

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 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. 02-1264
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-1869

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF BROOKFIELD,

PLAINTIFF-APPELLANT,

SANITARY DISTRICT NO. 4-TOWN OF BROOKFIELD,

**INTERVENING PLAINTIFF-
APPELLANT,**

v.

CITY OF BROOKFIELD,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:

J. MAC DAVIS, Judge. *Affirmed.*

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

¶1 PER CURIAM. The Town of Brookfield and Sanitary District No. 4 of the Town of Brookfield appeal from a judgment dismissing their claims against the City of Brookfield in a dispute about use of a sewer interceptor. We agree with the circuit court that the City was entitled to summary judgment because there was no contract, express or implied, between the City and the Town for the use of the sewer interceptor. We affirm.

¶2 The Town sought a declaratory judgment that the City must permit the Town to connect to the Gateway sewer interceptor constructed by the City because the parties had a contract, either express or implied, to that effect. The Town's Sanitary District later intervened in the action. All parties sought summary judgment. On summary judgment, the circuit court held that the documents exchanged by the parties did not amount to an express contract, the City council did not approve any agreement with the Town, and not all contract issues between the parties had been resolved. The Town and the Sanitary Board appeal.

¶3 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶4 On appeal, the Town argues that either there was an express or implied contract or it is entitled to utilize the Gateway interceptor in accordance with a May 1996 Intermunicipal Agreement between the Sanitary District and the City relating to the operation of a wastewater treatment facility.

¶5 “A contract is based on a mutual meeting of minds as to terms, manifested by mutual assent.” *Goossen v. Estate of Standaert*, 189 Wis. 2d 237, 246, 525 N.W.2d 314 (Ct. App. 1994). This is an essential element of both express and implied contracts. See *Dunlop v. Laitsch*, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962) (meeting of minds required in express contract); *Theuerkauf v. Sutton*, 102 Wis. 2d 176, 185, 306 N.W.2d 651 (1981) (meeting of minds required in implied contract).

¶6 The record reveals that the Town and the City never had a meeting of the minds relating to the Town’s use of or participation in the sewer interceptor. Therefore, there can be no express or implied contract which permits the Town to utilize the interceptor. At most, the parties had an agreement to agree which does not create a binding contract. See *Dunlop*, 16 Wis. 2d at 42.

¶7 In March 1996, the City’s sewer board met to discuss extending a sanitary sewer interceptor to an area of the City south of Capitol Drive to accommodate development of a new industrial park. Because some properties north of Capitol Drive are located within the Town, the sewer board directed the City to approach the Town about paying a proportionate share of the cost of constructing the interceptor in order to provide sewer service to Town lands north of Capitol Drive.

¶8 The City’s Director of Public Works, William Muth, wrote a letter to the Town on March 28, 1996, regarding construction of the interceptor. The letter stated that the City believed it was in the best interests of the Town and the City “to discuss the possibility of an intercommunity agreement to share in [the costs relating to the interceptor].” The parties went back and forth regarding the cost calculation. While these negotiations were ongoing, the City awarded an

interceptor construction bid in October 1996 and paid for the construction of the interceptor. The interceptor was designed to be able to provide service to the Town properties even though the Town had not responded on a timely basis to the City's inquiry regarding participation in the construction of the interceptor.

¶9 In February 1997, Steven Loth, the City's Engineering Administrator, provided the Town's Sanitary District with calculations for the Town's share of the cost of the interceptor if the parties ever reached an agreement to share the costs. The Sanitary District voted to approve the costs but stated that "it was probably not necessary to enter into the previously-discussed intermunicipal agreement" because the interceptor had been constructed.

¶10 In March 1997, after receiving the Town's approval of the costs, the City's sewer board directed the City to draft an intercommunity agreement. In April 1997, an agreement was drafted. The Sanitary District requested changes to the draft agreement, but by August 2000, the Sanitary District was still waiting for a final agreement from the City.

¶11 In February 2001, the Sanitary District tendered \$107,000 to the City as payment for sewer extensions in the Capitol Drive area. The City rejected the tender. When the Town made plans to extend the interceptor to Town lands, the City declined to permit the Town to connect to the interceptor. The Town sought a declaration of its rights to connect to the interceptor.

¶12 These undisputed facts indicate that the parties did not have a meeting of the minds. Although the parties discussed entering into an intercommunity agreement, such an agreement was the subject of lengthy negotiations and, in the end, was never signed. Moreover, during the negotiations, the City undertook to construct and pay for the interceptor. We note that the draft

agreement between the parties covered not only cost-sharing, but also extending sewer service north of Capitol Drive, and responsibility for repair and maintenance of the sewer pipes. These issues were never resolved. Finally, we note that the Town itself conceded that because the interceptor had been constructed, an intercommunity agreement was probably no longer necessary.

¶13 The Town argues that the parties had an implied contract to permit the Town to connect to the interceptor. However, we have already held that the parties did not have a meeting of the minds, an essential feature of an implied contract. *See Theuerkauf*, 102 Wis. 2d at 185.

¶14 The Sanitary District argues that it owns 13.21% of the regional wastewater treatment facility located within the City. In order to convey sewage from the participating municipality to the treatment plant, the Town needs to use the interceptor. The Town argues that it would be inequitable to determine that it did not have a contract with the City to use the interceptor and that the City's denial of access to the interceptor effectively deprives the Sanitary District of its benefits under a May 1996 Intermunicipal Agreement for the treatment facility.

¶15 The Town's ownership interest in the wastewater treatment plant does not create an agreement regarding use of the City's interceptor where none previously existed. The 1996 Agreement governs allocation to the District of a share in the plant's capacity and cost-sharing, not the conveyance of waste to the plant by capacity owners. The agreement contemplates that the municipalities whose waste must reach the treatment plant will enter into separate agreements relating to the transportation of waste or construct separate sewer pipes and interceptors. The Town has not established that the 1996 Agreement confers any right on it to use the City's sewer pipes or interceptors to transmit waste to the treatment plant.

By the Court.—Judgment affirmed.

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

