

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-3038
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-312

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF WAUKESHA,

PLAINTIFF-APPELLANT,

v.

CITY OF WAUKESHA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Nettlesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. The Town of Waukesha appeals from an order granting summary judgment in favor of the City of Waukesha. The Town sought a judgment declaring its rights to gain access to the City's sanitary sewer system. Because there are no material facts in dispute and the City is entitled to judgment as a matter of law, we affirm.

¶2 The following facts are undisputed. The City owns, operates and maintains sewer and water utilities. Since 1987, the City has had a policy of considering individual requests to extend sewer and water service based upon the overall benefit to the City of extending such service. In the past, the City has extended sewer and water service to property located within the Town without requiring that the affected property be annexed to the City if the City otherwise benefited from the extension of service. The City has not adopted an ordinance requiring annexation of Town property before such property could receive sewer service from the City. But, on occasion, the City has declined to extend sewer service to a Town property unless annexation occurred. For some of those Town properties, annexation was not possible because the properties were not contiguous to the City.

¶3 The Town sought a declaration of its rights to obtain sewer service from the City. The Town claimed that the City, in declining to make sewer service available to Town properties under the same conditions as service is provided to City properties, committed an antitrust violation. The Town further argued that because the City has not enacted an ordinance governing the extension of sewer service and has extended sewer service to some Town properties without requiring annexation of those properties, the City has waived its right to insist upon annexation as a condition of extending sewer service to any Town property.

¶4 The circuit court decided the case on summary judgment and concluded that there were no material factual issues in dispute. The court concluded that WIS. STAT. §§ 66.0813 and 62.18 (1999-2000)¹ give the City

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

discretion in responding to requests for the extension of sewer service to Town property. Applying the undisputed facts, the court concluded that the City was not legally obligated to provide sewer service to the Town, was not required to enact an ordinance relating to the provision of sewer service, and did not violate federal antitrust law, the Sherman Act. 15 U.S.C. § 1 et seq. The court also concluded that the City did not waive its right to require annexation of Town property on a case-by-case basis as a condition of extending sewer service. Finally, the court concluded that the use of federal or state government funding for the City's sewer service did not limit the City's ability to exercise its discretion when responding to a request for an extension of sewer service.

¶5 On appeal, the Town argues that the City cannot refuse to extend sewer service to Town property on the same terms and conditions as the City extends sewer service to City property because the City has not complied with the requirements of WIS. STAT. §§ 62.18(1) and 66.0813(3)(a). We disagree with the Town's premise that these statutes require the City to enact an ordinance governing sewer extensions.

¶6 WISCONSIN STAT. § 62.18(1) provides that a city has the power to construct sewer systems and to make additions to such systems. WISCONSIN STAT. § 66.0813(3)(a) states that "a city ... may by ordinance fix the limits of utility service in unincorporated areas." Neither of these statutes mandates the enactment of an ordinance.

¶7 The case law does not prohibit annexation in exchange for extending sewer service. In *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982), our supreme court held that Chippewa Falls did not commit an antitrust violation when it conditioned the extension of sewer service to

Hallie upon Hallie's agreement to allow Chippewa Falls to collect sewage and provide other municipal services. *Id.* at 536-37. Hallie refused, and Chippewa Falls annexed a portion of Hallie. *Id.* at 534.

¶8 Hallie sued Chippewa Falls, alleging that conditioning sewer service on its acceptance of other services was anti-competitive behavior and a violation of Wisconsin's antitrust law, WIS. STAT. § 133.03 (1979-80). *Hallie*, 105 Wis. 2d at 535. The court held that WIS. STAT. § 66.069(2)(c) (1979-80)² allows a city to fix areas outside of its boundaries for sewer service and that annexation can be an appropriate prerequisite to extending sewer services outside of city limits. *Hallie*, 105 Wis. 2d at 542. The United States Supreme Court held similarly in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

¶9 The City of Waukesha is not obligated by statute or case law to enact an ordinance governing the extension of sewer service or to forego annexation in exchange for extending sewer service. Therefore, the City has not waived its right to require annexation of Town property as a condition of obtaining sewer service, even if it has not required annexation in every case.³

¶10 We also reject the Town's alternative argument that it has an implied contract with the City relating to the provision of sewer service. We agree with

² WISCONSIN STAT. § 66.069(2)(c) (1979-80) was renumbered to WIS. STAT. § 66.0813(3)(a) (1999-2000) by 1999 Wis. Act 150, §§ 189, 240. The statutory language is substantially the same as that considered by the court in *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982). *Town of Neenah Sanitary Dist. No. 2 v. City of Neenah*, 2002 WI App 155, ¶24 n.7, 256 Wis. 2d 296, 647 N.W.2d 913.

³ The Town argues that this case presents the "different set of circumstances" suggested in *Hallie*, 105 Wis. 2d at 542, under which the City should be liable for its refusal to extend sewer service to Town properties. We disagree that this case presents facts which would amount to an antitrust violation.

the circuit court that the facts are undisputed on this point, and they do not favor the Town's argument that the City has an equitable obligation to provide sewer service.

¶11 The Town argues that sanitary sewer service must be extended to Town residents whose septic systems have failed. In the absence of a statutory or express intermunicipal contractual obligation to do so, the City is not required to extend service to such Town properties.

¶12 The Town also argues that the City has been unwilling to enter into intermunicipal contracts to provide sanitary sewer service. However, the applicable statutes do not require the City to do so. The City has extended sewer service pursuant to its own criteria.

¶13 The Town argues that federal and tax dollars from Town residents were used in the City's sewer system. We are not persuaded. These taxes were not assessed for the purpose of the City's sewer system, and they are not directly related to the construction or maintenance of the City's sewer system.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

