STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF YPSILANTI,

Plaintiff-Appellant,

v

DAVID LEE MILLER, individually, and d/b/a as DAVE'S DIAMONDS AND GOLD,

Defendant-Appellee.

UNPUBLISHED
June 15, 2004

No. 243879
Washtenaw Circuit Court
LC No. 02-131-CZ

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing its complaint and granting relief to defendant on his counter-complaint. For the reasons discussed more thoroughly below, we reverse the trial court and remand for entry of an order granting plaintiff's motion for a permanent injunction.

The trial court granted defendant's motion for permanent injunction on two grounds, those being: (1) plaintiff did not have discretion to deny a license when an application is in proper form and the fee is paid, and (2) the ordinance is unconstitutionally vague. We address both these issues in that order, as well as defendant's argument that the ordinance impermissibly grants decision-making authority to the sheriff.[1]

A. Ordinance § 22-100

Because state laws regulating pawnbrokers and secondhand dealers only apply to those businesses operating in cities and villages, see MCL 446.201 *et seq*. (governing pawnbrokers) and MCL 445.401 *et seq*. (governing secondhand dealers), plaintiff enacted a detailed ordinance

[1] Although the trial court did not address this issue because it granted defendant relief on another basis, it was raised by defendant in response to plaintiff's motion for an injunction. Defendant also raises it on appeal, and we resolve it now because it involves a pure legal issue involving the interpretation of the ordinance. *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 435; 592 NW2d 760 (1999).

regulating pawnbrokers and secondhand dealers. Ypsilanti Township Ordinance, § 22-81 *et seq*. At issue in this case is § 22-100, which sets forth the procedures to be utilized by the township board in reviewing an application for a secondhand or pawnbroker license:

> (a) Any applicant for a license pursuant to these provisions shall present to the township clerk the application containing the required information. The application *shall* then be referred to the county sheriff who *shall* have 30 days from the date of receipt of the application in which to investigate the application and the background of the applicant. Based on such investigation, the county sheriff, or his representative, *shall render a recommendation as to the approval or denial of the permit* to the township clerk.
>
> (b) In making his determination, the county sheriff *shall* consider:
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> (1) *Penal history*. All the applicant's convictions, the reasons therefor, *and the criminal history of the applicant subsequent to his release if the applicant was ever incarcerated or jailed.*
>
> (2) *License and permit history*. The license and permit history of the applicant shall explain whether such person is previously operating in this township or state or in another municipality or state under a license or permit has had such license or permit revoked or suspended, the reasons therefor, and the license and permit history of the applicant subsequent to such action.
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> (3) *Inspection of premises by township departments*. The township's building department and fire department shall inspect the premises proposed to be devoted to the business of a pawnbroker, secondhand dealer and/or junk dealer and shall make, within 30 days from receipt of the application, separate recommendations to the township clerk concerning compliance with the requirements of this article and all other applicable township ordinances and regulations.
>
> (4) *Grant of permit*. The township board, *after receiving these recommendations*, shall grant a license to the establishment if all requirements for the business of pawnbroker, secondhand dealer and/or junk dealer are met. [Emphasis added.]

The same rules that govern statutory construction govern the construction of ordinances. *Albright v Portage*, 188 Mich App 342, 351 n 7; 470 NW2d 657 (1991); *Settles v Detroit City Clerk*, 169 Mich App 797, 808; 427 NW2d 188 (1988). The essential rules of statutory interpretation are found in *In re RFF*, 242 Mich App 188, 198-199; 617 NW2d 745 (2000), and are stated as follows:

> Statutory interpretation is a question of law that this Court reviews de novo. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The starting point for determining the Legislature's intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed, and when the

> statutory language is clear and unambiguous, judicial construction is neither required nor permitted. Where the language employed by the Legislature is susceptible to more than one interpretation, judicial construction is justified. When construing a statute, the court must use common sense and should construe the statute to avoid unreasonable consequences. [Citations omitted.]

The trial court concluded that subsection (b)(4) of the ordinance was clear and unambiguous in stating that upon receiving the recommendations from the sheriff the board "shall" issue the license. Thus, the court concluded that judicial construction of the ordinance was neither required nor permitted under the principles of statutory interpretation.

We must therefore determine on de novo review whether the use of the word "shall" in the context of the ordinance unambiguously means that it is *mandatory* for the township board to issue the license regardless of the favorable or unfavorable recommendation by the sheriff (a recommendation that "shall" be done), or any other factors that the township board in its discretion determines relevant (such as the recommendations and information gathered pursuant to (b)(2) and (3)), as long as the applicant meets the express requirements of: (1) submitting an application, and (2) paying the investigation fee.

In general, "shall" indicates a mandatory duty. *Ross v Michigan Dep't of Treasury*, 255 Mich App 51, 58; 662 NW2d 36 (2003). In the instant case, the mandatory "shall issue a license" language in subsection (b)(4) is only applicable "if all requirements" are met by the applicant. The question is whether "all requirements" means the express requirements--being the mere formalities of (1) submitting an application, and (2) paying the investigation fee; or whether "all requirements" includes matters pertaining to the applicant's penal history, license and permit history, and/or results of the inspections by the township departments, all of which are required to be performed and submitted to the board under the ordinance before the decision is made.

Defendant argues that the express requirements of the application and the investigation fee alone are the only requirements to which subsection (b)(4) refers. However, plaintiff argues that if the license is to be automatically granted upon the proper submission of an application and payment of the investigation fee, then the investigation into the applicant's penal history, permit history, and inspection of premises is simply unnecessary and superfluous in the ordinance.

Plaintiff's argument is persuasive. The language of the ordinance establishes a clear and logical procedure: (1) an applicant submits the application with the fee, (2) the application is investigated, (3) a recommendation is forwarded to the board, and (4) the board reviews the recommendations and information related thereto and determines if the applicant meets the "requirements" for the license. If the recommendations from the sheriff and the discretion of the board play no role in the decision to grant or deny the license, then the entire investigation and recommendation scheme is of no use. "A court must give the language a valid and reasonable construction that reconciles inconsistencies and gives effect to all the parts." *Wright v Vos Steel Co*, 205 Mich App 679, 684; 517 NW2d 880 (1994). See, also, *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."). Were the ordinance to be construed as the trial court suggested, the mandatory investigations and recommendations required by the same ordinance

section would be rendered nugatory, for they could never be considered by the board in deciding a particular application. The language of the ordinance does not permit such a conclusion, and to read it as restricting the board would run contrary to settled law. *State Farm, supra.*

B. The Constitutional Questions

1. Vagueness

In agreeing with defendant that the ordinance was unconstitutionally vague,[2] the trial court concluded as follows:

> There is nothing in the ordinance that appears to define what the "requirements for the business of a pawnbroker, secondhand dealer and/or junk dealer" are such that an applicant has a reasonable likelihood of knowing whether he or she can meet those requirements and obtain a license. A person of reasonable intelligence probably would understand that there is some weight to be given to an applicant's penal history, license and permit history and that the Township Board is to weigh these recommendations in some way, but that person is certainly not notified with any reasonable specificity as to how these factors are to be weighed or as to what the requirements for obtaining a license are exactly. Section 22-100 is impermissibly vague and as such is unenforceable.

We begin, as did the trial court, by recognizing that ordinances are given a strong presumption of constitutionality. *Taylor Commons v City of Taylor*, 249 Mich App 619, 625; 644 NW2d 773 (2002). Accordingly, "courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent." *Wysocki v Felt*, 248 Mich App 346, 355; 639 NW2d 572 (2001). As we held in *Wysocki*, "[t]he court will not go out of its way to test the operation of a law under every conceivable set of circumstances. The court can only determine the validity of an act in the light of the facts before it. Constitutional questions are not to be dealt with in the abstract." *Id.*, at 356, quoting *General Motors Corp v Attorney General*, 294 Mich 558, 568; 293 NW 751 (1940). See also *Council of Organizations and Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997). These same rules govern the review of the constitutionality of an ordinance, *Plymouth Twp v Hancock*, 236 Mich App 197, 199; 600 NW2d 380 (1999), and it is defendant's burden to establish that the ordinance is clearly unconstitutional, *Gora v Ferndale*, 456 Mich 704, 711-712; 576 NW2d 141 (1998).

In *Dep't of State Compliance and Rules Div v Michigan Ed Ass'n – NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002), we set forth the three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague:

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[2] The federal due process clause is contained in US Const, Am XIV, while Michigan's is set forth in Const 1963, art 1, § 17. "The 'void for vagueness' doctrine is derived from the constitutional guarantee that the State may not deprive a person of life, liberty, or property without due process of law." *State Treasurer v Wilson (On Remand)*, 150 Mich App 78, 80; 388 NW2d 312 (1986).

> A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated.

In determining "whether a statute is void for vagueness, a court should examine the entire text of the statute and give the words of the statute their ordinary meanings." *Dep't of State*, *supra* at 116, citing *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997) and *In re Forfeiture of 719 North Main*, 175 Mich App 107, 111; 437 NW2d 332 (1989). In carrying out this function, we will "not set aside common sense, nor is the [township board] required to define every concept in minute detail. Rather, the statutory language need only be reasonably precise." *Dep't of State*, *supra* at 126-127. Although the Fourteenth Amendment requires adequate notice of unlawful acts, it does not require that the language of a legislative enactment be "mathematically" precise. *Michigan Wolfdog Ass'n, Inc v St Clair Co*, 122 F Supp 2d 794, 802 (ED Mich, 2000). Accord *Miller v California*, 413 US 15, 28; 93 S Ct 2607; 37 L Ed 2d 419 (1973) (absolute "godlike precision" not required by the Constitution).

Defendant's vagueness challenge focuses on only one of the three possible ways an ordinance can be determined vague—that the ordinance does not provide fair notice of the conduct that will prevent him from obtaining a license. Thus, as the trial court acknowledged, defendant's challenge to the ordinance does not include the assertion that the ordinance impinges upon First Amendment freedoms. This is an important facet of this case because "'[w]hen a defendant's vagueness challenge does not implicate First Amendment freedoms, the constitutionality of the statute in question must be examined . . . without concern for the hypothetical rights of others.'" *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001), quoting *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). Thus, "'the proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague *as applied to the conduct allegedly proscribed in this case*.'" *Id.* (Emphasis added.)

Defendant's argument is, and the trial court's holding was, that the ordinance is unconstitutionally vague because there is no indication in the ordinance regarding what "requirements" are to be considered by the board in granting or denying an application for a license. We disagree.

In applying the facts of this case to defendant's constitutional challenge, the trial court should have kept its focus on the fact that defendant's license was denied because of his alleged criminal activity. If the court had done so, then it would have been compelled to conclude that a reasonable person of average intelligence would surely know that an applicant's convictions and subsequent criminal history would be an issue of concern to the board when deciding whether to grant the license. *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 50; 530 NW2d 99 (1995). After all, since the ordinance *requires* the sheriff to conduct an investigation into each applicant's criminal convictions[3] and subsequent "criminal history," and *requires* the sheriff to

[3] The lower court record reflects that defendant had a prior criminal conviction. The affidavit of
(continued…)

make recommendations to the board on each application, an average person would realize that the sheriff would be submitting an applicant's "criminal history" to the board prior to the board's decision. Since defendant's criminal history is the specific conduct allegedly proscribed in this case, *Knapp, supra* at 374 n 4, then the trial court should have focused its inquiry on this particular fact pattern when addressing defendant's challenge. And, although the trial court recognized this aspect of the law, in its application, the court found the ordinance deficient for not containing sufficient detail on how the factors are to be weighed. This type of precision, however, is not required by the due process clause. *Miller, supra* at 28; *Dep't of State, supra* at 126-127; *Michigan Wolfdog,, supra* at 802. How the criteria listed in the ordinance are weighed (e.g., what type of crimes or criminal history warrant a denial of an application) is something that the board can permissibly determine in deciding each application, and the Constitution does not require that it be detailed in the ordinance itself. *Id.*

2. Delegation

Defendant's final argument is that if the ordinance is read to require a favorable recommendation from the sheriff's department as a requirement to obtain a license, then the ordinance impermissibly delegates licensing authority to the sheriff. This argument fails for the simple reason that the plain language of the ordinance does not *require* a favorable recommendation from the sheriff before a license is granted. Rather, the ordinance only requires that a recommendation, favorable or unfavorable, be made to the board before it makes a decision. The board, in the exercise of its discretion, can then determine whether it wants to follow whatever recommendation is made. Defendant's argument is therefore without merit.

For these reasons, we reverse the trial court's order, and remand for entry of an order granting plaintiff's motion for a permanent injunction. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray

(…continued)

FBI Special Agent Gregory Stejskal, attached to plaintiff's complaint, indicates that in 1988 defendant was convicted in Washtenaw County of delivery/manufacture of a controlled substance – marijuana, a felony.