COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP535 **Cir. Ct. No. 2015CV1076**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SANIMAX USA LLC,

PLAINTIFF-RESPONDENT,

V.

VILLAGE OF DEFOREST BOARD OF ZONING APPEALS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. This case involves a challenge to a zoning administrator's decision denying approval of reconstruction and expansion by Sanimax USA LLC, based on the administrator's interpretation of a local zoning ordinance. After the Village of DeForest Board of Zoning Appeals affirmed the

zoning administrator's decision, Sanimax successfully challenged the Board's decision in the circuit court. The Village now appeals the circuit court's decision. We affirm the circuit court.

Background

¶2 Sanimax operates a recycling plant in the Village of DeForest. As pertinent here, Sanimax obtains grease and used cooking oil from restaurants.[1] Sanimax recovers the grease from the restaurants' grease traps in the restaurants' drains leading to the municipal sewer system. Sanimax does not pay for the grease. As to the used cooking oil, the restaurants retain the oil and sell it to Sanimax. The restaurants have no further use for the grease or used oil in their own operations. Sanimax, however, has the ability to profitably process these materials into an ingredient in animal feed.

¶3 Following a fire in 2014, Sanimax sought approval from the Village zoning administrator for reconstruction and expansion of its grease and oil processing operation. In response, the zoning administrator informed Sanimax that its grease and oil processing was a prohibited activity because it fell under a prohibition on "[w]aste material ... processing ... as a principal use," applicable to the M-2 zoned area in which Sanimax is located. Consistent with this

[1] According to the Board's findings, which we accept for purposes of this decision, Sanimax obtained the grease and used cooking oil from "restaurants and other food service or food production operations." Although it might be that not all of the businesses are restaurants, we follow the parties' lead and use the term "restaurants" to collectively refer to these businesses.

interpretation of the zoning ordinance, the zoning administrator denied Sanimax approval for reconstruction and expansion.[2]

¶4 Sanimax filed an appeal of the zoning administrator's denial of approvals with the Village of DeForest Board of Zoning Appeals. A public hearing was held on March 11, 2015. Following the hearing, the Board affirmed the zoning administrator's application of the "[w]aste material ... processing ... as a principal use" language to Sanimax and the administrator's corresponding denial of approvals sought by Sanimax. Sanimax then sought review in the circuit court. The circuit court vacated the Board's decision and directed the Board to enter an order finding that Sanimax's grease and oil processing is a permitted use in the M-2 district where Sanimax is located.

Discussion

¶5 We review the decision of the Village of DeForest Board of Zoning Appeals. Our standard of review was summarized in ***HEEF Realty & Investments, LLP v. City of Cedarburg Board of Appeals***, 2015 WI App 23, 361 Wis. 2d 185, 861 N.W.2d 797:

> On certiorari, we review the decision of the Board, not the circuit court. Our review is limited to whether the Board "(1) kept within its jurisdiction, (2) acted according to law, (3) did not act arbitrarily or unreasonably or according to its will and not its judgment, and (4) made a decision based on evidence one might reasonably use to make the determination in question."

[2] The Sanimax facility also produces biodiesel from raw materials that may include some grease and oil. The zoning administrator determined that this part of Sanimax's operation was a permitted use, apparently because the primary raw material had already been processed. Sanimax spends substantial time discussing this part of its operation. However, at least for purposes of our analysis here, the biodiesel part of Sanimax's operation does not matter.

Id., ¶4 (citation and quoted source omitted).

¶6 The dispute here is over whether the Board acted according to law when it affirmed the Village of DeForest's zoning administrator's determination that Sanimax's grease and used cooking oil processing operation is a prohibited use in the Village's "M-2" industrial district where Sanimax operates. This question, in turn, hinges on whether the Board correctly interpreted and applied the ordinance language "[w]aste material ... processing ... as a principal use" to Sanimax's grease and cooking oil processing operation. More specifically, the parties dispute whether the grease and cooking oil are "waste" within the meaning of the ordinance.

¶7 The parties spend substantial time discussing the proper approach to construing the term "waste" *if* we conclude that the term "waste" is ambiguous as applied to the grease and cooking oil at issue here. Sanimax, relying on WIS. STAT. § 895.463[3] and cases such as ***Cohen v. Dane County Board of Adjustment***, 74 Wis. 2d 87, 246 N.W.2d 112 (1976), and ***HEEF Realty***, argues that we must resolve ambiguity in favor of Sanimax's free use of its private property. The Village, relying on WIS. STAT. § 62.23(7)(am) and cases such as ***Ottman v. Town of Primrose***, 2011 WI 18, 332 Wis. 2d 3, 796 N.W.2d 411, and ***Village of DeForest v. County of Dane***, 211 Wis. 2d 804, 565 N.W.2d 296 (Ct. App. 1997), argues that we must defer to the Board's interpretation of its local ordinance. Both parties make several related and alternative arguments. However, we agree with

[3] All references to the Wisconsin Statutes are to the 2015-16 version, unless otherwise noted.

another Sanimax argument, namely, that there is no ambiguity and that Sanimax prevails based on the plain meaning of the zoning ordinance.

¶8 Sanimax argues that the plain meaning of "[w]aste material ... processing ... as a principal use" does not cover its processing of grease and used cooking oil. The Village argues that this ordinance language plainly does cover the activity. The Village does not argue that we must resolve this plain meaning dispute with deference to the Board. That is, we understand the Village to be arguing that the issue of deference to the Board arises only if there is a need to resolve some ambiguity in the application of the ordinance to Sanimax. For example, the Village argues that the Board's interpretation of the ordinance must be accorded a presumption of correctness *if the Board's interpretation is reasonable*. Legislative language is ambiguous if it is susceptible to more than one reasonable reading. *See* ***State v. Williquette***, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986) (ambiguity exists if reasonable persons could disagree as to meaning). The Village does not argue that we need to defer to the Board's interpretation if we conclude that the ordinance language unambiguously does not apply to Sanimax's grease and cooking oil processing activity, that is, if we conclude that the Board's interpretation and application to Sanimax is unreasonable.

¶9 Thus, we understand the Village to have implicitly conceded the following: If we conclude, under de novo review, that the Board's interpretation is unreasonable—that "[w]aste material ... processing ... as a principal use" unambiguously does not apply to Sanimax's activity here—then there is no presumption or deference in favor of the Board's interpretation.

¶10 Accordingly, we turn our attention to whether it is reasonable to construe the words "[w]aste material ... processing ... as a principal use" as covering Sanimax's processing of the grease and cooking oil from restaurants into an ingredient in animal feed.

¶11 For purposes of this discussion, we will assume without deciding, in favor of the Village, that a "principal use" of Sanimax's facility is "processing" the grease and cooking oil. What remains is whether it is reasonable to construe "waste material" as covering the grease and cooking oil. In this regard, the parties focus on the word "waste."

¶12 The ordinance does not define "waste." We accept the Village's proposition that, when an ordinance does not define a word, the "common and generally understood meaning of a word should be applied." *See* ***State (Bd. of Regents of Univ. of Wis.) v. City of Madison***, 55 Wis. 2d 427, 433, 198 N.W.2d 615 (1972). We further accept the Village's assertion that the common meaning of a word should be determined by consulting dictionaries.[4]

¶13 According to the Village, the relevant dictionary definitions of "waste" are "unused," "unusable," and "unwanted." These definitions are consistent with relevant definitions we have located. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2580 (unabr. ed. 1993) ("thrown away or aside as worthless, defective, or of no further use during or at the end of a process").

[4] Looking to dictionaries for meaning is a standard tool used when words are undefined in legislation. *See, e.g.*, ***Swatek v. County of Dane***, 192 Wis. 2d 47, 61, 531 N.W.2d 45 (1995) ("'In the absence of a statutory definition, all words are construed according to common and approved usage.' The common and approved usage of a word may be established by resort to dictionary definitions." (quoting and citing ***State v. Gilbert***, 115 Wis. 2d 371, 377-78, 340 N.W.2d 511 (1983))).

¶14 The Village tells us that the grease and cooking oil fit these definitions of "waste" because the grease and cooking oil are unusable to and unwanted by *the restaurants* where Sanimax acquires the materials. However, the dictionary definitions the Village points to do not suggest this sort of limitation. That is, the definitions do not suggest that whether something is "unusable" or "unwanted" is determined by looking from a particular party's perspective.

¶15 Applying that common-sense view, we think it obvious that, if a reasonable person was asked whether used cooking oil that is profitably processed into an ingredient in animal feed by a company like Sanimax is "unused," "unusable," and "unwanted," the obvious answer would be no. Indeed, we think it beyond dispute that many non-waste materials *are of no use to the sellers of such materials*. For example, unprocessed oil shale is unusable to, and in some sense unwanted by, the typical owner of property with such shale deposits. But no reasonable person would think that oil shale that can be profitably extracted is "unusable" or "unwanted." This example illustrates that one does not ordinarily assess the usability or the wanted nature of a material from the sole perspective of those who are unable to process the material when others can.

¶16 The Village attempts to cast Sanimax's view that grease and cooking oil *are* usable and wanted as involving the inappropriate consideration of these materials' "future value." And, we agree that one part of Sanimax's argument, read in isolation, might be read as asserting that we should focus on the "post-production" value of the grease and oil. Sanimax writes:

> For example, until processed, wood pulp used to manufacture paper is of no useful purpose and could be considered waste. Prior to brewing, the malts and yeasts employed in making beer are not readily consumable and could be considered waste. If a mechanic in DeForest buys broken down cars (unused and unproductive property) and

> fixes them up for sale, is the mechanic engaged in waste processing? As these examples show, *the appropriate stage at which to make the "waste" determination is post-production.*

(Emphasis added.) Pointing to this passage, the Village contends that "it makes no sense to focus on future value of a substance in determining whether the substance is 'waste' *at the time it is processed*."

¶17 The Village misconstrues Sanimax's argument. Reading the above passage in context, Sanimax is not simply arguing that the grease and cooking oil are not "waste" because they have future value after processing. Sanimax's central point is that, like wood pulp and other unprocessed raw materials, the grease and oil here have *current* value because they are raw materials that can be profitably processed into a salable product.

¶18 The Village provides no reason why we should judge the unusable or unwanted nature of the grease and oil at issue here by looking only to whether they are unusable or unwanted by the restaurants.

¶19 Moreover, even if we took this approach, it is clear that the used cooking oil is not considered "unusable," nor is it "unwanted," by the restaurants. It is undisputed that restaurants retain their used cooking oil because it can be sold to Sanimax or a similar recycling operation. This means that the restaurant operators understand that the used cooking oil is both usable and wanted.[5] We agree with Sanimax that the Board's own findings support this view. The Board found that, "*[b]ut for* the recycling value of such material to Sanimax, or

[5] The Village does not dispute Sanimax's assertion that the processing of used cooking oil constitutes the principal share of its grease and oil processing operation.

Sanimax's competitors, the used grease and oil is material that would be discarded" (emphasis added).

¶20 Departing from its dictionary-based argument, the Village separately contends that the common understanding of the grease and oil at issue here as "waste" is evidenced by testimony showing that the Sanimax plant manager had a history of using the term "waste" when referring to the material. The Village points to examples of the plant manager referring to the unprocessed grease and oil as "waste" and referring to Sanimax's business as recycling "other people's waste."

¶21 However, our review of the plant manager's testimony reveals nothing more than the obvious fact that people often use terms imprecisely. Although the plant manager readily acknowledged using the term "waste" to refer to the grease and oil Sanimax acquired from restaurants, he also stated that the material was not waste "under the definitions" presented to him by the attorney representing the Village zoning administrator. He further opined that the material would be "waste" under those definitions only if it was fully discarded. The plant manager was asked: "If to you it's a raw material and not a waste, why do you refer to it as a waste?" and the manager answered: "That's a good point. Moving forward, I'll always call it a used material."

¶22 In sum, the grease and oil at issue here do not fit the dictionary definitions of "waste" that the Village relies on. Given that dictionaries provide the commonly understood and approved meaning of terms, we conclude that our discussion so far is fatal to the Village's plain meaning argument. Nonetheless, we make two more observations arising from the same language in the ordinance.

¶23 First, our plain meaning interpretation of "waste" is supported by the context in which the "[w]aste material ... processing" language appears in the ordinance. The controlled uses in the ordinance are organized under subheadings. The subheadings are:

- Industrial District Uses
- Transportation Related Uses
- Service Related Uses
- Warehouse or Distribution Related Uses
- Utility/Government Related Uses
- Miscellaneous Uses

The limitation on "[w]aste material ... processing" appears under the "Utility/Government Related Uses" subheading. There are 12 uses listed under this subheading. All other uses under this subheading appear to be activities engaged in by governmental entities (e.g., "Fire and police stations") or utilities (e.g., "Power Plants"). Putting "[w]aste material ... processing" to the side, none of the remaining 11 uses under this subheading appear to even arguably apply to non-governmental, non-utility entities like Sanimax. In contrast, the uses under all other subheadings describe activities that non-governmental and non-utility entities might engage in.

¶24 This categorization scheme suggests that the phrase "[w]aste material ... processing" is limited to activities that a governmental entity or a utility might engage in. This, in turn, supports the view that "waste" in this context refers to the sort of waste that does not interest a private business like Sanimax.

¶25 Second, we agree with Sanimax's alternative argument that the placement of the "[w]aste material ... processing" under the "Utility/Government Related Uses" subheading supports the view that the language is not intended to apply to non-governmental and non-utility entities. As noted, all other uses under that subheading appear to be activities engaged in by governmental entities or utilities. Sanimax is neither a government-related company nor a utility company. It follows, according to Sanimax, that none of the use restrictions under the "Utility/Government Related Uses" subheadings apply to private businesses like Sanimax. The Village does not reply to this argument. So far as we can tell, this argument alone leads to the conclusion that the "[w]aste material ... processing" language does not apply to Sanimax.

Conclusion

¶26 For the reasons stated above, we affirm the circuit court.

By the Court.—Judgment affirmed.

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