



OFFICE OF THE CORPORATION COUNSEL

August 14, 2014

Mr. Shawn Widish
Dane County Zoning Department
345 W. Washington Ave.
Madison, WI 53717

RE: Board of Adjustment Appeal No. 3658

Dear Mr. Widish:

Enclosed for filing please find the Brief of the Dane County Zoning Administrator. Copies have been sent this date to counsel for the Appellants.

Thank you for your attention to this matter.

Sincerely,



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Assistant Corporation Counsel

cc:
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DANE COUNTY BOARD OF ADJUSTMENT

Administrative Appeal by the Town of Madison,
Henry & Susan Bassett, and William & Renee West,
for an appeal of a Zoning Administrator decision
regarding the permitted use of a day resource center
in a C-1 Commercial Zoning District proposed at
1490 Martin Street being Lot 3, Fraust Plat, Section 34,
Town of Madison.

Appeal No. 3658

BRIEF OF THE DANE COUNTY ZONING ADMINISTRATOR

I.

**THE DAY RESOURCE CENTER IS A PERMITTED “SERVICE USE”
IN THE C-1 COMMERCIAL DISTRICT**

This appeal has nothing to do with the “use” of the property and everything to do with the people who will use the property. That is not the purpose of zoning. Zoning is about governmental regulation of the *uses* of the land. *Heitman v. City of Mauston*, 226 Wis.2d 542, 550 (Ct. App. 1999) The town does not get to regulate who uses the property if the “use” is permitted under the zoning code.

The Zoning Administrator correctly determined that the proposed day resource center is a permitted use in the C-1 zoning district. Specifically, the Zoning Administrator determined that the day resource center is a permitted “service use” in that district. Dane County Code of Ordinances §10.13(1) lists the permitted uses in the C-1 district, including:

- (a) Retail and service uses *including, but not limited to*, grocery stores, drugstores, hardware stores, appliance and furniture stores, barbershops and beauty shops *without limitation as to size*. (emphasis added).

The term “service use” is not specifically defined in the ordinance, and therefore this board must interpret its meaning. Ordinances are interpreted using the rules of statutory construction. *Maris v. City of Cedarburg*, 176 Wis.2d 14, 32 (1993). Construction begins with the language of the ordinance. If meaning is plain, the inquiry ends and that meaning is applied to the facts. “[Ordinance] language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *State ex rel. Kalal v. Circuit Court for Dane County*, 271 Wis.2d 633, 663 (2004), *citing*, *Bruno v. Milwaukee County*, 260 Wis.2d 633,660 (2003). An undefined term is not necessarily ambiguous if its plain meaning can be discerned from the language of the ordinance. “In determining the ordinary meaning of undefined words, [courts] may consult a dictionary to aid in statutory construction.” *County of Dane v. Labor And Industry Review Commission*, 315 Wis.2d 293, 310-311 (2009). The Dane County Zoning Ordinance at §10.01 states that: “Words and phrases not defined in this section or elsewhere in the ordinance shall be construed by resort to the following in order of preference: Wisconsin Statutes; Wisconsin zoning case law; the dictionary; and common usage.”

To determine what is a permitted “service use” in §10.13(1), the term “service” must be defined. The term “service” as used in this context is not defined in Wisconsin Statutes or case law. The term “service” “has a variety of meanings, dependent upon the context or the sense in which used.” *Black’s Law Dictionary*, 4th Ed., p. 1227 (1979), *citing*, *Central Power & Light Co. v. State*, 165 S.W.2d 920, 925 (Tx. Civ. App. 1942). As used in §10.31(1) “service” is an adjective. The Merriam-Webster Dictionary defines “service” when used as an adjective in this context as:

- 2: used in serving or supplying <delivery men use the *service* entrance>
- 4a: providing services <the *service* trades – from filling stations to universities>

b. offering repair, maintenance, or incidental services.

Dictionary.com defines “service” when used in this context as an adjective as:

25. of service; useful.

27. supplying aids or services rather than products or goods: *Medicine is one of the service professions.*

28. supplying maintenance and repair: *He operates a service center for electrical appliances.*

Finally, Webster’s Third International Dictionary defines “service” as an adjective as:

Providing services rather than tangible goods. *Transportation and entertainment are service industries.*

Clearly, when the term “service” is defined, the proposed day resource center is a “service use” as contemplated by §10.13(1). The scope of the resource center’s services was defined by the request to the Zoning Administrator for a “Formal Permitted Use Determination,” on June 23, 2014. That request summarized the following operations:

- The Center will only operate during the day. The hours of operation will be between 6:00 AM and 6:00 PM. No one will be sleeping at the facility.
- The Center will offer light food service facilities to prepare snacks and lunch for the guests.
- No food would be offered for sale.
- The facility will be open to the public. Anyone who is in need of the services and is willing to abide by the rules would be allowed access the facility.
- The facility will offer amenities and services to allow homeless individuals to meet basic needs. It will offer protection from the elements, restrooms, showers, locker space for storage, and laundry equipment.
- The Center will also provide supportive services to assist with employment, transportation, and permanent housing.

The resource center will be providing essential “services” to homeless individuals in the community. No matter how the Town of Madison wants to spin it, that’s a “Service use.”

In its Notice of Appeal the Town states “A commercial district implies zoning for private for profit businesses, an implication, which is born out by the examples provided by the ordinance. Said sec. specifically refers to “retail and service uses” affiliated with retail business. All examples the Ordinance uses to clarify “retail and service uses” clearly pertain to services in conjunction with the sale of retail goods and with general retail businesses, or to services provided in exchange for payment.” (Town Notice of Appeal, p. 2) This narrow interpretation that limits “service use” to “services provided in exchange for payment” simply cannot withstand scrutiny.

When interpreting an ordinance effect must be given to every word to avoid surplusage. *Kalal*, 271 Wis.2d at 663. The examples of “retail and service uses” provided in §10.13(1)(a) is modified by the express language “*including, but not limited to.*” This is an express statement by the county board that the list of examples provided is NOT exclusive. The Wisconsin Supreme Court has held that in legislative parlance “the phrase ‘including but not limited to’ in a statute is generally given an expansive meaning, indicating that the words that follow the general phrase are but a part of the whole.” *State v. Popenhagen*, 309 Wis.2d 601, 622 (2008) Nothing in §10.13(1)(a) limits a “service use” to a “private for profit business” or “to services provided in exchange for payment” as argued by the town. Rather, the use must simply be providing a service. The proposed resource center provides “services.”

The use of the proposed resource center is consistent with other permitted service uses in the C-1 district. As the Assistant Zoning Administrator stated in his June 24, 2014 determination:

The proposed day resource center will operate as a service use which is similar in nature to other service uses currently operating under C-1 Commercial Zoning

within the jurisdiction of Dane County Zoning. Other similar uses permitted by Dane County Zoning include youth service centers, tax/financial planning centers, fitness centers, food pantries, temporary employment centers, as well as the existing Hospitality House at the proposed site. These uses, which are not explicitly defined, are currently permitted as service uses within the C-1 Commercial Zoning District.

There are four permitted service uses located in the Town of Madison that are similar in nature to the proposed day resource center and not private for profit businesses.

- The DAIS Resource Center on Fordem Avenue provides free services to domestic violence survivors and their families and includes a 24/7 shelter. In 2014 Dane County provided funding of \$239,841 for these services.
- Youth Service Center at 2720 Rimrock Rd. This facility includes free runaway related services, intensive supervision and an 8 bed group home for homeless youth. In 2014 Dane County provided funding of \$1,079,362 for these services.
- St. Vincent de Paul Food Pantry at 2115 Fish Hatchery Road. This facility provides free food and clothing distribution, storage space, meals and prescription services to low income people.
- Porchlight Day Services at the location of the proposed day resource center. This facility currently provides free day services for homeless at Hospitality House. The County provided funding in 2014 of \$266,425, which included this facility and Grace shelter.

Obviously a service use is not required to be for profit as these service uses currently exist without objection from the Town of Madison. In fact the town has granted permits for them.

The town's reliance on DCO §10.16(1)(a) is without merit. That subsection states that "any use not listed as a permitted use in the District is prohibited in that District."

Based upon that language, the town argues that “A shelter is not listed as a permitted use in the District and therefore a shelter is a prohibited use in the District and should not be allowed.” This argument can’t be logically sustained. Section 10.13(1)(a) lists “retail and service uses” as permitted uses. The ordinance does not have an exclusive list of these uses. Under the town’s argument, only “grocery stores, drugstores, hardware stores, appliance and furniture stores, barbershops and beauty shops” are permitted “retail and service uses” in the C-1 district and anything not specifically listed is prohibited. This was clearly not the county boards intent. The logical extension of the town’s argument would render a myriad of uses currently operating in the C-1 district as prohibited.

The proposed day resource center is clearly a permitted “service use” in the C-1 district as authorized by DCO §10.13(1)(a). The proposed use provides a service to homeless individuals in the community. The fact that the appellants don’t want those individuals in their neighborhood is not relevant to zoning. The ordinance does not require that the services be provided for profit as argued by the town, and the list of examples provided in the ordinance is clearly not exclusive. The Zoning Administrator’s determination was correct and should be affirmed by this board.

II.

THE DAY RESOURCE CENTER IS NOT A “GOVERNMENTAL USE”

The Town of Madison argues that the proposed day resource center is a governmental use in the C-1 district. Their motive is obvious, a governmental use

requires a conditional use permit which under Dane County's ordinance the town could deny. This would achieve their ultimate goal of keeping the center's clientele out of their neighborhood. But, the town confuses ownership with use. The fact that Dane County would own the real estate would not make the property a governmental use.

The Zoning Administrator determined that the proposed resource center does not require a conditional use permit. Specifically, the Zoning Administrator stated:

I have determined that the proposed use is not of similar nature to uses that would require a conditional use permit or special exception permit. Such conditional uses require site suitability to allow for specific regulation of such things as: noise, odor, traffic, building size, overnight accommodations, licensed premises, unusual or extended hours of operation, large crowds, and uses that may not be compatible with surrounding land uses unless such use is specifically regulated.

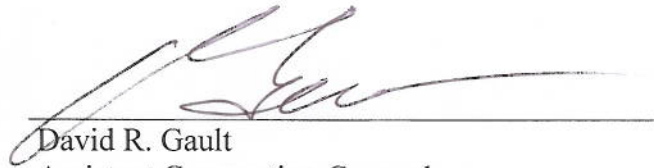
The operative term here is "use." Generally, two categories of allowable "uses" are listed for each zoning district: permitted uses and conditional uses. *The American Heritage Dictionary* defines "use" in this context as "the act of using;" "the manner of using;" "a purpose for which something is used." Thus, it is not ownership of land that determines the use, but rather who and how the property is being used. It is undisputed that Dane County would own the real estate in question. But, a private not-for-profit organization, Shine608, would operate the proposed resource center and provide the services. It is the user of the property that defines the use. Dane County is not the using the property. Therefore, the Zoning Administrator properly determined that this is not a governmental use.

CONCLUSION

A use cannot be permitted and conditional in a zoning district at the same time. Applying the plain meaning rule to the language of DCO §10.13(1)a, the proposed day resource center is

clearly a service use, just as the DAIS Resource Center, the Youth Service Center, and the St. Vincent de Paul Food Pantry. A service use is not required to be for profit, only that it provide a service. The Town of Madison should not be allowed to use zoning to regulate who gets these services. Therefore, the Zoning Administrator's interpretation should be affirmed.

Dated this 14th day of August 2014.



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