

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2015

Diane M. Fremgen
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. 2014AP1576

Cir. Ct. No. 2013CV189

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF MENASHA,

PLAINTIFF-APPELLANT,

v.

**WAVERLY SANITARY DISTRICT, CITY OF APPLETON, TOWN OF
HARRISON AND VILLAGE OF HARRISON,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Calumet County:
PETER L. GRIMM, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 NEUBAUER, C.J. The City of Menasha, the Town of Harrison and the Waverly Sanitary District entered into an intermunicipal agreement that neither the City nor the Town “shall make any attempt to dissolve and take over” the

sanitary district without the others' consent. Part of the territory in the Town incorporated into the Village of Harrison, and now, the City seeks a declaration that it has the right to take over the Waverly Sanitary District, despite its agreement. We conclude that the agreement to opt out of the statutory scheme governing transfer of ownership and control of a town sanitary district when part of a territory served by the district incorporates, is expressly authorized under WIS. STAT. § 60.79(2) (2013-14)¹ and affirm the circuit court's dismissal of the City's complaint for declaratory judgment asserting its right to ownership and control the town sanitary district.

BACKGROUND

¶2 The Waverly Sanitary District (the District) is a town sanitary district established under WIS. STAT. § 60.71. The District consists of territory in the Town of Harrison (the Town). The District provides sewer and water services extra-territorially, by contract, to some people in the Village of Harrison (the Village), the City of Appleton (Appleton), and the City of Menasha (the City).

¶3 The City, the District, and the Town entered into an intermunicipal agreement on October 28, 1999 (the Agreement). Among the listed purposes of the Agreement are to “[f]acilitate orderly development of the Town and the City,” to “[e]liminate current and minimize future litigation,” and to “[p]romote harmony between the municipalities.” The Agreement addresses boundaries, respective growth areas, and the District. Regarding the District, the parties agreed, among other things, that “[n]either the Town nor the City shall make any attempt to

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

dissolve and take over the Waverly Sanitary District without the consent of the Waverly Sanitary District and each other.” Furthermore, the parties agreed that nothing in the Agreement “accords any third party any legal or equitable right.” Finally, the Agreement indicates that it “shall be liberally construed to accomplish its intent.”²

¶4 In March 2013, part of the Town incorporated, becoming the Village. The City sought a declaratory judgment establishing its rights to ownership and control of the District, arguing that a change in the distribution of patrons served required that ownership and control of the District’s sewer and water system be transferred to the City. *See* WIS. STAT. § 60.79(2)(dm). According to the City’s complaint, the major portion of patrons served resided in the City. The Town, the Village, and the District counterclaimed that the City had breached the Agreement by attempting to take over the District.

¶5 The circuit court ruled that WIS. STAT. § 60.79(2)(dm) authorized the City and the District to enter into the Agreement and that the Agreement barred the City’s declaratory judgment request.

[T]he best argument that the City puts forward is that the Court should construe Section 9 [of the Agreement] as not applying because the City is not requesting a dissolution. I view that argument to be hypertechnical and not consistent with the intent of the agreement to be liberally construed

[T]akeover is the operative phrase that has to be applied here, and the Court concludes that the actions of the City ... by attempting the lawsuit ... is in violation of Paragraph 9. It is a clear attempt to take over the District.

² The City does not challenge the validity of the Agreement.

I do conclude, as a matter of law, that the agreement does trump the statute, and I conclude that easily because the statute allows the parties to accept or exempt themselves out from it. [The statute] allow[s] the parties to otherwise contract and agree differently. And I conclude, as a matter of law, that the signatories to this agreement did so agree to not be bound by that section, but, rather, their agreement is the binding language that the parties have to abide by and live under, and, therefore, the Court agrees with the analysis of the ... District and the Town and Village ... that the request ... must be denied and that the action thus be ... dismissed. So I uphold the agreement, it is valid and binding, it does trump the statute, and it shall be enforced.

The circuit court dismissed the City's complaint for declaratory judgment in its entirety.³

DISCUSSION

Standard of Review

¶6 The application of a statute to undisputed facts presents a question of law we review de novo. *Hempel v. City of Baraboo*, 2005 WI 120, ¶21, 284 Wis. 2d 162, 699 N.W.2d 551. In interpreting a statute, our goal is to ascertain the meaning the legislature intended, as indicated by the enacted language. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. We first look to the language of the statute. *Id.*, ¶45. If the language is clear, we go no further. *Id.*

³ Later, the court entered an amended order, also dismissing without prejudice the counterclaims of the District, the Town and the Village, pursuant to a stipulation by the District, the Town and the Village that their counterclaims were moot due to the circuit court's dismissal of the complaint.

¶7 The construction of a contract also presents a question of law we review de novo. *Acuity v. Ross Glove Co.*, 2012 WI App 70, ¶5, 344 Wis. 2d 29, 817 N.W.2d 455. When interpreting a contract, we discern the parties’ intent through the language of the contract. *See id.*

The Statute

¶8 WISCONSIN STAT. § 60.79(2) addresses the incorporation of part of a town sanitary district. Paragraph (a) provides, “The incorporation or annexation of territory within the town sanitary district detaches that territory from the district.” Sec. 60.79(2)(a). If the incorporated territory is less than the entire district, and the district has certain obligations to the territory or serves the territory, paragraphs (c) to (e) apply. Sec. 60.79(2)(b). The parties point us to paragraphs (c) and (dm), which provide:

(c) The city or village and the town sanitary district shall divide the assets and liabilities of the town sanitary district under [WIS. STAT. §] 66.0235 or by entering into an intergovernmental cooperation agreement under [WIS. STAT. §] 66.0301, except that the ownership of any water or sewerage system shall be determined under par. (dm).

....

(dm) 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.

Sec. 60.79(2)(c), (dm) (emphasis added). As emphasized, the statute expressly allows municipalities and districts to modify the provisions of the statute by agreement.

The Agreement

¶9 The Agreement lists as two of its purposes to “[e]liminate current and minimize future litigation” and to “[p]romote harmony between the municipalities.” In Section 9, the parties agreed that “[n]either 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.” The Agreement indicates that it “shall be liberally construed to accomplish its intent.”

¶10 The City argues that the Agreement’s failure to mention WIS. STAT. § 60.79 specifically shows that the parties did not intend to opt out of the statute. Section 60.79(2)(c), (dm) addresses “ownership of any water or sewage system” and “the responsibility for continuing operation.” The language in the Agreement prohibits an attempt to “take over” the District, and the complaint refers to the ownership and operational control of the District. Asserting rights to ownership and operational control means taking over. The statute allows for an exemption by agreement, and the Agreement prohibits an attempted take-over by the City.⁴

Effect of the Agreement on Third Parties

¶11 The City argues that any agreement to exempt municipalities and the District from the transfer provisions of WIS. STAT. § 60.79(2)(dm) “must include all parties that will be affected by any exemption.” First, the Agreement, to which the City is a party, states that it “is intended to be solely between the Town, the City and the Waverly Sanitary District. Nothing in this Agreement accords any

⁴ While the City does not address dissolution on appeal, we agree with the circuit court that a liberal construction of the Agreement and in particular Section 9 must result in denial of the City’s request for declaratory judgment.

third party any legal or equitable right, whatsoever” Second, the entities that the City paints as victims in its argument on their behalf—those municipalities that are not parties to the Agreement—have either supported the District’s position (the Village) or did not take a position before the circuit court on the City’s motion for declaratory judgment (Appleton). The City is a party to the Agreement and is bound by its terms, which prohibit the City’s declaratory judgment request for ownership and control of the District.⁵

CONCLUSION

¶12 WISCONSIN STAT. § 60.79(2) governs the transfer of ownership and control of a town sanitary district when there has been a threshold shift in patrons after a partial incorporation. However, the statute allows municipalities and town sanitary districts to opt out of its provisions by agreement. Here, the City agreed not to attempt to take over the District. The City’s declaratory judgment action seeking a declaration of its rights to ownership and control of the District was an attempt to take over the District and therefore properly dismissed by the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁵ As the Agreement prohibits attempts to take over control and ownership, we need not address the City’s complaints as to the consequences or future hypothetical municipal changes.

