrons; and 67 City of Appleton patrons. *Affidavit of Greg Keil*.

The City of Menasha Common Council responded to the partial incorporation of the Town by adopting Resolution, R-10-13, on August 1, 2013. This resolution set forth the City's opinion regarding the statutory impact of the partial incorporation on the Sanitary District. In particular, the City concluded that because the Sanitary District now served more patrons living in the City of Menasha than patrons living in the Town, Village, or City of Appleton, Wis. Stat. §60.79(2)(dm) required that the ownership and operational control of the Sanitary District's sewer and water system be transferred to the City of Menasha. Under §60.79(2)(d), each location served is considered one patron.

On October 16, 2013, the City filed this suit seeking a declaration regarding the legal status of the Sanitary District in light of the partial incorporation of the Town and the statutory mandate in §60.79(2)(dm). The Town, Village, and Sanitary District have filed answers opposing the City's request for declaratory relief and rejecting the City's interpretation of § 60.79(2)(dm). The City of Appleton has filed an answer requesting that the court declare the parties' respective rights under the statute.

#### ARGUMENT

**A. Under Wis. Stat. § 60.79(2)(dm), the City of Menasha Became the Proper Owner and Operator of the Sewer System as a Result of the Town's Partial Incorporation.**

Under Wisconsin law, town boards are specifically authorized to create town sanitary districts. Wis. Stat. § 60.71. The territory of a town sanitary district is strictly limited to

preclude territory located within a village or city, § 60.71(5), though town sanitary districts can provide service to city and village residents pursuant to contract.

In establishing the statutory scheme applicable to town sanitary districts, the Wisconsin legislature recognized that town sanitary districts would necessarily change over time, as cities grow, territory is annexed, or all or portions of the town are incorporated. Therefore, the legislature created specific statutory provisions to address various problems and confusion that may develop as such growth and changes occur. *See* Wis. Stat. §§ 60.785, 60.79(1); 60.79(2); *Town of Sheboygan v. City of Sheboygan*, 203 Wis.2d 274, 281, 553 N.W.2d 275, 278-279, (Ct. App. 1996). Relevant to this case, § 60.79(2) provides detailed direction as to what happens to a town sanitary district as a result of partial incorporation of a town sanitary district. Under this statute, the partial incorporation of the Town of Harrison requires that the ownership and operation of the sewer and water system currently operated by the Sanitary District be transferred to the City of Menasha.

**1. Wis. Stat. § 60.79(2)(dm) governs this case.**

Wis. Stat. §60.79(2) is titled "Incorporation or Annexation of Part of a Town Sanitary District." That is precisely the situation at issue in this case. The Town of Harrison was partially incorporated to form the Village of Harrison. Under § 60.79(2)(a), the partial incorporation automatically detached the incorporated area from the sanitary district. This means that the territory comprising the Village of Harrison is no longer part of the Sanitary District. However, because the Village is still being serviced by the Sanitary District, it is necessary to consider the remaining provisions of § 60.79(2), namely, subsections (2)(c) through (2)(e). *See* § 60.79(2)(b) ("The city or village and the town sanitary district are subject to pars. (c) to (e) if territory

constituting less than the entire town sanitary district is annexed or incorporated and . . . [t] he territory is served by the town sanitary district with a water or sewerage system."); *see also Town of Hallie v. City of Eau Claire*, 173 Wis. 2d 450, 455, 496 N.W.2d 656, 658 (Ct. App. 1992).

Of particular import to this case is § 60.79(2)(dm). That subsection provides in full:

If the responsibility for continuing the operation is vested in the town sanitary district, it shall continue, except by agreement, until the proportion of users changes so that a majority of the patrons reside in the city or village, at which time the property and the responsibility shall shift to the city or village.

Wis. Stat. § 60.79(2)(dm). In other words, the town sanitary district will continue to own and operate the sanitary system unless, as a result of the incorporation, the majority of users of the system reside outside the town sanitary district's defined territory. Once the majority of users live outside the town sanitary district's territory, the property and responsibility *shall* shift away from the town sanitary district.

In their answers to the City's declaratory judgment complaint, the Town, Village and Sanitary District suggest that § 60.79(2), and subsection (2)(dm) in particular, do not apply to this case because the Sanitary District services multiple municipal entities, not just a single town or village. Additionally, they argue that subsection (2)(dm) provides only that a recently incorporated city or village, such as the Village of Harrison, would gain ownership and control of a sanitary system as a result of a recent incorporation or annexation.

Defendants have no legal authority to support these arguments. Moreover, these arguments make no sense. Section 60.79(2) is the only statute applicable to partial incorporation of town sanitary districts, and it is clear from the language of the statute that the legislature intended for this statute to provide clear guidelines for transitions within a town sanitary district.

"The aim of all statutory interpretation is to discern the intent of the legislature." *Wagner Mobil*,

*Inc. v. City of Madison*, 190 Wis. 2d 585, 591, 527 N.W.2d 301, 303, (1995). Here, the legislature clearly anticipated that town sanitary districts would not exist indefinitely. For ease of transition, the statute provides that a town sanitary district may continue to operate even after parts of the original district boundaries become city or village territory. Over time however, when the majority of users fall outside the town territory, the ownership and operation of the sanitary system must transition. This is because it would not be reasonable for a town sanitary district to continue to exist when town patrons no longer make up the major portion of the patrons of the system. Subsection (2)(dm) specifies the point at which that final transition occurs.

It makes no sense to look at the proportion of users of the system in a vacuum with only consideration being given to the number of Town users versus the number of Village users, as there are other municipal entities affected by the substantial reduction of the number of patrons who reside in the Town resulting from the partial incorporation. It is not just the recent annexation or incorporation of a specific area that is relevant to the transition in ownership. Rather, it is the fact that the proportion of town users has shrunk to the extent that they are no longer the majority of users in the system. In order to evaluate the current makeup of users in a sanitary system, it is necessary to consider all the municipalities and users served by a town sanitary district, not simply the most recently incorporated entity.

In this case, that occurred with the partial incorporation of the Town of Harrison. Until that partial incorporation, the Sanitary District served mostly Town residents. Since the incorporation, Town residents no longer make up the majority of users. That shift has triggered the application of subsection (2)(dm).

**2. Under § 60.79(2)(dm), the City of Menasha is the proper owner and operator of the sanitary sewer system because the highest proportion of users serviced by the current Sanitary District are City residents.**

Under § 60.79(2)(dm), the ownership and operation of a town sanitary district transfers from the town sanitary district to a city or village when "the proportion of users changes so that a majority of the patrons reside in the city or village." Defendants Town, Village and Sanitary District argue that this means that the Sanitary District retains control of the sanitary system so long as no city or village holds a 50% "majority" of the users of a system. According to defendants' arguments, although the Sanitary District services more users in the City of Menasha than in the District, Town, Village or City of Appleton, the City of Menasha is not the proper owner because it does not hold a 50% majority of users.

Defendants' interpretation of the statute elevates form over substance and would defeat the legislative intent of an orderly transition that vests responsibility for the provision of sewer and water service in the hands of the entity whose residents are most affected by the system. The plain meaning of the statute is to transition ownership from a town sanitary district to a city or village once the majority of users do not reside within the town sanitary district. This does not mean that a 50% majority of users must reside within a single city or village. This simply means that once fewer than half of the users reside outside the town sanitary district, the district should no longer control the sanitary system. This makes sense in terms of the natural progression of growth anticipated by the legislature.

Moreover, the only fair and just interpretation is one that transitions ownership away from a town sanitary district once the town residents are the minority of system users. Pursuant

to statute, only town residents can act as commissioners on the town sanitary district. Wis. Stat. § 60.75(3). If the town sanitary district remained as the owner and operator of a system despite comprising a minority of users, there would be an unfair lack of representation for the majority of the users of the system. As applied in this case, the Sanitary District would continue to operate the system, while the users residing in the City of Menasha, who comprise the largest group of users in the system, are left with no representation or influence in the operations of the district. Such a result would fly in the face of our system of a representative government. Certainly, the legislature did not intend this kind of absurd result.

It should also be noted that the statute does not state that a city or village must hold a "50%" majority before taking control of a sanitary sewer system. In this case, no entity has a 50% majority of Sanitary District patrons residing within its territory. Given that there are three municipal entities, the City of Menasha, the City of Appleton, and the Village, it is highly unlikely that any single entity will ever acquire a 50% majority of Sanitary District users. However, it is inevitable that additional annexations into the Town will occur and the Town and the number of Sanitary District patrons residing within the district will continue to shrink. On August 6, 2013, the Village of Harrison adopted an ordinance adding more Town of Harrison territory to the Village of Harrison which further reduced the number of patrons residing within the Sanitary District. The Sanitary District's boundaries effective after the adoption of the August 6<sup>th</sup>, 2013, ordinance are shown in **EXHIBIT C**. Indeed, the only territory that remains in the Town is territory that is defined as the growth areas of the Cities of Menasha and Appleton under separate Intermunicipal Agreements with the Town. From a fiduciary perspective, it does not make sense that the Town of Harrison and the Sanitary District argue that they will be

harmed by the dissolution of the town sanitary district since more of the remaining territory in the Town is due to come into the City of Menasha via future annexations anyway.

In sum, there is no agreement by and among all of the parties affected as to how the recent incorporation affects the Sanitary District. Accordingly, § 60.79(2)(dm) governs this case. That statute takes into consideration all users and municipalities affected by the Sanitary District, with the result being that control of the sanitary system should be transferred to the City of Menasha.

**B. The City of Menasha is Not Barred by any Intermunicipal Agreement from Seeking a Declaration of the Parties' Respective Rights In Light of the Partial Incorporation of the Town and Wis. Stat. § 66.79(2)(dm).**

In their answers to the City of Menasha's underlying Petition for Declaratory Judgment, the Town, Village and Sanitary District contend that the City is precluded from seeking a declaration of rights regarding the Sanitary District by an Intermunicipal Agreement entered into between the City, Town and Sanitary District. That Agreement, which was signed on October 28, 1999, contains a provision stating that:

Neither the Town nor the City shall make any attempt to dissolve and take over the Waverly Sanitary District without the consent of the Waverly Sanitary District and each other.

**EXHIBIT D, ¶ 9.**

The City of Menasha does not dispute that the October 28, 1999 Intermunicipal Agreement is effective and governs several aspects of the relationships between the parties. However, this agreement does not preclude the filing of this lawsuit.

Through this lawsuit, the City merely seeks a judicial interpretation of the statutory effect that the partial incorporation of the Town had on the ownership and operation of the Sanitary District. The City has not taken any affirmative action to dissolve the Sanitary District. Rather, it is the City's position that the statute, § 60.79(2)(dm), *mandates* that the ownership of the Sanitary District be transferred to the City. *See* § 60.79(2)(dm) ("until the proportion of users changes so that a majority of the patrons reside in the city or village, at which time the property and the responsibility *shall* shift to the city or village") (emphasis added). Neither this, nor any other agreement between the parties addresses what should happen to the Sanitary District in the event of incorporation or annexation. The Agreement also does not address what would happen to the Sanitary District in the event that the majority of users of the system reside outside the Sanitary District. Given the lack of guidance in the Agreement, the City is merely seeking statutory interpretation of this provision and of the parties' respective rights. There is nothing in the language of the Intermunicipal Agreement that prevents the City from seeking such clarification.

It is bad faith on the part of the Town and Sanitary District to argue against the transition of the Sanitary District to the City, when the only territory remaining in the Sanitary District and the Town is that which is due to come into the City of Menasha<sup>1</sup> pursuant to the very Intermunicipal Agreement the Town and Sanitary District have produced in this case. If the only territory that remains in the Town and Sanitary District is due to come into the City of Menasha (or Appleton) under the terms of the Intermunicipal Agreement, what legitimate purpose is served by the Town and Sanitary District opposing the transition of the Sanitary District?

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<sup>1</sup> Or the City of Appleton under a separate intermunicipal agreement, but due to the low number of patrons residing in Appleton is not pertinent to the primary issue before this Court.

As stated above, the Intermunicipal Agreement does not address what happens when the proportion of users changes. Nor could it. The Agreement is not signed by all of the municipal entities affected by the Sanitary District. Without an agreement signed by all affected parties clearly explaining the effect of incorporations, annexations and changes in user proportionality among the municipalities, § 60.79(2)(dm) must govern and the City is entitled to seek interpretation of that statute as applied to this.

Finally, there is nothing that prevents Appleton or any other patron of the Sanitary District from asking the same question. If the Court concludes that the City of Menasha should not have brought this declaratory suit, the City will request leave to amend the Complaint to add a patron of Waverly Sanitary District as a petitioner.

#### CONCLUSION

The March 8, 2013 partial incorporation of the Town of Harrison to the Village of Harrison triggered the application of §60.79(2)(dm), Wis. Stats., requiring that the ownership and operation of Waverly Sanitary District, sanitary sewer and water, be transferred to the City of Menasha, since the proportion of users changed with the majority of patrons residing in the City.

Respectfully submitted this 21<sup>st</sup> day of March, 2014.



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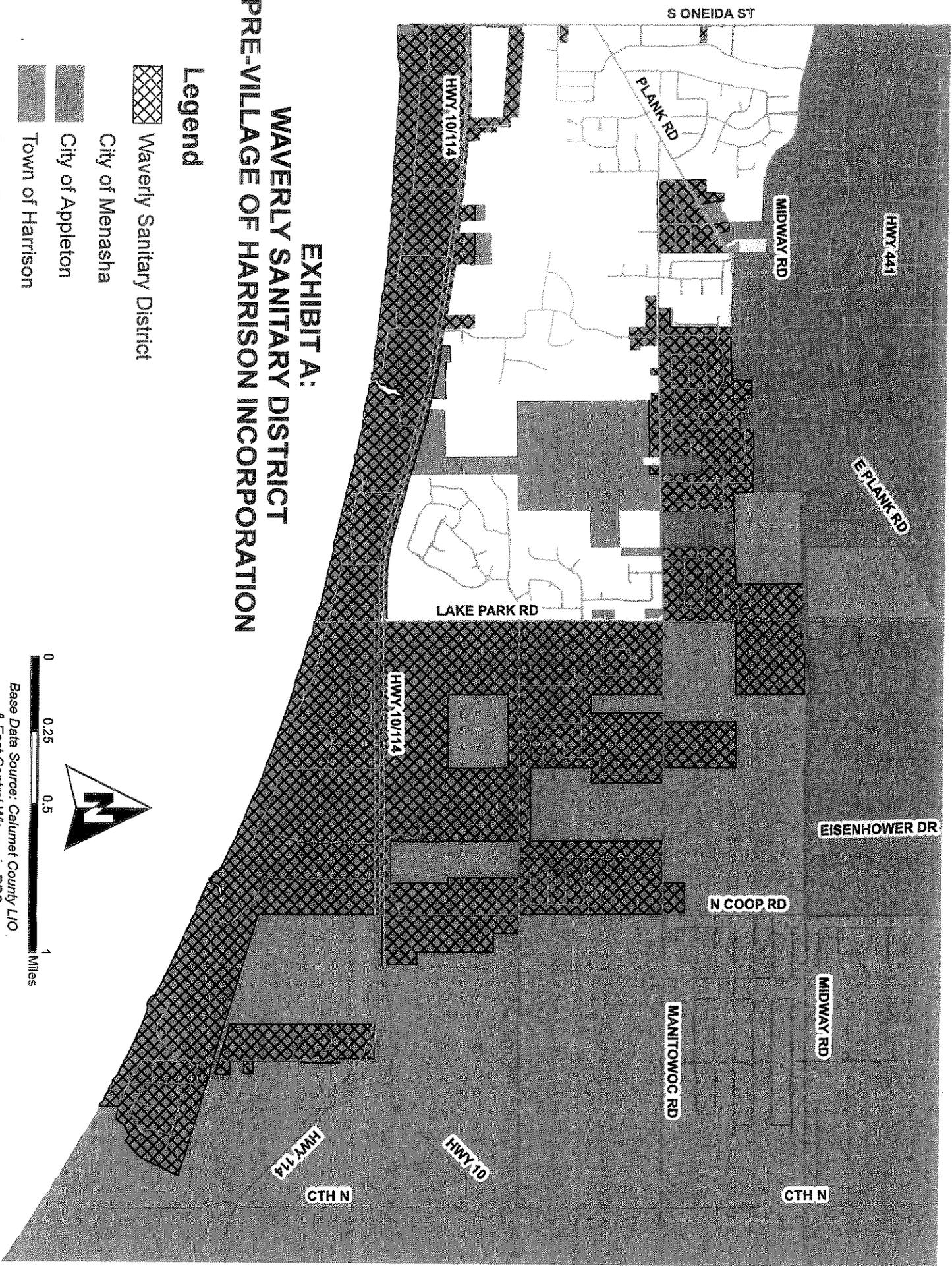
Pamela A. Captain  
City Attorney for the City of Menasha  
State Bar Number 1023192

140 Main Street  
Menasha, WI 54952  
(920) 967-3608

# EXHIBIT A: WAVERLY SANITARY DISTRICT PRE-VILLAGE OF HARRISON INCORPORATION

## Legend

-  Waverly Sanitary District
-  City of Menasha
-  City of Appleton
-  Town of Harrison
-  Road Centerlines



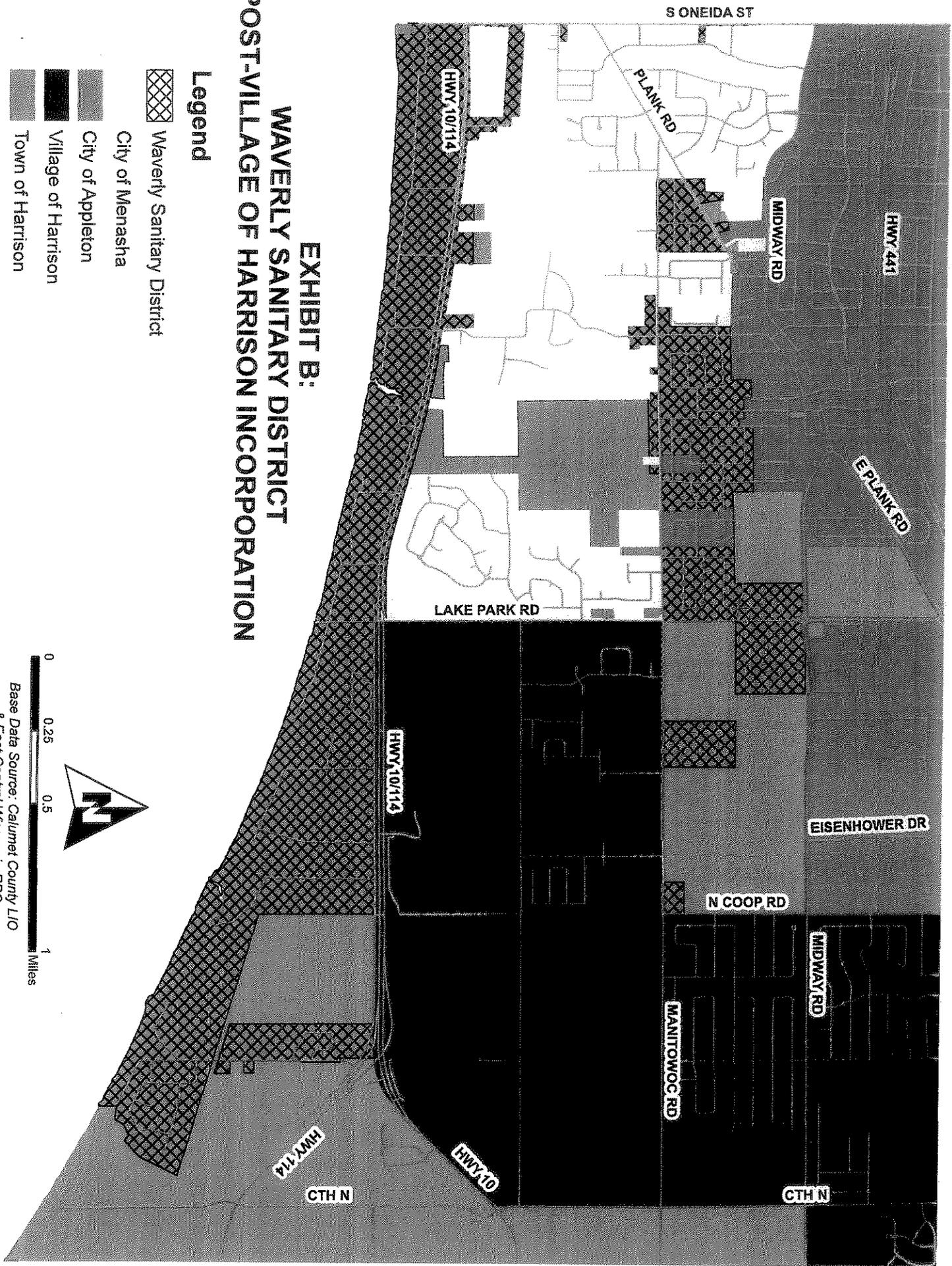
Base Data Source: Calumet County LIO  
& East Central Wisconsin RPC



# EXHIBIT B: WAVERLY SANITARY DISTRICT POST-VILLAGE OF HARRISON INCORPORATION

## Legend

-  Waverly Sanitary District
-  City of Menasha
-  City of Appleton
-  Village of Harrison
-  Town of Harrison
-  Road Centerlines



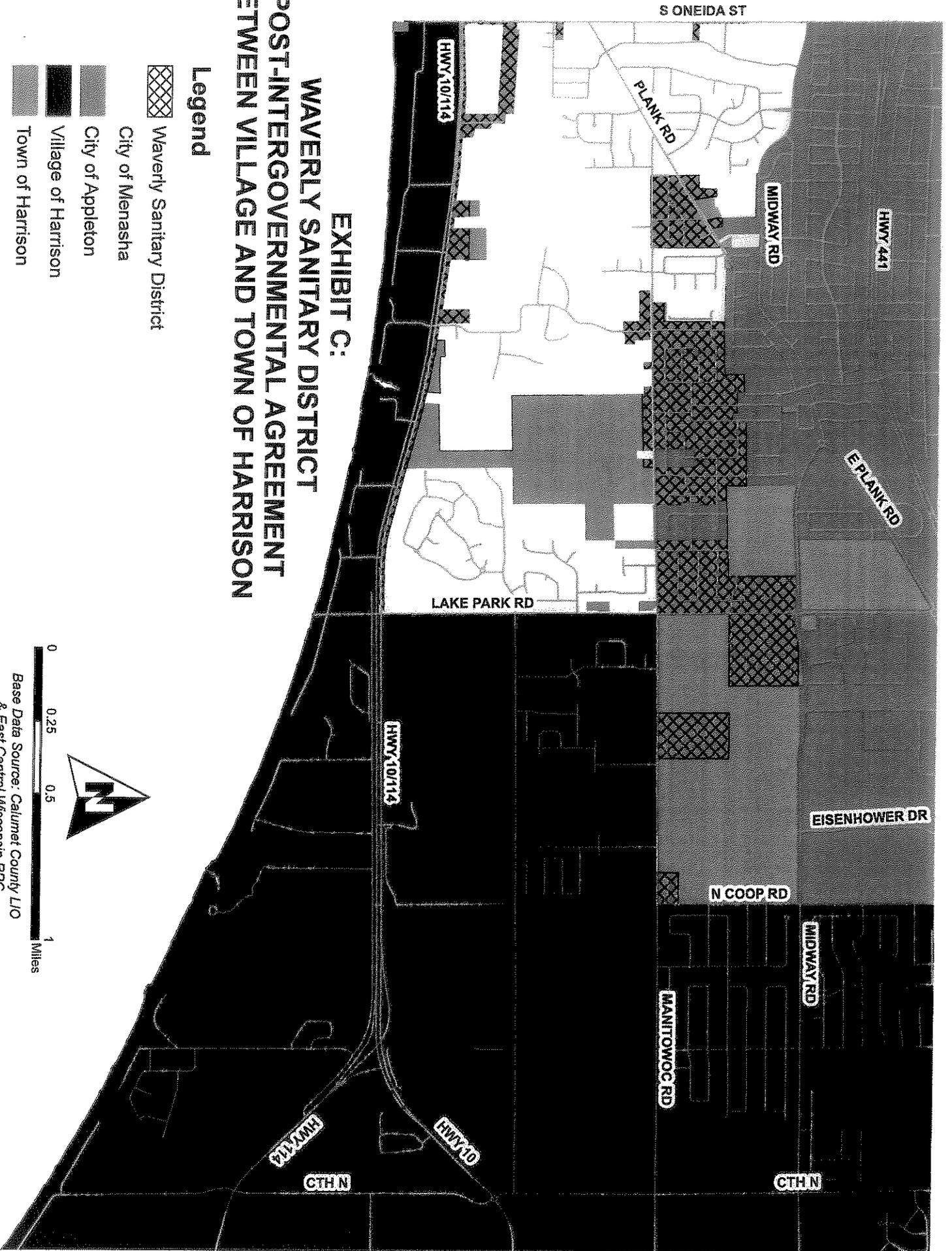
Base Data Source: Calumet County LIO  
& East Central Wisconsin RPC



# EXHIBIT C: WAVERLY SANITARY DISTRICT POST-INTERGOVERNMENTAL AGREEMENT BETWEEN VILLAGE OF HARRISON AND TOWN OF HARRISON

## Legend

-  Waverly Sanitary District
-  City of Menasha
-  City of Appleton
-  Village of Harrison
-  Town of Harrison
-  Road Centerlines



Base Data Source: Calumet County LIO  
& East Central Wisconsin RPC

0 0.25 0.5 1 Miles



## INTERMUNICIPAL AGREEMENT

### 1. Preamble

The Town of Harrison (Town), the City of Menasha (City), and the Waverly Sanitary District (Waverly) pursuant to ss. 66.027, 66.30 and 66.028 Wis. Stats., desire to enter into an Intermunicipal Agreement in order to:

- A. Establish fixed boundaries;
- B. Facilitate orderly development of the Town and the City;
- C. Eliminate current and minimize future litigation;
- D. Provide for cost effective governmental services to citizens of the Town and City;
- E. Maximize capacity of current infrastructure for sewer and water service;
- F. Promote harmony between the municipalities.

The Town and the City desire to enter into an agreement pursuant to s. 66.023 Wis. Stats. to formalize boundaries between the municipalities. This agreement is intended to be an interim agreement until such time as the s. 66.023 agreement is enacted.

### 2. Boundaries

The eastern boundary line shall be fixed to run from the intersection of Manitowoc and Lake Park Road southerly to the intersection of Lake Park Road and STH114 - US10. The southern boundary line shall run from the intersection of Lake Park Road and STH114 - US10 westerly to the intersection of Oneida Street and STH114 - US10. The western boundary line shall run along Oneida Street from the intersection of Oneida Street and STH114 - US10 to the intersection of Midway Road and Oneida Street. The northern boundary shall run from the intersection of Midway Road and Oneida Street easterly along Midway Road to Kernan Avenue, then south along Kernan Avenue to Manitowoc Road, then easterly along Manitowoc Road to Lake Park Road.

The Town territory within the boundary described shall be designated as an area within which the City may annex without Town objection. This area shall be designated the City growth area.

The territory east of Lake Park Road shall be designated the Town growth area. The City shall not accept any petition for annexation for any territory east of Lake Park Road.

A map will be prepared as Exhibit "A" and incorporated into this Agreement.

3. Residents Within the City Growth Area

Property owned by a Town resident who also resides on such property within the City growth area may be included in an annexation petition accepted by the City except as is limited below. The City agrees that it will not include in any annexation petition any part of property which was actively being farmed as of April 1, 1999 (except for property owned by Gordon Van De Hey which is being purchased by the City) unless such property owner resident signs the petition for annexation. It is understood that any and all property owned by a resident active farmer as of April 1, 1999 shall not be included in any annexation petition. These are the farms owned and operated by Jeffrey Wisnet, James Bodway, and John Bartlein. Should any of these farms no longer be actively farmed by the resident owner, the City may include any of that land in any annexation petition. For purposes of this paragraph, a property is not actively farmed if no crops are harvested for two consecutive growing seasons on the tillable land, or the property owner has certified to the City and the Town a valid agricultural reason for the land to remain unplanted for longer than two consecutive growing seasons. The City may also include in an annexation petition land at the intersection of Oneida Street and US10 - STH114 currently being developed as a gas station. The City will honor any permits or plats which have been issued or approved prior to April 1, 1999.

The Town will not contest nor finance any objection to any annexation petition filed consistent with this agreement. No property owner is obligated to sign an annexation petition unless that land is being developed.

The City may annex without objection from the Town, any occupied property within the City growth area, except occupied property as of April 1, 1999 in what is known as the Stacker plat, the Green Acres Pond plat (Ribble), the Cottonwood Creek plat, and the Cottonwood Creek II plat, the Hoffman Estates plat and the farms referred to above. No such annexation may occur except at such time as the current owner sells the property to other than an immediate family member. For purposes of this agreement, immediate family means husband, wife, son, daughter, stepson or stepdaughter. The City may annex any property within the City growth area whose owner signs a petition for annexation.

4 Any resident owner may replace or remodel his/her existing residence pursuant to Town regulations. No new additional residences may be constructed without the consent of the City.

With respect to the Stacker plat, Hoffman Estates plat, Cottonwood Creek plat, and the Cottonwood Creek II plat, the City shall not accept any annexation petitions unless they are unanimous consent annexation petitions.

Attached as Exhibit "B" and made part of this agreement by reference is the perimeter boundaries and/or descriptions of the Stacker plat, Hoffman Estates plat, Cottonwood Creek plat, Cottonwood Creek II plat and the Green Acres Pond Plat.

4. **Unimproved Property Within the City Growth Area**

To the extent allowed by law, the Town will not allow the development of any land within the City growth area except single and two family dwellings may be constructed on lots of record as of April 1, 1999. Development shall include the issuance of any building permit, rezoning consideration, vacation request or any other action requiring the approval of the Town of Harrison Planning Commission or Town Board. The Town shall notify the City of applications to construct or develop single family or two-family homes on lots of record as of April 1, 1999.

The Waverly Sanitary District shall not allow any connections to sanitary sewer or water service within the City growth area except for single and two family development on lots of record as of April 1, 1999. Should any property owner wish to develop or build in any manner which is not consistent with this provision, the Town shall advise that that property owner should file a petition with the City to annex the property.

The City agrees to indemnify and hold the Town and Waverly Sanitary District harmless in the event a Court of record imposes damages as a result of the obligations imposed by this section 4.

5. **Town Growth Area**

The City shall not accept for annexation any property within the Town growth area without the approval of the Harrison Town Board. The parties agree that this paragraph may be used as the sole basis for a Court determination regarding the invalidity of any annexation by the City within the Town's growth area. The City shall not exercise any extraterritorial zoning or extraterritorial plat review over any property within the Town's growth area.

6. **Sanitary Sewer Planning Area**

All development in the Sanitary Sewer Planning Area as established by East Central Regional Planning Commission shall require hook-up to public sanitary sewer systems connected to the Neenah-Menasha Sewerage System. No on-site waste disposal systems shall be allowed or approved, except as replacements for existing on-site waste disposal systems which have been designated as a failing system by the Calumet County Sanitarian. The Town and the City shall cooperate to expand the Sanitary Sewer Service Area so as to accommodate the intent of this Agreement. Such cooperation shall include a direct request for an initial expansion of the Sewer Service Area so as to provide an opportunity for immediate growth as well as a change in policy which would allow for automatic expansion of the sewer service area upon achieving a predetermined level of growth in the Sewer Service Area.

Neither the Town nor the Waverly Sanitary District may petition East Central Regional Planning Commission to include within the Sanitary Sewer Service Area any property within the City growth area without annexation to the City or the consent of the City.

Neither the Town nor Waverly Sanitary District may extend the Waverly Sanitary District within the City growth area.

A Memorandum of Understanding relating to expansion of the Neenah/Menasha Sewer Service Area and extension of sewer and water facilities is attached as Exhibit "C" and made part of this agreement by reference.

7. **Engineering Study of Sanitary Sewer System**

An engineering study has been prepared by Omni Engineering which establishes a plan for the installation of sanitary sewer service to areas within the City and Town growth areas. The City and the Town agree that option A, attached as Exhibit A, will be the basis for this service expansion with the parties sharing in the actual costs of construction according to the percentages of territory to be served by this expansion. The parties further agree that this expansion will take place during the 2000 construction season and that arrangements will be made in the respective budgets of the Town and the City to pay for this expansion. Upon completion of the system, the system will be turned over to the Waverly Sanitary District for operation.

The Waverly Sanitary District shall be responsible to bid the project design and construction. Upon receiving invoices, the City and Town will pay such invoices to Waverly based upon monthly-billed documentation. The share of the total project will be as determined by the Omni study. The City and Town shall have the right to review bidding documents and contract document before award and construction.

8. **Large Sewer Users**

The Town or the City shall provide notice to the other when considering for approval any plans, building permit requests, CSM's or plats filed for any large user of the sewer system. A large user will be any user whose discharge is greater than 5000 gallons/day. Any capacity used by a large user shall be allocated to the capacity of the municipality in which the user is located.

9. **Waverly Sanitary District**

The Town and the City agree that any infrastructure necessary for water or sanitary service shall be installed at the expense of the benefiting municipality and shall then be turned over to the Waverly Sanitary District for operation and maintenance. Neither the Town nor the City shall make any attempt to dissolve and take over the Waverly Sanitary District without the consent of the Waverly Sanitary District and each other. Any

extensions to the sanitary or water service system shall follow Waverly Sanitary District procedures.

If necessary due to capacity issues with the current force main/gravity sewer connections to Sanitary District No. 4, the City of Menasha agrees to allow a future forced main connection from joint lift station to its 15" sanitary sewer in STH 114 west of Melissa street provided adequate capacity exists in such sewer. Waverly Sanitary District must exercise its current option to use excess capacity pursuant to its agreement with Sanitary District No. 4.

The Town shall obtain the consent of the Waverly Sanitary District to this Agreement.

**10. Town Incorporation**

The City shall not contest any attempt by the Town to incorporate so long as all the territory of the incorporation effort is outside the City's growth area. The Town agrees that it will stipulate that any incorporation filed contrary to this paragraph does not meet the criteria of sec. 66.016 Wis. Stats.

**11. Joint Planning**

The parties agree to work in good faith on issues of joint planning. In addition, the parties shall, in the future, work together to provide the necessary public services to the residents of both municipalities. A joint planning committee comprised of three City members and three Town members shall be established to make recommendations to the City's Planning Commission and Common Council and to the Town Board on issues of joint planning. Any disputes will be settled by mediation by an agreed upon third party.

**12. Curtin Annexation**

Upon execution of this agreement, the Town will dismiss its claims in the lawsuit challenging the Curtin annexation, *Town of Harrison and Carlton A. Wieckert v. City of Menasha*, 97 CV 100. The Town shall also not finance any continuation of this lawsuit by Carlton A. Wieckert or any other third party.

**13. Amendments**

This agreement may be amended from time to time by mutual agreement. No amendments shall be valid until such time as the amendments are authorized by the governing bodies of the City of Menasha and the Town of Harrison and executed in writing. The Town and the City agree that each shall entertain any requests for amendments by the other and make a decision as to the amendment within 90 days of the receipt of the notice of the request for the amendment.

**14. Notices**

All notices required by this agreement must be served personally, or by certified mail upon the respective municipal clerks. All petitions for annexation shall be forwarded from the party receiving it to the other party as soon as possible.

**16. Miscellaneous**

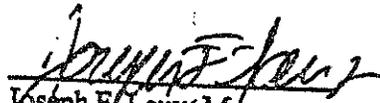
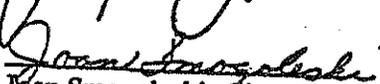
- a. It is contemplated that the municipalities will rely on ss. 66.30, 66.027 and 66.028 Wis. Stats., as statutory authority for this Boundary Agreement. The agreement shall be binding upon future Town Boards and City Councils and shall remain in effect until the enactment of a s. 66.023 Wis. Stats. agreement. Should such s. 66.023 agreement not be enacted, this agreement shall be extended until September 1, 2029. This Agreement may be extended by the approval of the City Common Council and the Town Board at any time. It is the intent of the parties that no statutory amendments, changes in the forms of government of the Town or the City nor changes in the elected officials shall affect the enforceability of the agreement.
- b. This Agreement is intended to be solely between the Town, the City and the Waverly Sanitary District. Nothing in this Agreement accords any third party any legal or equitable right, whatsoever which may be enforced by any non-party to this Agreement. Waverly Sanitary District shall approve of this agreement.
- c. If any portion of this Agreement is deemed to be invalid or unconstitutional, it shall not invalidate the balance of the Agreement not affected by that determination.
- d. The Agreement imposes a duty of good faith and fair dealing on all parties.
- e. This Agreement is the complete agreement of the parties with respect to the matters covered by this Agreement. No agreements, promises, nor representations made by either party during the negotiations for or approval of this agreement shall be binding or effective unless included. The negotiating parties agree that each of them shall recommend this agreement to the City Council, the Town Board, and Waverly Sanitary Board for approval. The negotiating parties agree further that each of them shall support and promote this agreement to any other entity, public or private that is affected by, or needs to approve any issue necessary to carry out the intent of this agreement.
- f. Either party without objection in any action to enforce the terms of this Agreement may enter this Agreement into evidence.
- g. The failure of any party to require strict compliance with any provision of this Agreement shall not constitute a waiver of the provisions of the Agreement nor any of the parties' rights under this Agreement. Rights and obligations under this agreement may only be waived or modified in writing signed by the party waiving that right or

obligation. Waiver or modification of one term will not constitute a waiver of any other term.

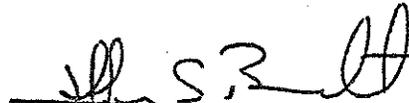
- h. The City will construct its share of Carpenter Street during the 1999 construction season unless cost prohibitive. In that event, it will be constructed during the 2000 construction season.
- i. This Agreement shall be liberally construed to accomplish its intent. The parties agree that each has been involved in the drafting of this Agreement so that no ambiguity shall be held against either party simply as drafter.
- j. The parties agree that any unresolved dispute will be submitted to a mediator prior to either party instituting any legal action concerning this agreement.

Dated this 28th day of Oct, 1999.

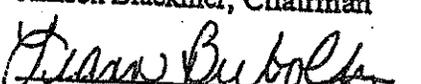
**CITY OF MENASHA:**

  
Joseph F. Laux, Mayor  
  
Jean Smogoleski, City Clerk

Approved as to form:

  
Jeffrey S. Brandt

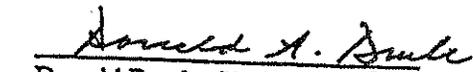
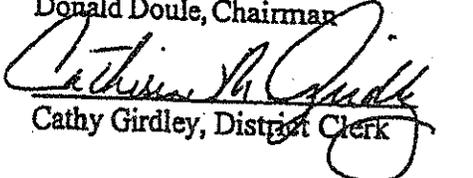
**TOWN OF HARRISON:**

  
Allison Blackmer, Chairman  
  
Leann Buboltz, Adm. Coord.  
Deputy Clerk

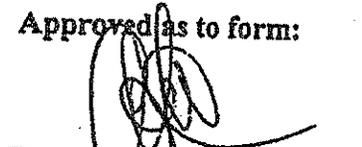
Approved as to form:

  
~~John D. Chappell~~

**WAVERLY SANITARY DISTRICT:**

  
Donald Doule, Chairman  
  
Cathy Girdley, District Clerk

Approved as to form:

  
Charles J. Hartzheim



**EXHIBIT B**

**Stacker Plat**

SW ¼, NE ¼, Section 7, T20N, R18E, Town of Harrison

**Green Acres Pond plat**

Part of the West ½ of the NW ¼, Section 8, T20N, R18E, Town of Harrison,  
Calumet County, Wisconsin

**Hoffman Estates**

Lot 2 of Certified Survey Map 1728 being Part of Lot 5 of Block 2 of Stacker Plat,  
located in the Southwest ¼ of the Northeast ¼ of Section 7, Township 20 North,  
Range 18 East, Town of Harrison, Calumet County, WI

**Cottonwood Creek**

All of C.S.M. 1624 and part of the Southwest ¼ of the Northwest ¼ of Section 8,  
Township 20 North, Range 18 East, Town of Harrison, Calumet County,  
Wisconsin

**Cottonwood Creek II**

Part of the Southwest ¼ of the Northwest ¼ of Section 8, Township 20 North,  
Range 18 East, Town of Harrison, Calumet County, Wisconsin

**EXHIBIT "C"**  
**Memorandum of Understanding**

This memorandum is entered into between the City of Menasha, Town of Harrison, Waverly Sanitary District and the East Central Wisconsin Regional Planning Commission's Regional Development Committee (RDC). This agreement is subject to the approval of the Wisconsin Department of Natural Resources on the the original swap amendment.

WHEREAS the City of Menasha, Town of Harrison, and Waverly Sanitary District have cooperated in the design of major sanitary sewer system improvements to service development in the vicinity of Lake Park Road and STH 10/114, and;

WHEREAS major investments will be required to extend the backbone sanitary sewer system to service the projected growth areas and;

WHEREAS the East Central Wisconsin Regional Planning Commission is the designated sewer service area planning agency for the subject area, and;

WHEREAS the Regional Development Committee takes actions and makes advisory recommendations to the WDNR on sewer service area amendments, and;

WHEREAS the amount of developable acreage currently within this portion of the Neenah/Menasha Sewer Service Area boundary would not be capable of supporting the costs of the necessary system improvements;

NOW, THEREFORE BE IT RESOLVED that the East Central Wisconsin Regional Planning Commission's Regional Development Committee will support and recommend to the WDNR approval of a future request from the Waverly Sanitary District to add an additional 105.8 total acres of land, of which 91.2 acres are vacant, to the Neenah/Menasha Sewer Service Area, shown as Area #4 per the attached map;

BE IT FURTHER RESOLVED that the addition of Area #4 acres will be subject to Area #2 being developed to a point which meets or exceeds 50% of its total land area.

BE IT FURTHER RESOLVED that the addition of Area #4 will still be subject to WDNR review and certification once advisory recommendations are acted upon by the Regional Development Committee.

BE IT FURTHER RESOLVED that this agreement will expire on January 1, 2002 or once the East Central Wisconsin Regional Planning Commission initiates a 5-year update of the Neenah/Menasha Sewer Service Area Plan.

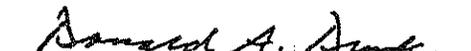
BE IT FURTHER RESOLVED that the City of Menasha and the Town of Harrison will support such an amendment;

  
\_\_\_\_\_  
Joseph F. Laux, Mayor - City of Menasha

Date: 10-28-99

  
\_\_\_\_\_  
Allison Blackmer, Chairperson - Town of Harrison

Date: 10-28-99

  
\_\_\_\_\_  
Donald Doule, President - Waverly Sanitary District

Date: 10-28-99

\_\_\_\_\_  
Donald DeGroot, Chair - ECWRPC Regional Development Committee

Date: \_\_\_\_\_

\_\_\_\_\_  
Harlan Kiesow, Director - East Central Wisconsin RPC

Date: \_\_\_\_\_

AFFIDAVIT OF KARA HOMAN

KARA HOMAN, having been first duly sworn on oath deposes and states:

1. I am the Principal Planner for the City of Menasha.
2. I created EXHIBIT A: WAVERLY SANITARY DISTRICT PRE-VILLAGE OF HARRISON INCORPORATION using a geographic information system (GIS) software called ArcGIS with data pertaining to municipal boundaries and road centerlines acquired from Calumet County's Land Information Office and data pertaining to Waverly Sanitary District acquired from the East Central Wisconsin Regional Planning Commission. Within the maps, boundaries for incorporated municipalities (e.g. City of Appleton and City of Menasha) overlay Waverly Sanitary District service area boundaries to reflect that town sanitary districts do not extend into incorporated municipalities.
3. I created EXHIBIT B: WAVERLY SANITARY DISTRICT POST-VILLAGE OF HARRISON INCORPORATION using a geographic information system (GIS) software called ArcGIS with data pertaining to municipal boundaries and road centerlines acquired from Calumet County's Land Information Office and data pertaining to Waverly Sanitary District acquired from the East Central Wisconsin Regional Planning Commission. Within the maps, boundaries for incorporated municipalities (e.g. City of Appleton, City of Menasha and Village of Harrison) overlay Waverly Sanitary District service area boundaries to reflect that town sanitary districts do not extend into incorporated municipalities.
4. I created EXHIBIT C: WAVERLY SANITARY DISTRICT POST-INTERGOVERNMENTAL AGREEMENT BETWEEN VILLAGE AND TOWN OF HARRISON using a geographic information system (GIS) software called ArcGIS with data pertaining to municipal boundaries and road centerlines acquired from Calumet County's Land Information Office and data pertaining to Waverly Sanitary District acquired from the East Central Wisconsin Regional Planning Commission. Within the maps, boundaries for incorporated municipalities (e.g. City of Appleton, City of Menasha and Village of Harrison) overlay Waverly Sanitary District service area boundaries to reflect that town sanitary districts do not extend into incorporated municipalities.

Dated at Menasha, Wisconsin this 21<sup>st</sup> day of March, 2014.

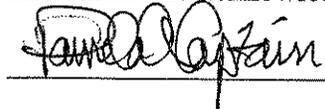
  
Kara Homan

STATE OF WISCONSIN)

(ss

WINNEBAGO COUNTY)

Personally came before me this 21st day of March, 2014 the above-named Kara Homan to me known to be the person who executed the foregoing instrument and acknowledge the same.

  
\_\_\_\_\_

Notary Public

My commission IS PERMANENT



AFFIDAVIT OF GREG KEIL

GREG KEIL, having been first duly sworn on oath deposes and states:

1. I am employed as the Community Development Director for the City of Menasha.
2. In response to my request via telephone, the Waverly Sanitary District emailed an excerpt from a Public Service Commission report attached as Exhibit G which lists the December 31, 2012 number of Waverly Sanitary District patrons. On that date there was a total of 1,968 patrons. Of this total 1,003 were within the Town of Harrison, 898 within the City of Menasha and 67 within the City of Appleton. The annotations on the report made by Waverly Sanitary District staff determined the number of patrons within the Village of Harrison after its partial incorporation and subsequent entrance into an intergovernmental agreement affixing the boundaries of the Village and Town to be 625.
3. A follow-up telephone inquiry was made with Cathy Girdley to determine the number of patrons in the Village of Harrison after March 13, 2013, but prior to entering into the intergovernmental agreement between the Town and the Village affixing boundaries. I was informed via a telephone conversation with Cathy Girdley that the number of patrons within the Village at that time was 240. On March 21, 2014 I confirmed that number via telephone conference with Cathy Girdley.

Dated at Menasha, Wisconsin this 21<sup>st</sup> day of March, 2014.

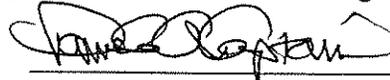
  
\_\_\_\_\_  
Greg Keil

STATE OF WISCONSIN)

(ss

WINNEBAGO COUNTY)

Personally came before me this 21st day of March, 2014 the above-named Greg Keil to me known to be the person who executed the foregoing instrument and acknowledge the same.

  
\_\_\_\_\_

Notary Public

My commission IS PERMANENT



**WATER CUSTOMERS SERVED**

List the number of customer accounts in each municipality for which your utility provides retail general service. Do not include wholesale customers or fire protection accounts.

**COPY**

Location (a)	Customers End of Year (b)
<b>Calumet County</b>	
<b>Cities</b>	
APPLETON	67
MENASHA	898
<b>Total Cities:</b>	<b>965</b>
<b>Towns</b>	
HARRISON	1,003
<b>Total Towns:</b>	<b>1,003</b>
<b>Total Calumet County:</b>	<b>1,968</b>
<b>Total Company:</b>	<b>1,968</b>

1,003.00+

378.00-

625.00\*

Village of Harrison

8.+

35.+

35.+

26.+

26.+

36.+

36.+

36.+

34.+

8.+

17.+

25.+

8.+

35.+

13.+

378.\*\*

Total TOH  
West of LP

378.+

362.-

16.\*\*

13 on Manitowoc

3 on Johann

Stacker Plat 54.+

Hoffmann Est 11.+

Green Acres Pond Est. 9.+

Berry Fields 26.+

Cotton Wood Creek 88.+

Haen Heights 72.+

1st Acre Ashland Hollows 8.+

Cedar Ridge Est 42.+

2nd Acre Cedar Ridge 52.+

362.\*\*

Within Subdivisions

7/23/13

