

2001 DRAFTING REQUEST

Bill

Received: 11/28/2001

Received By: **agary**

Wanted: **As time permits**

Identical to LRB:

For: **Dean Kaufert (608) 266-5719**

By/Representing: **Ed Eberle (aide)**

This file may be shown to any legislator: **NO**

Drafter: **agary**

May Contact:

Addl. Drafters:

Subject: **Transportation - highways**

Extra Copies: **TNF**

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Constructing pipelines and sewers to transmit water along highways

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	agary 01/28/2002	hhagen 01/28/2002	jfrantze 01/29/2002	_____	lrb_docadmin 01/29/2002	lrb_docadminS&L 02/15/2002	

FE Sent For: *At intro*

<END>

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1?	agary	11/28/02 hmk	Bill	Bill			

FE Sent For:

<END>



State Representative Dean R. Kaufert

MEMORANDUM

TO: Aaron Gary, Attorney

FROM: Representative Dean Kaufert

DATE: November 28, 2001

Re: Drafting request relating to: amending section 86.16 of the state statutes to apply to sewer mains, as well as water mains.

Attached you will find a copy of a letter sent to our office by Curt Witynski of the League of Wisconsin Municipalities. I am requesting that **item #2** on his memo from October 23, 2001 be drafted as legislation.

Please feel free to call Ed Eberle or me in my office at 6-5719 with any questions or concerns. Curt Witynski can be reached at 267-2380. I have included his business card for your reference.



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Madison, Wisconsin 53703-2215

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Fax: 608/267-0645

E-mail: league@lwm-info.org
www.lwm-info.org

To: Representative Dean Kaufert
From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities
Date: October 23, 2001
Re: Legislative Proposals Allowing Municipalities to Install Sewer Through Towns

Municipalities seeking to provide utility service to properties located within new or growing areas of the municipality may occasionally find it necessary or economically prudent to construct sewer or water mains through an adjacent town. Certain provisions in state law make it possible for towns to thwart the installation of municipal utility facilities through a town.

Two statutes in particular have been the source of controversy and, most recently, litigation between towns and municipalities over extraterritorial installation of municipal utility facilities. These statutes are sec. 60.52(1), Stats., and sec. 86.16(1), Stats.

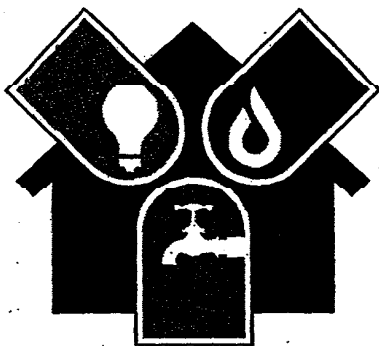
1. **Sec. 60.52(1).** This statute grants town boards authority to approve or deny a municipality's request to extend sewer or water systems into or through a town. The statute specifically provides: "With the approval of the town board, any city or village adjoining a town may construct and maintain extensions of its sewer or water system in the town." The courts have interpreted this statute as requiring a city to obtain approval from a town board even before installing water or sewer mains across city owned land located in the town. We believe this is contrary to the original intent of the provision. As the attached article explains, the legislative history of sec. 60.52(1) indicates that it was originally expressly limited to situations involving municipal utility facilities being installed under town roads.

The League respectfully requests that you please consider introducing legislation amending sec. 60.52(1), Stats., to clarify that town approval is necessary only when a city or village proposes to install sewer or water mains under a town road.

2. **Section 86.16(5).** This statute provides that any municipality may, with the written consent of the local authority that has jurisdiction over the highway, construct and operate "pipes or pipelines for the purpose of transmitting . . . water . . . along, across or within the limits of the highway." The statute further provides that when, for example, a town board denies a municipality permission to install water mains under or along a town road, the municipality can appeal to the state division of hearings and appeals (DHA) for an order requiring the town to grant the municipality permission to install sewer mains within the town road. While sec. 86.16(1), Wis. Stats., does not explicitly mention pipes for the transmission of *sewer*, the division of hearings and appeals and its predecessor agencies, the Transportation Commission and the Office of the Commissioner of Transportation, have repeatedly found over the years that sewer mains are within the scope of sec. 86.16(5), Wis. Stats. Recently, however, a circuit court concluded otherwise and held that the statute did not apply to the installation of sewer mains. The City involved has appealed the decision to the Court of Appeals.

The League respectfully requests that you consider introducing legislation amending sec. 86.16(1) to expressly provide that it applies to sewer as well as water mains.

Thanks for your consideration of these proposals.



MUNICIPALITIES AND TOWNS Utility Extension Disputes

By: Curt Witynski*
League Legal Council

Municipalities seeking to provide utility service to properties located within new or growing areas of the municipality may occasionally find it necessary or economically prudent to construct sewer or water mains through an adjacent town. While municipalities are clearly authorized to install utility facilities through a town to provide service to other properties within the municipality, a town may, and likely will, raise objections.

This month's comment reviews state statutes relevant to extraterritorial installation of municipal utility facilities. It describes what powers towns have and what methods towns typically use to thwart construction of municipal sewer and water

mains within their boundaries. It also describes what authority municipalities have to install sewer and water mains through a town and what arguments municipalities can employ to stymie town efforts to obstruct this type of municipal activity.

RELEVANT STATUTES

1. City and Village Authority

A number of state statutes either expressly or implicitly grant municipalities authority to construct utility facilities in towns. These are:

Section 62.18(13), Wis. Stats., expressly provides that any city "may lay sewers in . . . any highways of the county, whether within the limits of said city or not." This provision also applies to villages. See sec. 61.39, Wis. Stats.

Sections 62.22(1) and 61.34(3), Wis. Stats., authorize cities and villages, respectively, to acquire property by gift, purchase or condemnation outside the municipality for water and sewage systems.

Section 62.23(2), Wis. Stats., provides that cities and villages¹ may, under certain circumstances, provide in their master

plans for future sewer extensions outside the municipal boundaries.

Section 66.076(1)(a), Wis. Stats., expressly provides that municipalities may construct sewer mains outside their corporate limits.

Section 86.16(1), Wis. Stats., provides that any "person," which includes municipalities,² may with the written consent of the local authority that has jurisdiction over the highway, construct and operate "pipes or pipelines for the purpose of transmitting . . . water . . . along, across or within the limits of the highway." The statute further provides that when, for example, a town board denies a municipality permission to install sewer³ mains under

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continued on page 410



1. Section 61.35, Wis. Stats., makes sec. 62.23, Wis. Stats., applicable to villages.
2. See Sec. 990.01(26), Wis. Stats., which provides that the word "person" includes "bodies politic or corporate."
3. While sec. 86.16(1), Wis. Stats., does not explicitly mention pipes for the transmission of sewer, the division of hearings and appeals and its predecessor agencies, the Transportation Commission and the Office of the Commissioner of Transportation, have repeatedly found over the years that sewer mains are within the scope of sec. 86.16(5), Wis. Stats., and no court has held otherwise. Moreover, the only reported decision relating to sec. 86.16, Wis. Stats., *City of Appleton v. Transportation Commission*, 116 Wis.2d 352, 342 N.W.2d 68 (Ct. App. 1983), involved a sewer main. See *City of West Bend v. Town of Barton*, DHA Case No. 99-H-1119 (Wis. Div. Hearings & Appeals Sep. 13, 1999) (DOT).

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or along a town road, the municipality can appeal to the state division of hearings and appeals (DHA) for an order requiring the town to grant the municipality permission to install sewer mains within the town road.

The issue on appeal before the DHA is whether the proposed installation of the sewer mains will result in an unreasonable obstruction to traffic on the town road. A municipality may be denied approval to install sewers through the town by the DHA only if construction will "cause an unreasonable obstruction of the highway." *City of Appleton v. Transportation Commission of Wisconsin*, 116 Wis.2d 352, 342 N.W.2d 68, 72 (Ct. App. 1983). The DHA may conditionally approve municipal installation of a sewer main within a town road as long as the condition rationally relates to the prevention of an unreasonable obstruction of the highway. *Id.*

Section 196.58(7)(a), Wis. Stats., provides that if a municipality operating a water system finds "it is necessary or economically prudent" for the municipality to install mains "through, upon or under a public street, highway, road, public throughfare or alley" located within an adjacent town in order to serve consumers in an area that is part of the municipality, the municipality may petition the town clerk for approval to install the mains. The town board has fifteen days after the petition is filed to act on it. If the town board fails to act on the petition within the fifteen-day period, the petition is deemed approved and the municipality may proceed with the installations.

If the town board denies the petition, the municipality may apply to the Public Service Commission (PSC) for authority to install the water mains through the town. If the PSC determines, after holding a hearing on the matter, that it is "necessary or economically prudent" for

the municipality seeking to serve its consumers to install water mains within the town, the commission must promptly issue an order authorizing the municipality to proceed to make the installation.⁴

A municipality making an installation of water mains in a town road under this section must restore the road to the same condition as it existed before the installation. In addition, the town may require a performance bond from the municipality seeking to make the installation. Sec. 196.58(7)(b), Wis. Stats.

2. Town Authority

In addition to the powers that towns have to approve or deny a municipal utility project within a town road under secs. 86.16 and 196.58(7), Wis. Stats., town boards are also granted authority to approve or deny a municipality's request to extend sewer or water systems into a town under sec. 60.52(1), Wis. Stats. That statute specifically provides in part as follows: "With the approval of the town board, any city or village adjoining a town may construct and maintain extensions of its sewer or water system in the town." The extent of a town board's authority under this statute is a matter of some debate. Not surprisingly, towns interpret their powers broadly while municipalities interpret town powers under this statute narrowly.

There are no reported Wisconsin court decisions interpreting the scope of sec. 60.52(1), Wis. Stats., or its predecessor, sec. 60.29(16). In addition, there are no attorney general opinions interpreting these statutes. Also, somewhat surprisingly, the League legal staff has not issued any legal opinions interpreting sec. 60.52(1) or its predecessor. The possible scope of the statute's application is discussed in greater detail below.

SOME ISSUES IN DISPUTE

1) *Must a municipality obtain approval from a town board under sec.*

60.52(1), Wis. Stats., before installing sewer or water mains under a town road to serve properties in a part of the municipality?

Some towns read the plain language of sec. 60.52(1), Wis. Stats., as requiring a municipality to obtain prior approval from a town whenever a municipality constructs or maintains sewer mains in the town, regardless of whether the mains are being installed to serve customers within the municipality and not town property owners.⁵ Municipalities, on the other hand, interpret the statute to mean that town approval is necessary only when municipal sewer mains are installed to provide service to town residents.

The argument in support of the municipalities' interpretation of the statute is that sec. 60.52(1) applies on its face only to "extensions" of a municipality's "sewer or water system" in a town (emphasis added). The use of the term "system" connotes more than the mere installation of sewer mains through a town to serve municipal customers. A "sewer system" encompasses all elements of the collection, transportation, and treatment of sewage, that is, the entire array of sewer services. Thus, sec. 60.52(1) applies only when a municipality proposes to provide sewer service to property located within a town. If no sewer service will be rendered to town residents and the sewer mains are being installed merely to provide service to properties located within the municipality, then the municipality has not "extended" its "sewer system" in the town and sec. 60.52(1) does not apply.

2) *Must a municipality obtain approval from a town board under sec. 60.52(1), Wis. Stats., when installing sewer or water mains through a town to serve properties located within the municipality when the mains are not installed under a town road?*

This issue is currently being litigated in Chippewa County Circuit Court. The

4. It should be noted that 1999 Assembly Bill 450 and its companion in the Senate, Senate Bill 228, which were introduced at the request of the Wisconsin Towns Association, eliminates the PSC's authority under sec. 196.58(7)(a), Wis. Stats., to approve municipal water main installations within a town. Under the bill, if a town denies a municipality permission to install water mains under a town road, the municipality is without recourse to the PSC or any other agency.

5. At least one circuit court judge has agreed with this reading of the statute. See *Danielson v. City of Sun Prairie*, No. 98-CV-2032 (Wis. Cir. Ct. Dane County Aug. 24, 1999).

Town of Hallie is arguing that the City of Eau Claire was required by sec. 60.52(1), Wis. Stats., to obtain approval from the town before it installed sewer mains in city owned property located in the town to serve properties within the city. The city argues in its brief filed with the circuit court that sec. 60.52(1) only applies when sewer mains are being installed to serve town residents, and that the statute is applicable only when municipal sewer mains are installed under a town road or highway.

The city points to the legislative history of sec. 60.52(1) and the absurdities that would otherwise arise as support for its argument that the statute applies only in cases involving a town road or highway. Section 60.52(1) was created in 1984 by 1983 Wisconsin Act 532 as part of a comprehensive recodification of ch. 60, the general town government statute. The bill which became Act 532 was developed by the Special Committee on the Revision of Town Laws of the Wisconsin Legislative Council. Act 532 included explanatory notes provided by the Legislative Council regarding changes made by the Act to existing statutes. The Legislative Council explanatory note to sec. 60.52 stated:

NOTE: Restates s. 60.29(16), except that the current provision which prohibits depriving an abutting property owner from use of a water system is amended to include an abutting owner's use of a sewer system.

The statute that was restated, sec. 60.29(16), Wis. Stats. (1981), read as follows:

Section 60.29 [The town] board is empowered and required:

(16) WATER MAINS AND SEWERS OF ADJOINING MUNICIPALITY. To grant to any adjoining city or village permission, in the extension of its water or sewerage systems, subject to the rights of abutting property owners, to lay and maintain water mains and sewers in any street or highway in the town, and no abutting property owner who is permitted to connect with and use any such water main shall be deprived of the use thereof, except as to the use of water for nonpayment of water charges, without the consent of the town. (Emphasis added.)

Thus, the predecessor to sec. 60.52(1) required a municipality seeking the extension of its water or sewage system to obtain town permission to lay and maintain its water mains and sewers but only within town streets or highways. Town approval was required under the former statute only when a municipality proposed laying and maintaining sewer mains in a town road. Since sec. 60.52(1) is the intended clone of sec. 60.29(16) (1981 Wis. Stats.), it should be understood in the same sense as its predecessor.⁶

The Legislative Council's explanatory note regarding sec. 60.52(1) included in Act 532 indicates sec. 60.52 merely restates sec. 60.29(16). Thus, no substantive change from the previous law was intended by the creation of sec. 60.52(1). The City of Eau Claire, therefore, makes a strong argument that the legislature intended sec. 60.52(1) to apply, like its predecessor, only to the construction and maintenance of municipal utility facilities in town roads. Thus, the answer to the above question, based on the legislative history of sec. 60.52(1), is that the statute does not apply when municipal utility facilities are installed outside of a town road on land or an easement owned by the constructing municipality.

The City of Eau Claire also pointed out in its brief on this issue, that to con-

see *Utility Extension Disputes*
continued on page 412

“ MUNICIPALITIES, ON
THE OTHER HAND,
INTERPRET THE
STATUTE TO MEAN
THAT TOWN
APPROVAL IS
NECESSARY ONLY
WHEN MUNICIPAL
SEWER MAINS ARE
INSTALLED TO
PROVIDE SERVICE
TO TOWN
RESIDENTS.”

6. Sec. 990.001(7), Wis. Stats., provides the following directions with regard to construing revised statutes: "A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction. If the revision bill contains a note which says that the meaning of the statute to which the note relates is not changed by the revision, the note is indicative of the legislative intent."

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clude otherwise would lead to the absurd result that a municipality could, under secs. 86.16(5) and 196.58(7), Wis. Stats., be authorized to construct water and sewer mains in a town road despite town objections; but not in property owned by the municipality and located in the town. Sections 86.16(7) and 196.58(7) apply only when a town board denies a municipality permission to construct utility facilities within a town road. These statutes afford no appeal to a state agency where a town denies a municipality permission to install sewer or water mains within an easement or property owned by the municipality. Unless sec. 60.52(1) is interpreted only to apply to the construction of municipal utility facilities within town roads, a municipality could be barred from installing sewer or water mains through the town on property owned by the municipality. Such a result would be anomalous and absurd.

3) Under sec. 86.16(5), Wis. Stats., can the state division of hearings and appeals (DHA) condition approval of a municipality's request to install sewer mains through a town to serve property located in an area within the municipality on the municipality agreeing to serve town properties abutting the sewer?

The court of appeals examined this issue in *City of Appleton v. Transportation Commission of Wisconsin*, supra, and concluded that the Transportation Commission, DHA's predecessor, had authority under sec. 86.16, Wis. Stats., to impose such a condition when approving Appleton's request to install sewer through the Town of Grand Chute.

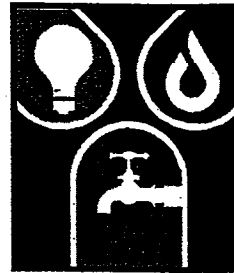
The primary basis for the court's holding in *City of Appleton* was that sec. ILHR 83.01(2), Wis. Adm. Code, now known as sec. Comm. 83.01(2), Wis. Adm. Code, required buildings on land abutting streets containing public sewers to be connected to the sewer. The rationale behind the Transportation Commis-

sion's condition requiring Appleton to allow town residents to hook-up to the sewer main was to avoid the unnecessary expense and highway disruption caused by the town having to construct a parallel system for the town residents who would be required to hook-up to a public sewer system. Though sec. Comm 83.01(2), Wis. Adm.

Code, does not require a town under such circumstances to build a parallel sewer system and for practical economic reasons no such construction in the street would have ever occurred, the court of appeals concluded that such a condition was rationally related to preventing unreasonable highway obstruction.

The court of appeals' decision in *City of Appleton* failed to take into account the power of municipalities to condition providing sewer service on annexation to the municipality. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34. (1985), the U.S. Supreme Court validated the municipal practice of conditioning the provision of sewer service on annexation to the municipality. In that case, the Supreme Court noted that sec. 62.18(1), Wis. Stats., authorizes cities to construct sewerage systems and includes the power to "describe with reasonable particularity the district to be [served]." And sec. 66.069(2)(c), Wis. Stats., provides that a city operating a public utility may, by ordinance, delineate how much of unincorporated areas it will serve, and that the city shall have no obligation to serve beyond the area so delineated.

Also, the basis for the *City of Appleton* decision has recently been brought into question. On December 8, 1998 the State Legislature's Joint Committee for the Review of Administrative Rules suspended the first two sentences of sec. Comm 83.03(2), Wis. Adm. Code, which like sec. Comm 83.01(2), Wis. Adm. Code, deals with public sewer connections. The suspended language provides as follows "When public sewers approved by the department of natural resources become available to the premises served, the



use of the private sewage system shall be discontinued within that period of time required by order, but not to exceed one year. The building sewer shall be disconnected from the private sewage system and be connected to the public sewer." In addition, a bill has been introduced by the Joint

Committee, 1999 Assembly Bill 96, prohibiting the Department of Commerce from promulgating or enforcing a rule that requires the owner of a private sewage system to discontinue use of the private sewage system and connect to a public sewer because a public sewer becomes available.

Thus, the basis for the court of appeals' decision in *City of Appleton*, that sec. Comm. 83.01(2)(b), Wis. Adm. Code, required properties abutting sewer mains to be connected to them, has been suspended and therefore does not currently exist. Moreover, if Assembly Bill 96 is enacted, the Department of Commerce will be permanently prohibited from requiring the owners of private sewage systems to hook up to public sewers.

The answer to the above question, then, is that the DHA currently has no reasonable basis for conditioning an order under sec. 86.16, Wis. Stats., allowing a municipality to install sewer mains through a town on the municipality allowing abutting town property owners to hook up to the system. Even in the absence of recent legislative activity in this area, the DHA does not have authority to order annexation of abutting town properties and the DHA should not interfere with a municipal policy requiring annexation prior to being allowed to connect to the municipality's sewer system.⁷

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7. See *City of West Bend v. Town of Barton*, DHA Case No. 99-H-1119 (Wis. Div. Hearings & Appeals Sep. 13, 1999) (DOT).



2001 BILL

Needed by
1/31 - end of
day
turned in 1/28

Generate

1 AN ACT ...; relating to: pipelines within the limits of a highway.

Analysis by the Legislative Reference Bureau

Under current law, a person (including a municipality) may construct and operate pipes or pipelines for the purpose of transmitting water within the limits of a highway if the authority with jurisdiction over the highway provides written consent. If such consent is not given, the person may appeal to the department of administration's division of hearings and appeals for an order allowing construction and operation of the pipes or pipelines.

This bill specifies that the same procedure and appeal rights apply to pipes or pipelines transmitting sewage within the limits of a highway.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 86.16 (1) of the statutes is amended to read:

3 86.16 (1) Any person, firm, or corporation, including any foreign corporation
4 authorized to transact business in this state may, subject to ss. 30.44 (3m), 30.45 and
5 196.491 (3) (d) 3m., with the written consent of the department with respect to state

BILL

SECTION 1

1 trunk highways, and with the written consent of local authorities with respect to
2 highways under their jurisdiction, including connecting highways, construct and
3 operate telegraph, telephone or electric lines, or pipes or pipelines for the purpose of
4 transmitting messages, water, sewage, heat, light, or power along, across or within
5 the limits of the highway.

6

(END)

Barman, Mike

From: Gary, Aaron
Sent: Thursday, February 14, 2002 4:48 PM
To: Barman, Mike
Subject: LRB-4333

Mike,

I just got a call from Ed in Rep. Kaufert's office asking that LRB-4333/1 be jacketed for Rep. Kaufert. Thanks.
Aaron

Aaron R. Gary
Legislative Attorney
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