

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2004

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. 03-3433
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000184

**IN COURT OF APPEALS
DISTRICT III**

FABRICATION DiMARTECH, INC.,

PLAINTIFF-APPELLANT,

v.

**JEROME FOODS, INC., F/K/A THE TURKEY STORE
COMPANY, K/N/A JENNI-O TURKEY STORE, INC.,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Fabrication DiMartech, Inc., a subcontractor, appeals a judgment dismissing its foreclosure action against Jerome Foods, Inc. The trial court concluded that DiMartech's construction lien was invalid because DiMartech failed to give Jerome Foods notice of the lien as required by WIS.

STAT. § 779.02(2)(b).¹ The notice provision only applies for construction projects of less than 10,000 square feet of “usable floor space.” DiMartech argues that the project exceeded 10,000 square feet if the wastewater storage tanks, clarifier tank and oxidation ditch are counted as part of the project. Because we conclude that the tanks and ditch should not be included in the calculation of usable floor space as a matter of law, we affirm the judgment.²

¶2 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* WIS. STAT. § 802.08(2). Statutory construction and its application to the undisputed facts present questions of law that we review without deference to the trial court. *See State v. Leitner*, 2002 WI 77, ¶16, 253 Wis. 2d 449, 646 N.W.2d 341. When construing the language of a statute, this court gives words their common and ordinary meaning. *See Bruno v. Milwaukee County*, 2003 WI 28, ¶20, 260 Wis. 2d 633, 660 N.W.2d 656.

¶3 To obtain a construction lien, WIS. STAT. § 779.02 requires subcontractors to give notice unless the project consists of more than 10,000 square feet of usable floor space. We conclude that “usable floor space” does not include the base of wastewater storage tanks, clarification tanks or oxidation ditches. In numerous statutory references to “floor space,” the legislature is referring to floor space enclosed in buildings. *See e.g.*, WIS.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² Because we conclude that the tanks and ditch should not be included in the calculation of usable floor space, we need not decide whether their construction should be viewed as a separate project as Jerome Foods argues in the alternative.

STAT. §§ 13.482(2)(b), 99.015, 101.14(4m)(b). The statutes define storage tanks and refer to them in terms of volume. *See e.g.*, WIS. STAT. § 101.09(2)(c), 101.1431)(fg). It strains the language to refer to the base of a liquid storage tank as “floor space.” If the legislature had intended to include the base of tanks and ditches in determining the size of the project, it could easily have used a term that does not suggest an occupied building.

¶4 Contrary to DiMartech’s argument, *Sullivan Brothers v. State Bank of Union Grove*, 107 Wis. 2d 641, 649, 321 N.W.2d 545 (Ct. App. 1982) does not compel a different result. In *Sullivan*, the court considered a construction project for a bank and its exterior canopied area. The court interpreted “usable floor space” as the floor space within the enclosed structure, excluding the canopied area. Here, only the wastewater storage tanks have four walls and a roof, and are enclosed. *Sullivan* should not be construed to hold that any vessel enclosed by walls and a roof should be included in “usable floor space.” The construction project for the bank in *Sullivan* was obviously designed to create an enclosed workspace. The size of office space is commonly referred to in terms of floor space. A liquid storage tank, such as a septic tank, would not ordinarily be included in the floor space of a building. Therefore, we conclude that, regardless of the size, shape or materials used in its construction, a liquid storage tank does not add to the “usable floor space” of a building.

By the Court.—Judgment affirmed.

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

