

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 16, 1997

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

NOTICE

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

No. 96-1171

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**TERRY LOCKE AND LEA LOCKE, D/B/A G & L AUCTION
SERVICE,**

PLAINTIFFS-APPELLANTS,

V.

**TOWN OF MENASHA, JEANNE A. KRUEGER, ROBERT
SOKOLOWSKI AND JERRY LINGNOFSKI,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS S. WILLIAMS, Judge. *Affirmed.*

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

PER CURIAM. Terry and Lea Locke, d/b/a G & L Auction Service, appeal from a summary judgment in favor of the Town of Menasha, Jeanne A. Krueger, Robert Sokolowski and Jerry Lingnofski. The issue on appeal

is whether the Town had authority to regulate an auction Terry Locke desired to conduct in August 1994 and, if so, whether it erroneously enforced its ordinance by precluding Locke from holding the auction without a license. Because we conclude that the Town had such authority and Locke did not comply with the ordinance, the Town properly barred the auction. Summary judgment was appropriate on Locke's claims.

We review decisions on summary judgment by applying the same methodology as the trial court. *M & I First Nat'l Bank v. Episcopal Homes Management, Inc.*, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); see § 802.08(2), STATS. 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. See *id.* at 496-97, 536 N.W.2d at 182.

Resolution of this appeal depends largely on construction of the Town of Menasha's ordinance governing auctions. We construe ordinances in the same manner as statutes. See *State v. Ozaukee County Bd. of Adjustment*, 152 Wis.2d 552, 559, 449 N.W.2d 47, 50 (Ct. App. 1989). The meaning of an ordinance is a question of law which we review de novo. See *id.* Construction of legislation should conform to the intention of the body enacting it. See *Ashland Water Co. v. Ashland County*, 87 Wis. 209, 211, 58 N.W. 235, 235 (1894). If the language of the ordinance is plain and clearly understood, it should be given its ordinary and accepted meaning. See *Stoll v. Adriansen*, 122 Wis.2d 503, 510, 362 N.W.2d 182, 186 (Ct. App. 1984).

Section 9.02(2), TOWN OF MENASHA, WIS., TOWN OF MENASHA MUNICIPAL CODE (July 1990),¹ deems unlawful any auction held without an auction license. A license for an auction sale² must be obtained from the Town of Menasha by application made a minimum of five days prior to the event. The application must provide information which identifies the applicant and describes the proposed sale. *Id.* A \$25 license fee is charged for the auction license. However, the auction license “shall not be required when a person holds [a] one time auction of personal property owned by the person holding the auction. However, the auctioneer at such sales shall be required to be licensed pursuant to Section (5).” Section 9.02(6). Section (5) requires the auctioneer “who shall accept bids and conduct any auction sale” to be licensed at a fee of \$5 for each day of the auction. Section 9.02(5).

Locke contracted with three individuals to auction their personal property on August 21, 1994. On August 15, the Monday preceding the auction, Locke called the Menasha town hall and requested an auction license for the August 21 sale. He was informed he could pick up the auction license on August 19. On August 19, Locke tendered the fees for the auction and auctioneer’s licenses but refused to complete the application as required by the town clerk. As a result, the town clerk declined to accept Locke’s payment for the fees and refused to issue either license. The town clerk then notified the chief of police that Locke had failed to comply with the Town’s auction ordinance and asked the

¹ Section 9.02 of the TOWN OF MENASHA, WIS., TOWN OF MENASHA MUNICIPAL CODE was amended and recreated in ordinance No. 900625-1 ORD, effective July 1990.

² An auction sale is defined in the ordinance as “[a] public sale wherein goods or land are offered for sale to any and all persons attending the sale who may offer bids for the purpose of such goods and where the goods are then sold to the highest bidder.” TOWN OF MENASHA, WIS., TOWN OF MENASHA MUNICIPAL CODE § 9.02(2).

police department to bar the auction. The police did so, and Locke sued the town clerk and two police officers for damages he sustained when the auction was canceled.³

The trial court found no material facts in dispute and granted summary judgment to the defendants on the grounds that the Town had validly regulated the auction, Locke violated the Town ordinance when he attempted to hold the auction without licenses, and the defendants properly prohibited the auction.

Locke challenges the Town ordinance on the ground that the state has preempted auction regulation by virtue of ch. 480, STATS. Chapter 130, STATS., which regulated auctions and auctioneers, was repealed in 1989 Wis. Act 336, § 250 op, effective May 11, 1990. Locke argues that the subsequent enactment of ch. 480 preempted the Town's municipal ordinance. This analysis is fatally flawed because ch. 480 applies after February 28, 1995. *See* § 480.02(1), STATS. This dispute arose in August 1994. At that time, there were no state statutes in effect governing auctions and auctioneers. In the absence of a state statute, a municipality may regulate a particular area. *Cf. DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis.2d 642, 651, 547 N.W.2d 770, 773 (1996)

³ Locke also brought a defamation claim. However, he does not appeal the trial court's dismissal of this claim.

(municipalities may enact ordinances in areas addressed by the state legislature if the ordinances do not conflict with the legislation).⁴

Locke argues that the 1989 repeal of ch. 130, STATS., withdrew the Town's authority to regulate auctions. Ordinance 900625-1 ORD, which amended and recreated § 9.02, acknowledged the repeal of ch. 130 and stated that in the absence of state regulation of auctions and auctioneers, the municipality was exercising its authority to address matters relating to public health and safety. Section 9.02(1). This is an appropriate exercise of police power by the village board. *See* § 61.34(1), STATS.⁵

Locke contends that he did not need to complete the application because he sought to conduct a one-time sale for which he did not need an auction license. In so arguing, Locke usurps the authority of the town clerk to issue licenses. Section 9.02(2). The information requested in the license application permits the clerk to determine whether the proposed sale falls within the one-time sale exception to the requirement of an auction license. *See* 9.02(6). The language of the ordinance is not ambiguous. We further note that Locke did not apply for the auction license five days prior to the event. He tendered his licensing fee on August 19, two days before the scheduled auction. On that date he declined

⁴ The trial court erroneously concluded that ch. 480, STATS., applies and blocks the Town's authority to regulate auctioneers. As we have already stated, ch. 480 was not in effect when the auction in this case was scheduled. We also note that the trial court's summary judgment decision refers to ch. 457, STATS., as the statute governing auctions. In fact, the legislation which would have created ch. 457 was vetoed by Governor Thompson, and ch. 480 was subsequently created in 1993 Wis. Act 102, effective after February 28, 1995.

⁵ In 1956, the Town adopted a general and continuing resolution granting the Town board of supervisors the authority to exercise the powers of a village board.

to complete the license application. Under these facts, the clerk did not err in denying him a license.

Locke argues that the Town attorney's August 1987 interpretation of a previous form of the ordinance supports his view that he did not need to apply for or receive an auction license for a one-time sale of an individual's personal property. The Town attorney interpreted § 9.02(6) as an exemption to the ordinance for estate and liquidation sales by individuals and as requiring only a \$5 per day auctioneer's license which would alert the Town about the private auction.

Locke is not aided by the Town attorney's interpretation. The unambiguous language of § 9.02(6) states: "The [\$25] auction license ... shall not be required where a person holds [a] one time auction of personal property owned by the person holding the auction." Here, Locke sought to auction the personal property of three individuals. The Town attorney interpreted the ordinance to exempt sales by individuals who are not regularly engaged in the auction business. Here, the auction was arranged by Locke; his role was not limited to being the on-site auctioneer. Locke is regularly engaged in the auction business. On the undisputed facts, the Town attorney's interpretation does not avail Locke. Under the Town attorney's interpretation, Locke at least needed a \$5 auctioneer's license. He did not have one when he attempted to hold the auction.

In the alternative, Locke argues that he complied with the requirements for obtaining an auction license and the clerk did not have discretion to refuse to issue a license. While there may be a factual dispute as to whether Locke refused to complete the application or whether the town clerk denied him the opportunity to do so after Locke insulted the Town's application policy, the fact remains that Locke attempted to hold the auction without a license. Summary

judgment must be denied only where there are material facts in dispute. *See Clay v. Horton Mfg. Co., Inc.*, 172 Wis.2d 349, 353-54, 493 N.W.2d 379, 381 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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

