

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 18, 2005

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. 2004AP2333

Cir. Ct. No. 2002FO134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TOWN OF LYNDON,

PLAINTIFF-RESPONDENT,

V.

GILBERT D. JENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Juneau County: DENNIS C. SCHUH, Judge. *Affirmed in part; reversed in part.*

¶1 HIGGINBOTHAM, J.¹ Gilbert D. Jensen appeals a partial summary judgment and order in favor of the Town of Lyndon, concluding Jensen violated Town of Lyndon Ordinances 7 and 21 and ordering abatement of the operation of Jensen's salvage yard. Jensen argues Ordinance 7 cannot be applied to regulate a licensed business operation. Jensen further argues WIS. STAT. § 175.25, as applied through Ordinance 21, is regulated solely by the state and does not apply to him or his business. Finally, Jensen argues he is entitled to relief under the theory of equitable estoppel.

¶2 We agree with Jensen that Ordinance 7 does not regulate his salvage yard. However, we conclude that WIS. STAT. § 175.25 can be applied to Jensen's business and that Jensen is not entitled to equitable estoppel relief. We therefore affirm in part and reverse in part.

FACTS

¶3 Jensen owns and operates an auto repair, auto towing, used auto sales and auto salvage business in the Town of Lyndon. The Town sued Jensen seeking forfeitures and injunctive relief, alleging Jensen's businesses violated Town of Lyndon Ordinances 7 and 21 and WIS. STAT. § 175.25.

¶4 After discovery was completed, Jensen and the Town agreed there were no issues of material fact and both moved for summary judgment. The trial

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

court granted an “Interlocutory Order Granting Partial Summary Judgment” in favor of the Town and against Jensen.²

¶5 The Town then moved to impose penalties and Jensen moved for reconsideration. The trial court entered a judgment denying Jensen’s motion for reconsideration and imposed forfeitures and costs against Jensen. The judgment also ordered an evidentiary hearing on the issue of whether Jensen should be ordered to abate the violations. In lieu of conducting an evidentiary hearing, the parties stipulated to the entry of an “Order Regarding Abatement.” This order required Jensen to cease operation of his salvage yard and to remove all junk from the premises. However, the parties also stipulated this order would not take effect until a decision is rendered on this appeal. Further facts will be provided as necessary in this decision.

DISCUSSION

¶6 Our review and the interpretation of a municipal ordinance is a question of law subject to de novo review. *Board of Regents of the University of Wisconsin v. Dane County Board of Adjustment*, 2000 WI App 211, ¶11, 238 Wis. 2d 810, 618 N.W.2d 537. Jensen was initially charged with a violation of Town of Lyndon Ordinance 7. Ordinance 7 regulates dumping and waste disposal in the Town of Lyndon

to promote the public health, safety, general welfare and
good order of the Town of Lyndon and for its inhabitants;

² The Town charged Jensen with a violation of Town of Lyndon Ordinance 7 (Count 1) and four violations of Town of Lyndon Ordinance 21 (Counts 2-5). However partial summary judgment was granted only for Counts 1 and 3 and was denied for Counts 2, 4 and 5. After the summary judgment decision, the Town moved for dismissal without prejudice of the remaining charges, which the trial court granted.

to further the orderly layout and use of lands in the Town of Lyndon; to prevent the overcrowding of land, to lessen congestion of the streets and highways in the Town of Lyndon; to provide for adequate light and air; to facilitate provisioning for water, sewerage and other public improvements; to provide for proper ingress and egress [sic] from public highways to private lands; and to provide for the orderly development and growth of the Town of Lyndon, pursuant to the police powers held by said Town

The purpose of Ordinance 7 is

to regulate the dumping or disposal of waste, garbage, refuse and sludge by individuals, corporations and municipalities within the Town of Lyndon. Because of the possible danger of the health, safety and welfare of the public, such dumping or disposal within the Town of Lyndon shall only be permitted under the terms and conditions set forth below.

Ordinance 7, § 2 provides the following definitions, among others:

A. Dumping or Disposal. Dumping or disposal includes, but is not limited to, unloading, throwing away, discarding, emptying, abandoning, discharging, burning or burying waste, garbage, refuse or sludge on, into or under any property or lands, whether publicly or privately owned, within the Town of Lyndon.

B. Waste. Waste is garbage, refuse and all other discarded or salvageable material, including waste materials resulting from industrial, commercial and agricultural operations and from domestic use and public service activities.

C. Garbage. Garbage is discarded material resulting from the handling, processing, storage, preparation, serving and consumption of food.

D. Refuse. Refuse is combustible and non-combustible discarded material including, but not limited to, inoperable or unlicensed motor vehicles, trash, rubbish, paper, wood, metal, glass, plastic, rubber, cloth, ashes, litter and street rubbish, industrial waste, dead animals, mine tailings, gravel pit and quarry spoils, toxic and hazardous wastes and materials and debris resulting from construction or demolition.

E. Sludge. Sludge is sewage treatment residue in any form whatsoever, whether solid, semi-solid or liquid which has been processed or treated in any way, form or manner, including, by way of illustration and not by way of limitation, the contents of any septic tank or septic system.

Ordinance 7, § 3 prohibits the dumping or disposal of “waste, garbage, refuse or sludge within the Town of Lyndon, unless a permit to engage in such dumping or disposal is first obtained from the Town of Lyndon”

¶7 Jensen was specifically charged with a violation of Ordinance 7, § (5)(E), which states:

Persons or municipalities who are permitted to engaged in dumping or disposal operations shall be subject to the following regulations:

....

E. No person may have more than three inoperable or unlicensed motor vehicles located upon an individually owned parcel of land at any time which are in plain sight from any public highway in the Town of Lyndon.

¶8 Jensen argues Town of Lyndon Ordinance 7 cannot be applied to regulate a licensed business operation. Specifically, he claims because he is a licensed salvage dealer, the items on his property are not waste and are therefore not “dumped” as that term is defined in Ordinance 7. We agree.

¶9 Ordinance 7 clearly regulates town dumps, not licensed salvage yards. The plain language of Ordinance 7 prohibits the dumping of waste and garbage and trash, then proceeds to provide for the regulation of said dumps, setting forth a fairly detailed regulatory scheme for doing so. The items held on

Jensen's property are held for resale purposes³ under his State-issued salvage license and are not "dumped" or "disposed" of materials as defined by Ordinance 7. Likewise, the materials on Jensen's property are not "waste" as that term is defined but instead are materials held for inventory and resale to the general public. Ordinance 7 is not designed or created to prevent the operation of licensed salvage yards but is planned to prohibit public health and safety hazards from discarded or abandoned waste and garbage.

¶10 We also observe that Ordinance 7, § 5 provides for general regulations of "Persons or municipalities who are permitted to engage in dumping or disposal operations [who] shall be subject to" the regulations set out in § 5. Section 5(E) provides that no person is permitted to have more than three inoperable or unlicensed motor vehicles on their property at any time in plain view from any public highway in the Town of Lyndon. The Town seizes on § 5(E) as one of its grounds for claiming Jensen, by maintaining his salvage yard, violates Ordinance 7. The Town's efforts are misplaced. Subsection E only applies to "[p]ersons ... who are permitted to engage in dumping or disposal operations" As we explained, Jensen's salvage yard is not a town dump or the type of dump Ordinance No. 7 seeks to regulate. Therefore, Subsection E does not apply to Jensen.

¶11 Jensen next argues WISCONSIN STAT. § 175.25 is regulated by the state, not the Town, and does not apply to Jensen. Thus, he contends, he cannot be

³ The Town characterizes the items on Jensen's lot as junk. However, the Town does not dispute that this "junk" is held out for resale, which is the distinguishing characteristic from trash that is dumped into the typical "town dump" from "junk" that is collected in a salvage yard for the purpose of selling of its parts, as is the case with Jensen's yard.

charged with a violation of Town of Lyndon Ordinance 21. Town of Lyndon Ordinance 21 states:

The Town Board of the Town of Lyndon ... in order to promote the public health, safety, general welfare and good order of the Town of Lyndon, and for its inhabitants, pursuant to its police powers inherent to it as a Town and granted to it by the electors of the Town pursuant to the provisions of Section 60.10(2)(c) and Section 60.22(3) does ordain as follows:

....

Section 2

Public Nuisance Defined: The following acts, omissions, places, conditions and things are hereby declared to be public nuisances:

....

(3) Code Violations: Any place or premises within the Town where Town ordinances or state laws relating to the public health, safety, peace, morals or welfare are openly, continuously, repeatedly and intentionally violated.

WISCONSIN STAT. § 175.25 addresses storage of junked automobiles and states

(1) No person, firm, partnership or corporation shall accumulate or store any junked automobiles or parts thereof outside of any building on any real estate located within the corporate limits of any city, village or town except upon a permit issued by the common council or village or town board.

(2) No accumulation or storage of such material shall be allowed within 2,000 feet outside of the corporate limits of a city or village or within 750 feet of the center line of any county trunk, state trunk or federal highway or within 500 feet of the center line of any town road, except upon a permit issued by permission of the town board.

(3) The permit issued by city council, village or town board shall be signed either by the mayor or president or chairperson as the case may be and clerk thereof and shall specify the quantity and manner of storing such junk. Such permit shall be revocable at any time by such council or board after a hearing at which it has been found that the

permit holder has failed or refused to comply with the ordinances or restrictions providing regulations for the storage of such junked automobiles or parts thereof. Such hearing may be held by the common council of any city or the board of any town or village upon its own motion, or upon the complaint in writing, duly signed and verified by a complainant. Such complaint shall state the nature of the alleged failure to comply with such ordinance or regulation. A copy of the complaint together with a notice of the hearing shall be served upon the permit holder not less than 10 days previous to the date of hearing.

(4) Any person, firm, partnership or corporation now engaged in the business of accumulating or storing and leaving accumulated or stored junked automobiles, or parts thereof, outside of any building on real estate within the corporate limits of any city or village, or within 2,000 feet outside the corporate limits of a city or village, or within 750 feet of the center line of any state trunk or federal highway in any town on August 19, 1939 may, at any time within 6 months after such date, upon application therefor to the governing body of such town, city or village upon showing such facts, be granted a permit for such place of accumulation or storage; any person, firm, partnership or corporation succeeding a business now engaged in the accumulating or storage and leaving accumulated and stored junked automobiles, or parts thereof, outside of any building on real estate as hereinbefore provided may likewise be granted such permit.

¶12 Jensen argues the trial court misinterpreted the definition of junked vehicle as used in WIS. STAT. § 175.25(1) and inappropriately interchanged junked vehicle with salvage vehicle. Jensen contends § 175.25 and Ordinance 21 cannot be applied to him because the vehicles on his property are not “junked” vehicles as used in § 175.25 because “a vehicle does not become a junked vehicle until such time as there are no useable or saleable parts remaining upon said vehicle” and a vehicle does not become “junked” until “such time as there are no more parts to dismantle.” This argument has no merit.

¶13 In making this argument, Jensen refers to WIS. STAT. § 340.01(25g).⁴ He argues “junked” means dismantled for parts or scrapped. He differentiates between vehicles that are completely dismantled and those in the process of being dismantled.

¶14 Jensen’s argument ignores WIS. STAT. § 340.01(25j)(a), which defines “junked vehicle” as “[a] vehicle which is incapable of operation or use upon a highway and which has no resale value except as a source of parts or scrap.” By that definition, Jensen’s inventory are “junked vehicles” as their value is admittedly “as a source of parts.”

¶15 We conclude WIS. STAT. § 175.25(1) prohibits Jensen from accumulating or storing junked automobiles or parts thereof outside any building in the Town of Lyndon except upon receipt of a permit from the Town. Subsection (2) prohibits Jensen from accumulating or storing junked automobiles or parts thereof within 750 feet of the center line of any county trunk, state trunk or federal highway except upon receipt of a permit from the Town. It is undisputed that Jensen does not possess a permit from the Town Board. Section

⁴ WISCONSIN STAT. § 340.01(25g) states

In s. 23.33 and chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning:

....

(25g) “Junked” means dismantled for parts or scrapped.

175.25 applies to him as he stores junked automobiles within 750 feet of a state highway and within 500 feet of a town road.⁵

¶16 Finally, Jensen argues he is entitled to relief under the theory of equitable estoppel. Jensen argues the Town had full knowledge of his business operations since February 1999. He states that in March 1999, he appeared before the Town Board to address the number of vehicles on his property and that he was granted the right to exceed the three-car limit. Jensen points out that in August 1999, there was some discussion about the existence of a junk pile on his property but no action was taken. The summary judgment record shows the Town Board took no further action on Jensen's property until March 2001. At that time the Town Board sent Jensen a letter asking him to contact the Board about the number of vehicles located on his property. Jensen claims the Town Board addressed his business operation and allowed him to exceed the three-car limitation and never directed him to limit the number of vehicles on his property. Thus, according to Jensen, the Town is equitably estopped from any enforcement process requiring him to terminate his business.

¶17 The Town counters that Jensen has waived the defense of equitable estoppel because he failed to plead it. In addition, the Town contends, Jensen

⁵ We note that Jensen does, indeed, have a salvage license issued by the Department of Transportation pursuant to WIS. STAT. ch. 218. That salvage license was signed by Town Chairman Anthony Snyder, attesting that a local permit or license was issued for the operation of a salvage yard within 750 feet of the center line of any county trunk, state trunk or federal highway. However, this signature was in error and the Town subsequently withdrew the Chairman's signature on the salvage yard application. Jensen has never applied for nor been granted a permit by the Town Board to operate a salvage yard within 750 feet of the center line of any county trunk, state trunk or federal highway. Neither party addresses the legal effect of the withdrawal of the Chairman's signature or the validity of the DOT salvage yard permit or whether this information was ever conveyed to the DOT.

waived the equitable estoppel defense by stipulating to the exact remedy to which he now seeks to estop. Jensen does not respond in his reply brief to the Town's analysis. Therefore, we deem this omission a concession and conclude Jensen waived equitable estoppel as a defense on appeal. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (arguments not refuted may be deemed conceded).

¶18 In sum, Town of Lyndon Ordinance 7 cannot apply to regulate Jensen's licensed salvage yard business. We therefore reverse the partial summary judgment and order on this issue. However, WIS. STAT. § 175.25 does apply to Jensen's business via Town of Lyndon Ordinance 21. Furthermore, Jensen waived the defense of equitable estoppel. We therefore affirm this portion of the partial summary judgment and order.

By the Court.—Judgment and order affirmed in part and reversed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

