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August 11, 2009

VIA FACSIMILE AND U.S. MAIL

Racine County Board of Drainage Commissioners
c/o Knuteson, Powers & Quinn, S.C.
500 College Ave.
Racine, WI 53403

Kenneth F. Hostak
(1930-2005)

**RE: Objection to Proposed Annexation of Lands Into the Norway/Dover
Drainage District**

To Whom It May Concern:

As you know, we represent the Town of Norway ("Town") and are authorized to file this letter with you. The Town hereby objects to the annexation of its land into the Norway/Dover Drainage District, for the following reasons:

1. The Racine County Board of Drainage Commissioners ("the Board") is required, pursuant to s. ATCP 48.20 of the Wisconsin Administrative Code to file with the Department of Agriculture Trade and Consumer Protection "complete specifications" for each drainage district under its jurisdiction by December 31, 2000 and obtain State approval of those plans and specifications.

According to the State's Drainage Engineer, the Board does not have on file with the State such specifications for the Norway/Dover Drainage District and will need to do so before undertaking any district project. The specifications are important as they contain, among other things, a map of the boundaries of the drainage district, the intended alignment and extent of every district drain, the intended location and width of every district corridor, as well as the intended cross-section of every district drain (including top and bottom width of the ditch, depth of the ditch, side slope angle of the ditch, and drainage structures), and estimated water elevations, including the peak water surface elevations in the ditch in the event of a 10-year 24-hour storm event.

Before obtaining State approval of the specifications, the Board is required to hold a public hearing. Specifically, s. ATCP 48.20(3) of the Wisconsin Administrative Code states as follows:

(3) DEPARTMENT APPROVAL. (a) To obtain the department's approval under sub. (1), a county drainage board shall file all of the following with the department:

1. The drainage district specifications for which the county drainage board seeks approval.
2. A description of how the county drainage board established the specifications.
3. Documentation showing that the county drainage board has complied with sub. (2) [Notice to Landowners; Opportunity to Object.]
4. Notice of every landowner objection filed under sub. (2)(d).
5. The County drainage board's position on every unresolved objection under sub. (2)(d).

Moreover, the Board is also obligated, pursuant to Section ATCP 48.22 to, after holding a public hearing, file a construction and maintenance Compliance Plan with the Department containing such things as a professionally drawn map of the district, restoration plan, repair and maintenance plan, and a plan for controlling soil erosion and runoff. Again, these steps have not been taken by the Board.

2. The expansion of drainage district boundaries is normally accomplished by the voluntary petition of landowners pursuant to Wis. Stat. §88.77. The Board, however, is erroneously proceeding under Wis. Stat. §88.78. That statute only permits annexation of additional land based upon erroneous information that was relied upon at the time the drainage district was formed. As stated in Wis. Stat. §88.78(1):

Whenever any lands outside a drainage district are in fact receiving the benefits of any drain of such district but such fact was not evident or was inadvertently overlooked at the time of organization of the district, such benefited lands may be annexed under the procedure prescribed in this section. (Emphasis added).

There has been no showing made that the Board was not aware of or inadvertently overlooked the fact that the proposed Norway/Dover Drainage District was part of a larger watershed. In fact, at the July 28, 2009 public informational meeting called by the Board at the request of the Town, one of the Board's Commissioners quoted at length from a "History of the Town of Norway" compiled by Melvin Johnson, a former Town Chairman. That document relates that the drainage district was specifically formed in 1908 on the basis of an engineering drainage study, for the sole purpose of draining a swamp area given to the Town by the State and making that land suitable for farming. That purpose was accomplished.

The Board's attempt over 100 years later to add the entire watershed into the drainage district's boundaries is not based upon any mistake made at the time of the district's formation – but is rather an attempt to add to the Board's coffers.

Such an attempt runs directly counter to the Wisconsin Supreme Court's decision in *Jefferson County Farm Drainage Board v. Baneck*, 264 Wis. 339, 59 N.W.2d 655 (1953), in which the Court prohibited the Jefferson County Drainage Board from doing the very thing being attempted by this Board. As stated in *Jefferson County Farm Drainage Board*, "the drainage law ... does not allow the creation of a drainage district piecemeal or by gerrymander." *Id.* at 341. Where the district is organized "embracing only a portion of a natural watershed, then any later proceedings which seek to add lands directly affected and of the nature of the lands included in the first organization are without sanction of law. *Id.* (Emphasis added).

3. The Board violated Wis. Stat. §88.16, when it failed to give written notice, as soon as possible, of the hiring of Griswold Engineering to conduct a study related to the operation of a drain or a district, and as to completion of the study and information where the study may be reviewed, to the governing body of the county, and any village or town having jurisdiction over the area subject to the engineering study. Although the report was completed on February 9, 2009, notice of the report was not received until July 15, 2009.

4. The Board failed to obtain a report or any other assistance from the state drainage engineer employed by the Department of Agriculture, Trade and Consumer Protection (DATCP), as provided in Wis. Stat. §88.11(3), in order to improve district operations, and provide guidance to the board and in developing district surveys and maintenance plans.

5. Upon information and belief, not all property owners in the area proposed to be annexed have received the notice required under Wis. Stat. §88.48, and further, the board failed to publish a class 3 notice, under Chapter 985, in the affected area, with the last insertion not more than 20 days before the hearing, as required by Wis. Stat. §88.05(3)(b).

6. The Board, and the engineering report it relies upon, fails to show that the lands proposed to be annexed benefit from the operation of any district drain, as required by ATCP 48.04, and has failed to properly apply the factors for assessing benefits to land, set forth in ATCP 48.06, 48.08 and 48.10. Among other things, the engineering report fails to show a change in the amount of runoff from the property proposed to be annexed, incorrectly depicts current district boundaries, and further contains no supporting documentation for the conclusions it sets forth.

7. The proposed annexation, in failing to include areas in Waukesha County to the north of the current district, violates equal protection of the law guaranteed by the state and federal constitutions, as these areas are no less benefited by district drains than the proposed area in Racine County, and is further contrary to the Supreme Court decision in Jefferson County Drainage Board, as it proposes piecemeal creation or additions to the district.

8. Some of the lands proposed to be annexed are in areas that do not drain into the Wind Lake chain, or any drain served by the district.

9. Pursuant to ATCP 48.14, the Board is obligated to annually inspect every drainage district. That inspection is to include all district drains and corridors, and shall determine all the following:

- (a) Whether district drains are being maintained in compliance with this chapter.
- (b) Whether a district corridor has been established and is being maintained around every district ditch in compliance with this chapter.
- (c) Whether landowners are complying with applicable requirements under this chapter.
- (d) Whether, and to what extent, sedimentation has occurred in district drains.
- (e) Whether the cross-sections or grade profiles of district drains have changed significantly from the formally established cross-sections or grade profiles.
- (f) Whether any drains should be restored, altered or improved to ensure proper drainage, to reduce soil erosion or sedimentation problems, or to comply with this chapter.
- (g) Whether the district drainage system is operating effectively to achieve the goals which have been specified for the drainage district pursuant to s. 88.63, Stats., and s. ATCP 48.36 (1) (f). (Emphasis added).

Given the fact that the District has not yet established its cross-sections and grade profiles, the affected residents are unable to compare the District's present and proposed work within the drainage district, to the approved plans and specifications.

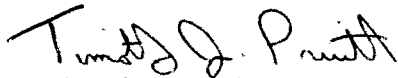
The failure to provide adequate notice of the engineering report, and the other procedural defects, leaves property owners without a meaningful opportunity to respond to the petition by August 12, 2009. We request that the Board postpone the hearing, and refrain from taking action on the petition, until property owners have received proper

notice of the proceedings and the engineering report, providing them a meaningful opportunity to respond.

A more detailed and comprehensive explanation of the objections of Town of Norway are contained in the complaint and other documents filed in Racine County Case No. 09-CV-2484, and in the attached resolution passed unanimously by the Town Board of the Town of Norway on August 3, 2009.

Sincerely,

HOSTAK, HENZL & BICHLER, S.C.



Timothy J. Pruitt,
Attorneys for the Town of Norway
tpruitt@hhb.com

TJP/sab

cc: Mr. John Knuteson, Knuteson, Powers & Quinn, S.C. (via facsimile & U.S. Mail)
Mr. Jon Lehman, Racine County Corporation Counsel (via electronic mail)
Mr. Jeffrey M. Leggett (via electronic mail)
Mr. Michael J. Piontek, Knuteson, Powers & Quinn, S.C. (via facsimile & U.S. Mail)
Mr. Thomas R. Kramer, Town of Norway Treasurer & Business Manager (via electronic mail)
Ms. Camille Cohen, Town of Norway, Clerk (via electronic mail)

1 August 03, 2009

2 **RESOLUTION NO. 2009-10**

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6 **RESOLUTION BY THE TOWN OF NORWAY EXPRESSING OPPOSITION TO THE PETITION OF**
7 **THE RACINE COUNTY BOARD OF DRAINAGE COMMISSIONERS TO ANNEX LANDS INTO THE**
8 **NORWAY/DOVER DRAINAGE DISTRICT.**

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11 **WHEREAS**, on July 16, 2009, the Town of Norway received from the Racine
12 County Board of Drainage Commissioners (hereinafter "Drainage Board"), a Notice of
13 Public Hearing of Proposed Annexation of Lands into the Norway/Dover Drainage
14 District, with attached Petition of John S. Ingersoll, Jr., dated April 15, 2009, to annex
15 3,109 additional parcels, including lands owned by the Town of Norway, into the
16 Drainage District, and assess benefits and costs as it does for other lands already in the
17 Drainage District; an Order of the Board, also dated April 15, 2009, scheduling a
18 hearing on the Petition for August 12, 2009, at 6:00 p.m., and a Racine County Farm
19 Drainage Norway-Dover Mapping & Benefit Assessment Project Report (hereinafter
20 "Engineering Report") dated February 9, 2009, prepared by Griswold Engineering;

21 **WHEREAS**, the Petition effectively increases the land subject to the jurisdiction
22 of the Drainage District from 18,879 acres to 33,306 acres, and the affected parcels
23 from 1,868 to 4,977, and results in a significant assessment for taxpayers to be
24 annexed to the Drainage District, including \$35,275.63 on lands owned by the Town;

25 **WHEREAS**, the Petition alleges that the land proposed to be annexed receives
26 benefits of the Drainage District from the maintenance and improvement of the drainage
27 canal and field tile for the drainage of water or protection of land from water, and that
28 these benefits were not evident or were inadvertently overlooked at the time the
29 Drainage District was organized in 1908;

30 **WHEREAS**, although the Engineering Report was completed on February 9,
31 2009, and was acted on by the Drainage Board on April 15, 2009, the Town did not
32 receive notice of the report until July 16, 2009, despite §88.16, Wis.Stats., requiring that
33 the Town receive written notice of the hiring of an engineer to conduct a study related to
34 the operation of a drain or a district, "as soon as possible", and further receive written
35 notice, "as soon as possible", of the report's completion and where to review it;

36 **WHEREAS**, the Drainage Board failed to obtain a report from the state drainage
37 engineer employed by the Department of Agriculture, Trade and Consumer Protection
38 (DATCP) before proposing to add territory to the Drainage District, as provided in
39 §88.11(3), Wis.Stats.; and according to DATCP, has failed to seek approval and adopt
40 complete specifications for the Drainage District as of December 31, 2000, as required
41 by ATCP 48.20, Wis.Adm.Code;

42 **WHEREAS**, it does not appear that the Drainage Board provided proper notice of
43 the August 12, 2009 hearing to the County, as it neglected to provide notice to the
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1 Page Two

2 County Highway Commissioner as required by §88.05(4)(a), Wis.Stats., and failed to
3 publish a class 3 notice as required by §88.05(3)(b), Wis.Stats.;

4 **WHEREAS**, the Drainage District is in violation of state law for failure to have its
5 Drainage District specifications adopted, approved, and filed with the Department of
6 Agriculture, Trade and Consumer Protection by December 31, 2000 as required by
7 ATCP 48.20.

8 **WHEREAS**, the proposed assessments were not determined in accordance with
9 ATCP 48.20 (Assessing Benefits in Agricultural Lands") and 48.10 ("Assessing Benefits
10 to Nonagricultural Land")

11 **WHEREAS**, the Drainage District is in violation of state law for failure to have its
12 construction specifications prepared, approved and filed with the state as required by
13 ATCP 48.22.

14 **WHEREAS**, the Petition fails to show that the affected areas were unintentionally
15 omitted at the time the Drainage District was created, and it only later became apparent
16 that such lands were directly affected; the report fails to show the lands proposed to be
17 annexed are benefited by district drains, and further fails to show a change in runoff
18 from the property proposed to be annexed, as required by ATCP 48.06, et.seq.;

19 **WHEREAS**, the proposed annexation violates equal protection of the law
20 guaranteed by the state and federal constitutions, and allows for the piecemeal
21 additions to the Drainage District, as it appears that areas to the north of the properties
22 proposed to be annexed, namely lands in Waukesha County, are no less benefited by
23 district drains than the proposed areas in Racine County;

24 **WHEREAS**, delays and defects in notice as set forth above, most particularly the
25 lack of information regarding the Engineering Report, and the failure of the Drainage
26 Board to complete the required Drainage District specifications and to obtain the input of
27 the state drainage engineer, impairs the ability of the Town to prepare an adequate
28 response to the petition, including hiring its own engineers to evaluate the claims made
29 by the Drainage Board engineers, on or before the August 12, 2009 hearing date;

30 **WHEREAS**, the Town Board of the Town of Norway expresses its opposition to
31 the Petition to annex property to the Drainage District, resulting in significant
32 assessments for County and other property owners in the proposed annexed area, and
33 objects to the Drainage Board taking any further action on this Petition, until the Town is
34 provided adequate opportunity to review the Engineering Report and all relevant
35 documents, to determine whether its properties benefit from the district drain, and until
36 the Drainage Board follows proper statutory and administrative procedural requirements
37 in proposing to expand the Drainage District;

38 **NOW, THEREFORE, BE IT RESOLVED** that the Town Board of the Town of
39 Norway expresses its opposition to the Petition for Annexation of Lands into the
40 Norway/Dover Farm Drainage District, including land owned by Town of Norway; and

41 **BE IT FURTHER RESOLVED** that the Town of Noway expresses its opposition
42 to the Drainage Board conducting a hearing on the Petition as proposed on August 12,

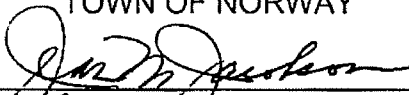
1 2009, and issuing any order thereto, until the Town is provided proper notice of the
2 hearing and of the Engineering Report, and is provided an adequate opportunity to
3 respond to the Petition and the Report, and potentially conduct its own engineering
4 study, and to have the benefit of the required Drainage District specifications and a
5 report by state drainage engineer;

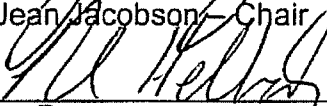
6 **BE IT FURTHER RESOLVED** that the Racine County Office of the Corporation
7 Counsel and /or Town Attorney is authorized to file an objection to the Petition, at or
8 before the August 12, 2009 hearing, and is further authorized to take any action
9 necessary to legally enjoin the proposed meeting to be conducted or any further action
10 from being taken by the Drainage Board on this issue, until proper notice of the Petition
11 and of the Engineering Report can be provided, which action may include the filing for
12 injunctive relief in Racine County Circuit Court, and the filing of a Petition for Writ of
13 Certiorari in said court pursuant to §88.09, Wis.Stats., if the Drainage Board does take
14 action to annex the proposed land, including property owned by the Town; and counsel
15 is authorized to execute and documents necessary to carry out the intent of this
16 resolution;

17 **BE IT FURTHER RESOLVED** by the Town Board of the Town of Norway be
18 directed to send copies of this Resolution of the members of the Town of Norway State
19 legislative delegation and other affected municipalities.

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21 Adopted this 3rd day of August, 2009 at a duly convened Town Board meeting.
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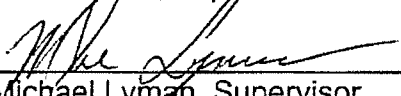
24 TOWN OF NORWAY

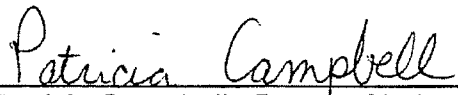
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26 By: 
27 Jean Jacobson – Chair

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29 Robert Helback, Supervisor

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31 Ralph Schopp, Supervisor

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34 Tim Hansen, Supervisor

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37 Michael Lyman, Supervisor

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41 Attest: 
42 Patricia Campbell, Deputy Clerk
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