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DISTRICT IV

December 11, 2024

To:

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You are hereby notified that the Court has entered the following opinion and order:

2024AP1886 Town of Reseburg v. Clear-View Solutions Group
(L.C. # 2022CV116)

Before Blanchard, Graham, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Clear-View Solutions Group, LLC and Jeffrey Sauer (together, "the company") appeal an order in favor of the Town of Reseburg and the Town Board of Reseburg (together, "the Town"). Based upon our review of the petition for leave to appeal, the response, the supplemental arguments on the petition pursuant to our order of October 29, 2024, and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2021-22).[1] We reverse, and also grant relief pending appeal, in the form of a stay of the circuit court order through the date that the appeal is remitted to the circuit court.

BACKGROUND

The Town commenced this action seeking to enforce one of its ordinances against the company. As it pertains to this appeal, the Town alleged that the company is subject to licensure under the ordinance, and the Town sought an injunction requiring the company to comply with provisions of that ordinance which impose operational requirements for businesses of the company's type. On summary judgment, the circuit court ruled that the ordinance does not require the company to obtain a Town license, but that it does allow the Town to require the company to follow certain operational requirements in the ordinance, specifically those in Section 5 of the ordinance. The court ordered the company not to operate without taking certain actions. That order was nonfinal because the court also denied summary judgment as to the Town's separate nuisance claim, due to disputes of material fact, and that claim remains pending. The company petitioned for leave to appeal, and we granted the petition as to one issue, namely, whether Section 5 of the ordinance is a standalone provision that regulates the conduct of non-licensees, such as the company, in which case the company must follow the Section 5 operational requirements at its plant.

The title of the relevant Town ordinance is "Commercial Rendering/Composting of Livestock Mortality & Butchering Waste Licensing." Section 3 of the ordinance defines the term "animal processing plant" to include, among other things, a facility for collecting dead animals and composting them to produce fertilizer or other products or byproducts. The parties

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

on appeal do not dispute that this definition applies to the company's animal composting facility. Section 4 of the ordinance creates a licensing requirement. The circuit court held, based on express language in Section 4, that the Town licensing requirement applies only to persons who are required to be licensed by the state under WIS. STAT. § 95.72, a statute which addresses transportation, processing, and disposal of dead animals. The court further ruled that the company is not required to obtain a state license and therefore is not required to obtain a Town license. This conclusion is not disputed by the Town on appeal.

At issue in this appeal is the interpretation of Section 5 of the ordinance, titled "General Restrictions and Requirements." Section 5 contains some operational requirements for animal processing plants. The remaining ordinance sections, up to Section 14, mainly address procedural aspects of licensing. The circuit court ruled that, even though the company is not required to obtain a Town license, it must nevertheless comply with the operational requirements in Section 5.

As to this issue, the circuit court noted that, unlike the licensure requirement in Section 4, the operational requirements in Section 5 do not refer to persons licensed under WIS. STAT. § 95.72. Instead, Section 5 simply states that "[n]o person" may establish an "animal processing plant" without meeting certain operational requirements. The court turned to the ordinance's definition of "animal processing plant," which includes the company's facility. For this reason, the court ruled, the company is required to follow Section 5's operational requirements, because they apply to "animal processing plants." In essence, the circuit court determined that the Town has created an ordinance that (1) mostly addresses the topic of Town licensing, which applies only to persons who are required to have a state license under WIS. STAT. § 95.72 (and therefore required to have a Town license), but (2) also creates a definition of "animal processing plant"

that is broader than that license group, and in Section 5 the Town has also regulated that broader group, covering both town licensees and non-licensees.

ANALYSIS

The methods of statutory interpretation are well established and we need not repeat them here. *See, e.g.*, ***Rise, Inc. v. WEC***, 2024 WI App 48, ¶¶21-23, 413 Wis. 2d 366, 11 N.W. 3d 241. The parties do not dispute that these methods also apply to construction of ordinances.

Although we ultimately disagree with the circuit court's conclusion and the Town's arguments, we start by acknowledging that, in contrast to the licensure requirement in Section 4, the language of Section 5, by itself, does not expressly restrict its applicability to only those persons who are licensed under WIS. STAT. § 95.72. As explained, the introductory portion of Section 5 states that "no person" may establish a plant without meeting its requirements, and we agree that, when construed in isolation, this introductory language can be reasonably interpreted to regulate both those required to be licensed by the Town and those without that requirement.

However, our statutory interpretation is not confined to the text of that provision. We must also consider the context and closely related provisions. When we do that, we conclude that, based on several indicators we discuss below, including in Section 5 itself, the ordinance is most reasonably interpreted as applying only to those persons who are required to obtain Town licenses, and not also as a standalone provision regulating non-licensees. Some of those indicators are argued by the company, and others we have independently identified. We now describe four of those indicators and explain why they are significant.

First, the ordinance title suggests that the focus of the ordinance is on licensing because it does not mention any broader regulatory goal beyond licensing. ("Commercial

Rendering/Composting of Livestock Mortality & Butchering Waste Licensing.") *See* ***State v. Dorsey***, 2018 WI 10, ¶30, 379 Wis. 2d 386, 906 N.W.2d 158 ("reference to [a statute's] title is appropriate" in statutory interpretation); ***Aiello v. Village of Pleasant Prairie***, 206 Wis. 2d 68, 73, 556 N.W.2d 697 (1996) ("Although titles are not part of statutes, ... they may be helpful in interpretation.").

Second, Section 5 itself contains a reference to "the licensee." It does so in Section 5(a)(2), which prohibits an animal processing plant from being located on a road not designed for the traffic generated by the plant, "unless the licensee" improves the road at its own expense.

As to this provision, the Town contends that the company has forfeited any argument based on this reference in Section 5. The Town asserts that the company makes this argument for the first time on appeal, and notes that this court normally does not consider issues for the first time on appeal. However, there is a distinction between a new issue and a new argument. The issue before us is the interpretation of whether the ordinance applies here, and the discussion about the use of "licensee" in Section 5(a)(2) is one of several arguments being made in favor of a particular result on that issue. As a matter of judicial administration, we generally do not consider new issues or new arguments on appeal, yet we have used our discretion in applying this general rule to consider new or refined arguments on issues that were decided in the circuit court. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶¶23-25, 338 Wis. 2d 114, 808 N.W.2d 155 (the general rule against raising issues for the first time on appeal does not necessarily prevent an appellant from presenting an argument for the first time on appeal). We consider the company's argument regarding Section 5(a)(2) because we deem it to be weighty in resolving the legal issue

here and both sides had ample opportunities to address the meaning of the ordinance in the circuit court.

There are at least two ways in which the reference in Section 5 to "the licensee" is meaningful. First, it is important because, although it appears in a subsection with a separate number designation, "the licensee" completes the sentence that begins with the broad "[n]o person" language on which the Town relies. When the introductory part of Section 5 is construed in light of subpart (a)(2), the effect is to create the following sentence: "No person may establish an animal processing plant: (2) on a road not designed for the traffic generated by the animal processing plant unless the licensee, at his or her own expense, develops and implements a plan to maintain or improve the road …." When read together in this way, it seems clear that "the licensee" who is referred to in the second part of the sentence is the "person" being referred to in the first part. "The" licensee refers to a specific person, namely, the person establishing the animal processing plant. In other words, as used here, the "person" referred to in the first part is a potential "licensee."

Furthermore, considering Section 5(a)(2) more broadly, if Section 5 were intended to restrict the location or condition of roads serving plants that are being established by both licensees and non-licensees, why does it allow only licensees to improve an inadequate road, and not also non-licensees? No reason to make that distinction is readily apparent, but the discrepancy is avoided if the provision does not apply to non-licensees to begin with.

The third indicator is along the same lines. It is that Sections 5(b) and 5(c) provide operational requirements for "the" animal processing plant. Construed in context, this appears to refer to the specific plant that a person required to be licensed operates, and does not include plants that are operated by persons who are not required to be licensed. Put differently,

Sections 5(b) and 5(c) do not appear to contemplate the regulation of two categories of plants: those operated by persons who are required to be licensed and others operated by persons who are not required to be licensed.

Fourth, looking at the general structure and focus of the ordinance, we are not persuaded that it shows an intent to create an enforcement regime targeting non-licensees within an ordinance that is in all other respects focused on a licensing regime. Under the Town's interpretation, Section 5 would be the only section that regulates conduct outside the licensing context. If the Town intended to create such a subset of regulations within the broader ordinance, it could easily have done so in perfectly clear terms, rather than the indirect or oblique method argued by the Town. That is, Section 5 could have been drafted to expressly say that its terms apply to all animal processing plants, whether or not the plant is operated by a licensee. And other cues that could also have made that intent clear, such as titles of the ordinance or its subsections, are not present.

Further, not only do these four indicators individually and collectively point towards Section 5 covering only licensees, there is an absence of similar indicators strongly suggesting that Section 5 is intended to reach beyond licensees. The Town argues that several exist, but we do not find them as persuasive, as we next discuss.

As noted, the Town argues that it is significant that Section 4 states that "[n]o person, who is required to be licensed under [WIS. STAT.] § 95.72(2)" may establish an animal processing plant without a Town license, but Section 5 states only that "no person" may establish a plant without meeting certain conditions. The Town contends that this difference in language, in which Section 5 lacks a reference to § 95.72(2), indicates an intent to have different meanings, with Section 5 not limited to licensees.

To repeat, if these two provisions were the only ones in the ordinance, this argument would have more force. Instead, when these provisions are construed in proper context, the most reasonable explanation for the difference in language is that the drafters decided not to use the full phrase "who is required to be licensed under [WIS. STAT.] § 95.72(2)" each and every time the ordinance refers to a "person" who is seeking or holding a license. This interpretation is supported by other parts of the ordinance. For example, Section 6(d) provides: "No person may allow another to use his or her animal processing plant license." Under the Town's argument that an unqualified reference to "person" also includes non-licensees, Section 6(d) would mean that both licensees and non-licensees may not allow others to use their license. However, it would make no sense to forbid non-licensees from sharing a license. Therefore it appears more likely that the unqualified term "person," as used in Section 6(d), is intended to apply only to licensees, in line with our similar conclusion about the unqualified use of "person" in Section 5.

Another unqualified use of "person" appears in Section 12(d), which bars a person whose license was revoked by the Town from being granted another license within twelve months. Like Section 6(d), the only reasonable interpretation of this use of "person" is that it applies only to licensees or former licensees, and not to all persons.

The Town argues that the penalty provisions of the ordinance contain language showing that the ordinance is intended to apply to persons other than licensees. We agree, but only to the extent that it applies to persons who violate the ordinance in some manner that involves licenses, as we now explain.

The penalties are in Section 14. Section 14(b) states that "any person" who violates any provision of the ordinance is subject to a certain forfeiture, while Section 14(c) provides that "any licensee or permitee" violating the ordinance may be subject to nonrenewal, suspension, or

revocation of their license.[2] The Town argues that the broad reference to "[a]ny person" in the former shows an intent for the ordinance as a whole, including Section 5, to apply to all persons, in contrast to the more limited group of licensees covered in the latter.

We interpret this distinction between persons and licensees as serving two purposes. One is based on the fact that licensees are the only persons whom it is possible to penalize by nonrenewal or other actions against their licenses. In other words, the licensees referred to in Section 14(c) are a subset of the group of "persons" who are subject to forfeitures under Section 14(b). Beyond forfeitures, that subset is also subject to additional penalties related to their licenses.

We reject the Town's argument that the use of "person" in Section 14(b) indicates an intent to cover persons outside the context of the licensing scheme. We agree that the use of "person" in Section 14(b) is intended to cover a group beyond licensees themselves, but not a group that is disconnected from the licensing scheme. There is a third group that sits between "all persons" and "licensees," namely, those persons who are not actually licensees, but are nevertheless in a position to violate the ordinance in some way concerning licenses. Most obviously, it is necessary to use "person" in Section 14(b), instead of "licensees," because this is the penalty provision that would apply to persons who are required to obtain a license under Section 4, but who do not obtain one, and instead operate an unlicensed plant. Similarly, this in-between group might also include employees of a licensee who take actions that are contrary to

[2] It is not clear why the penalty provision refers to "permittees," because the ordinance does not otherwise refer to permits or permittees. But the Town does not make any argument that depends on the meaning of "permittee" in the ordinance and we do not discuss the concept of permits or permittees as distinct from licenses and licensees.

the license or ordinance. Accordingly, we do not regard this unqualified use of "person" as indicating an intent to cover all persons outside the context of the licensing scheme, and therefore it also does not imply such an intent behind the use of "person" in Section 5.

The Town notes that the title of Section 5 lacks the word "license" that is present in some other section titles, and from this argues that Section 5 is not limited to licensees. However, whatever force this argument may have is countered by the titles immediately around Section 5. The three titles are: Section 4, "Animal Processing Plant License"; Section 5, "General Restrictions and Requirements"; and Section 6, "Other License Requirements." Considered as a group, it is reasonable to interpret Section 6 as providing license requirements "other" than what are intended to be "general" license requirements in Section 5, even though the title of Section 5 does not use the word "license."

The Town argues that interpreting Section 5 as being limited to only licensees thwarts the purpose of the ordinance. For this argument, the Town relies on ordinance Section 1, which states that the ordinance is enacted to "direct the location, management, construction of, and license and regulate any industry, thing, or place where any nauseous, offensive or unwholesome business is conducted." The Town asserts that this shows that the purpose of the ordinance goes beyond licensing. However, that is not the only reasonable interpretation of Section 1, because the licensing scheme and requirements themselves have the function of directing and regulating in the manners described in Section 1. It is not necessary that the ordinance cover more than licensees for this statement of purpose to be accurate. Furthermore, as previously discussed, the great majority of the content of the ordinance clearly applies only to the context of licensing. It is a stretch to conclude that Section 1 shows that the Town intended to bury one broadly applicable, non-licensing provision in Section 5 alone.

In summary, we recognize that there may be explanations other than our own for some individual ordinance features discussed above. Taken as a whole, however, we are satisfied that the most reasonable interpretation that fits all closely related provisions is that Section 5 was intended to be exclusively part of a licensing scheme and is not intended to function as a standalone provision that also regulates the conduct of non-licensees. Therefore, we reverse the circuit court order directing the company to follow the ordinance's operational requirements at its plant.

RELIEF PENDING APPEAL

We turn to the question of relief pending appeal under WIS. STAT. § 808.07 and WIS. STAT. RULE 809.12. The company's petition for leave to appeal asked several times for a stay of the circuit court order, but the petition did not develop any argument for that relief, and we did not act on that request. Since then, the company has filed what it labels as a motion to reconsider our denial of a stay. The Town opposes the motion. We now stay the circuit court order, for the reasons that follow.

The company accurately observes that, even though our current summary disposition order reverses the circuit court, our decision is not effective until the record is remitted to the circuit court, which occurs no sooner than thirty-one days after our order, but would be further delayed by a motion for reconsideration in this court or a petition for review in the supreme court. *See* WIS. STAT. RULE 809.26. As a result, whether to stay the circuit court decision remains a meaningful question for a minimum of thirty-one days and perhaps for an extended period beyond that.

The Town's response notes at least two major flaws in the company's motion, namely, the company's failure to request relief in the circuit court first and its failure to make an

argument based on the factors in ***State v. Gudenschwager***, 191 Wis. 2d 431, 439-40, 529 N.W.2d 225 (1995). Often these flaws would provide an adequate basis for us to deny the motion. However, at this stage of the appeal, we conclude that there is little point in having the circuit court address the issue first, in part because the factors supporting a stay are sufficiently clear even without argument that specifically cites the applicable case law.

The movant must (1) make a strong showing that it is likely to succeed on the merits of the appeal, (2) show that it will suffer irreparable injury unless a stay is granted, (3) show that no substantial harm will come to other interested parties, and (4) show that a stay will do no harm to the public interest. ***Id.*** at 440.

Because we have concluded that the circuit court order should be reversed, the company's likelihood of ultimate success on the merits is high. While our decision remains subject to review by our supreme court, it is not a foregone conclusion that review will be granted under WIS. STAT. RULE 809.62(1r).

As to injury to the company, it appears to be clear that the company is injured by the circuit court order. That order directed the company to comply with the Town ordinance, specifically by ceasing all operations within a quarter-mile of a dwelling and confining all operations within an enclosed structure. All parties appear to agree that the order requires the company to either make changes to its composting operation or stop composting. The changes that were ordered appear likely to involve expenses or investment, and cessation of operations strongly implies loss of income. Either way, compliance with the order appears inevitably to cause the company financial injury.

The Town's response to the motion asserts that the company continues to derive income from the property by accepting carcasses there for shipment elsewhere for ultimate disposal.

However, the Town does not suggest that this aspect of the operation is mutually exclusive with the composting operation. In other words, there is no reason to think the company cannot do both. The Town also does not suggest that income from carcass acceptance and shipment fully substitutes for lost income from composting. The fact that the company continues to pursue this litigation suggests it does not. And, even if it did fully substitute, the company is still being prevented from earning the income in the manner that it chooses. Therefore, this argument does not persuade us that the company is uninjured by the circuit court order.

As to whether the injury is irreparable, in the Town's response opposing the petition for leave to appeal, it argued that the company's injury is not irreparable because it is merely financial, and therefore "compensable." However, the Town did not explain *who* would retrospectively compensate the company for its compliance expenses or lost income, if the company were later to prevail in the appeal. We are confident that the Town did not mean to imply an intent to pay that compensation itself, and no other source is apparent. Accordingly, any injury to the company in the form of expenses or lost income is likely irreparable.

The third and fourth factors relate to harm to the Town itself or to the public interest, and most particularly to the interest of users of the properties near the company's facility. We acknowledge the harm to those interests that may flow from staying or reversing the circuit court order, and it is for that reason, along with the injury to the company, that we granted leave to appeal, and have greatly expedited this appeal, so that the case can proceed more quickly toward a final result that is legally sound. We appreciate the efforts of counsel in expediting the arguments. However, when balancing the factors for relief pending appeal, the first two factors weigh so strongly in favor of the company that they outweigh the harms to the Town and the public interest. Therefore, we stay the circuit court order.

IT IS ORDERED that the circuit court order appealed from is summarily reversed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the circuit court order of August 9, 2024, is stayed through remittitur.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals