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In the Matter of:

900 Central Avenue, Albany New York; Tax Map No.  
53.83-1-5;

**NARRATIVE  
IN SUPPORT**

Request Pursuant to

*§375-1(G): The Chief Planning Official shall be authorized to interpret the provisions of this USDO, including but not limited to the location of zoning district boundary lines, unless a different City official is specifically designated in this USDO to make a particular interpretation. The decisions of the Chief Planning Official are subject to appeal to the Board of Zoning Appeals. An applicant may request a formal written interpretation of this USDO be made by the Board of Zoning Appeals;*

To Authorize the Proposed Use as a Personal or Business Service  
As Permitted in the MU-CH, Mixed-Use Community Highway Zoning  
District.

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## INTRODUCTION

Somerset Associates, LP, 900 Central, LLC, Central Colvin Realty, LLC and Dedham Post Funding LLC (collectively, the “Applicant”), the owners of the 900 Central Avenue, Albany, New York, also known as Hannaford Plaza, appeal to the City Board of Zoning Appeals (“BZA”) seeking an interpretation that the proposed new tenant within Hannaford Plaza, a blood plasma collection center that will occupy ±11,000 SF of vacant space, is permitted as a personal or business service use under the Unified Sustainable Development Ordinance (“USDO”).

On March 29, 2017 and August 8, 2017, the Applicant, through its attorney, submitted letters in support of the interpretation. Those letters are attached hereto and labeled Exhibits 1 and 2, respectively.

By letter dated July 20, 2017 (“Denial Letter”), the Director of Planning determined, pursuant to §375-3(A)(3) of the USDO that his office was “unable to conclude that this use is ‘so consistent with the size, scale, operating characteristics, and external impacts of a listed use that it should be treated as the same use’”. However, this determination fails to address the initial part of the test – “the Chief Planning Official shall determine whether or not [the proposed use] is included in the definition of a listed use...”

§375-3(A)(3) of the USDO, in its entirety, provides:

When a proposed land use is not explicitly listed in Table 375-3-1: Permitted Use Table) below, the Chief Planning Official **shall determine whether or not it is included in the definition of a listed use** or is so consistent with the size, scale, operating characteristics, and external impacts of a listed use that it should be treated as the same use. In making this determination, the Chief Planning Official shall consider the scale, character, traffic impacts, storm drainage impacts, utility demands, and potential impacts of the proposed use on surrounding properties. The Chief Planning Official's interpretation shall be made available to the public and shall be binding on future decisions of the City until the Chief Planning Official makes a different interpretation or this USDO is amended to treat the use differently. **Should the Chief Planning Official determine no similar use is listed within this USDO**, the Chief Planning Official shall have the right to delay making a determination and to propose the addition of a new use to Permitted Use Table through an amendment to this USDO as described in Section 375-5(E)(23) (Amendments to Zoning Map or USDO Text).

The Denial Letter continues:

I am hereby exercising my authority to delay making a determination on the matter so that the addition of a new use to Permitted Use Table may be pursued through an amendment to this USDO. Said amendment will be considered as a part of periodic review on the USDO scheduled to occur on or around December 2017.

The Denial Letter also fails to determine whether there is any "similar use[] listed within this USDO". Instead it simply defers to a determination by the Common Council at some future date.

Consequently, it is likely that the Applicant will be required to wait three, or more, months before a determination might be made by the legislative body of the City, whether or not to add the proposed use to the Permitted Use Table for the MU-CH district. Given that the Applicant has been working to fill this significant vacancy within Hannaford Plaza (approximately 8.5% of the shopping center) for more than seven months, having to wait for almost a year to fill this space is causing economic hardship on the Applicant, resulting in this application.

## **BACKGROUND**

The proposed tenant is CSL Plasma, Inc., one of the world's largest collectors of human plasma with nearly 170 collection centers across the country. CSL Plasma, Inc. is a division of CSL Behring, a plasma protein biotherapies company. CSL Plasma, Inc. conducted an extensive site selection search for the location of its new proposed blood plasma collection facility and decided, after lengthy discussions with the Applicant, to locate its facility at the Hannaford Plaza. CSL Plasma performs life-saving work and improves the quality of life for people with rare and serious diseases. Its work includes treating coagulation disorders including hemophilia and von

Willebrand disease, primary immune deficiencies, hereditary angioedema, inherited respiratory disease, and neurological disorders. The company's products are also used in cardiac surgery, organ transplantation, burn treatment and to prevent hemolytic disease of the newborn.

## PROPOSED USE

The proposed CSL Plasma blood plasma collection center involves an individual coming to the center, and having his or her blood drawn and run through a device which separates the plasma from the blood. The blood is then returned to the individual and the plasma retained. After the initial visit, which includes a medical evaluation of the donor and the completion of a questionnaire, the process can be expected to take approximately 90 minutes. The individual is compensated for the plasma and the plasma is shipped to other company facilities where it is processed, and used for the purposes set forth in the "Background" section of this Narrative. Plasma collection centers are committed to the highest standards of quality and safety. This service will ensure that tens of thousands of people are able to live normal, healthy lives.

## THE LAW

While courts will generally give deference to the interpretation of an ambiguous zoning ordinance by the local zoning board, where "the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required." Matter of Albany Basketball & Sports Corp. v. City of Albany, 116 A.D.3d 1135, 1137 (3d Dep't 2014), lv. denied, 23 N.Y.3d 907 (2014) [BZA's interpretation of the term "auditorium" excluded commonly accepted definitions and was irrational and unreasonable]. Zoning is in derogation of the common law. Moreover, "[b]ecause zoning ordinances are in derogation of the common law, they must be strictly construed against the municipality that drafted them." Matter of Boni Enters., LLC v. Zoning Bd. of Appeals of Town of Clifton Park, 124 A.D.3d 1052, 1053 (3d Dep't 2015).

## ANALYSIS

### A. Permitted as Personal or Business Service

The Applicant requested a determination that the proposed blood plasma collection center is a permitted use in the shopping center (MU-CH zoning district) under the category of "Personal or Business Services", similar to a beauty salon. As explained by the Applicant, a beauty salon is expressly listed as an example of a personal or business service and a comparable similar use to the blood plasma collection center.

Personal or Business Services is defined as:

Any business that primarily performs a support service for an individual or business, **including but not limited to** a shoe repair shop, dry-cleaning establishment, laundromat, barber shop, **beauty parlor**, photocopying (either self-service or full-service), design, printing and binding of documents, presentations, desktop publishing, packaging, and/or mailing, makerspace, collaborative work space, and sign shop...

The USDO does not define the terms “barber shop” or “beauty parlor”. The term “including, but not limited to” establishes the intent of the Common Council that this list of permitted uses is not a finite list. Rather, a variety of other commercial and retail service uses are also permitted, even beyond those that are specifically listed in the definition.

Pursuant to the USDO, the Chief Planning Official “shall determine whether or not [the proposed use] is included in the definition of a listed use...” The Planning Director failed to make any such determination.

The blood plasma collection center should be “included in the definition of a listed use”. It is a “business that primarily performs a support service for an individual or business”, similar to a beauty parlor. As such it is a personal or business service. It will be no different than other tenant personal or business uses within the existing shopping center. As noted above, individuals will come to the shopping center, park in the available parking facilities, enter the business and be greeted by employees. The individual will then be seated where his or her blood will be drawn and, through a machine, plasma will be removed and the blood returned to individual.

This process is akin to a customer of a beauty parlor, which are located in shopping centers across, not only New York, but the country. Such patrons of these establishments, for instance, may be compensated for having their long hair cut, and the hair cuttings retained by the beauty parlor and, thereafter, used for wigs or hair extensions, and the like. Beauty parlors are explicitly permitted in the MU-CH district under the umbrella of a “Personal or Business Service”. The proposed blood plasma collection center is no different and falls under the same umbrella.

Moreover, CSL Plasma, Inc. is a subsidiary of CSL Behring, a plasma protein biotherapies company. CSL Plasma is “primarily performing a support service for [a] business” which is also consistent with the definition of Personal or Business Services. The plasma collected is transferred to the parent company in furtherance of the business services.

Common sense dictates that the proposed blood plasma collection center is analogous to and falls squarely within the definition of a personal or business service, because it primarily performs a support service for an individual or business. The BZA should make such an interpretation.

#### B. Permitted Use as a Hospital

Moreover, the proposed use is also analogous to a hospital, which is also a permitted use in the MU-CH zoning district. Hospital is defined as:

An establishment that provides diagnosis and treatment, both surgical and nonsurgical, for patients who have any of a variety of medical conditions through an organized medical staff and permanent facilities that include inpatient beds, medical services, and continuous licensed professional nursing services. **This definition includes any facility licensed by the state as a**

**general, limited, or special hospital.** Accessory uses can include helipads licensed by the State of New York.

Clearly, the proposed use will perform services very similar to those performed at a hospital. For instance, a “special hospital” is a “hospital for the medical and surgical care of patients with specific types of diseases (for example, ear, nose, and throat; eyes; mental illness)”. See, <http://medical-dictionary.thefreedictionary.com/special+hospital>. The services provided (i.e. plasma collection), noted among the activities in the “Background” section of this Narrative, confirm that the blood plasma collection center is akin to at least one hospital service, as permitted in the MU-CH zoning district.

### C. Permitted Use as a Commercial and Retail Use

The blood plasma collection center has been examined by other municipalities for zoning compliance and they concluded that the use was a permitted in business and mixed-use districts.

For instance, the City of Schenectady specifically found, in connection with the establishment of a blood plasma collection and donation center in the Woodlawn Plaza shopping center within the City’s C-5 Business District, that “[u]se of the property for a variety of commercial and retail uses is permitted and is in compliance with the City’s Zoning Ordinance. Specifically, a blood plasma donation center is a permitted use of the property.” A plasma collection center is not a specifically permitted use in the C-5 zoning district, yet zoning compliance was found as a commercial/retail use.

Similarly, in the Town of Greece, the use would be situated in a shopping center in a mixed-use zoning district which permits a variety of office, retail service and residential uses. Although not specifically listed as a permitted use in the zoning district, the Town found zoning compliance, as follows: “Based on my review of the Zoning Ordinance and the CSL Plasma, Inc. website... a donation/collection center for blood/blood products, such as the one operated by CSL Plasma Inc., would be a permitted use in the DMU zoning district.”

Pursuant to the USDO, the MU-CH district is a commercial mixed-use zoning district. The proposed use will occupy space as a tenant within an existing shopping center. The purpose of the MU-CH district specifically provides:

The purpose of the MU-CH district is to provide for a wide variety of retail, residential, and commercial uses intended to serve an area larger than a specific neighborhood, in areas characterized by large blocks with arterial street access, and designed for convenient access by automobile. A mix of residential and nonresidential uses on individual lots is permitted but not required. Permitted uses are shown in Table 375-3-1 (Permitted Use Table).

USDO Section 375-2(D)(4)(b).

As with the zoning compliance findings of Schenectady and Greece, authorizing the proposed use within the Hannaford shopping center is consistent with the purpose of the MU-CH

zoning district to promote a “wide variety of retail, residential and commercial uses.” It also must be remembered that the terms of the USDO are in derogation of the common law and “they must be strictly construed against the municipality that drafted them.” *Id.* It is respectfully submitted that the proposed donation/collection center for blood and blood products is a commercial business and retail use and permitted as of right in the MU-CH zoning district.

D. Permitted as Consistent with Size, Scale, Operating Characteristics, and External Impacts of a Listed Use that it Should be Treated as the Same Use

The Denial Letter failed to address whether the proposed use was similar to a personal or business service listed as a permitted use within the MU-CH zoning district. Instead it simply deferred a decision until a time when the Common Council might potentially adopt legislation at some undefined point in the future. This determination frustrates the Applicant’s ability to re-tenant this space in the shopping center for a considerable (unknown) period of time.

The Denial Letter indicates that the Director (without properly deciding in the first instance if the use was included in the definition of a listed use) could not determine whether the proposed use was “so consistent with the size, scale, operating characteristics, and external impacts of a listed use that it should be treated as the same use” that the Common Council should determine in the future through an amendment to the USDO. This is unnecessary.

Applying the listed factors establishes that the blood plasma collection center is a permitted use as a personal or business service.

1. Consistent with size and scale of a listed use.

The proposed tenant will occupy ±11,000 SF of vacant space within Hannaford Plaza. This represents 8.9% of the overall shopping center. Within the shopping center are typical retail and personal or business service uses including - a Hannaford Supermarket, laundromat, wine and liquor store, Chinese restaurant, Brueggers Bagels, a bank and locksmith. All of these uses occupy various amounts of square feet within the shopping center. Occupancy of 11,000 SF of space is consistent with the size and scale of a personal or business services use.

2. Consistent with operating characteristics of a listed use.

The proposed use will operate within an existing, and long standing, permitted shopping center. As noted above, individuals will simply drive or walk to the shopping center, park their cars and enter the establishment. They would then be greeted at the door and, seated at a station where blood is drawn and run through a device which separates the plasma from the blood. The blood is returned and they will then leave. This is no different than a patron of a beauty parlor located within a shopping center who, for instance, goes to the shopping center, enters the establishment with the intention of receipt of compensation for cutting their long hair to be used for wigs or extensions, and the like. The proposed use is consistent with the operating characteristics of a listed use (retail and personal or business service [beauty parlor]).

3. Consistent with external impacts of a listed use.

The proposed use will operate currently in available tenant space within the existing and long standing permitted shopping center. There will be no external impacts different than a listed use.

4. Based on compliance with the above criteria, the use should be treated as a listed use as if it were the same use – i.e. a personal or business service beauty parlor – and permitted to occupy this space within the shopping center.

5. Moreover, the use will perform services similar to that provided at a hospital, which is a permitted use in the MU-CH zoning district. The services provided (i.e. plasma collection), noted among the activities in the “Background” section of this Narrative, confirm that the blood plasma collection center is analogous to at least one aspect of what happens in a hospital, a permitted use in the MU-CH zoning district.

In making this determination, the Chief Planning Official is also required to consider the scale, character, traffic impacts, storm drainage impacts, utility demands, and potential impacts of the proposed use on surrounding properties.

Consideration of the scale and character of the proposed use. As noted above, the scale and character are consistent with other tenant space within the existing shopping center.

Consideration of traffic impacts. The proposed use is no different than a beauty salon. There are no traffic impacts of re-tenanting vacant space within an approved shopping center with ample off-street parking for a personal or business service use. Furthermore, the location was chosen in part because the Shopping Center is on a bus line. CSL Plasma reports that a significant portion of both its employees and its clients utilize public transportation to access and depart from the business.

Consideration of storm drainage impacts. Re-tenanting vacant space within an approved shopping center involves no new impervious surfaces and will have no impact on storm drainage.

Consideration of utility demands. Re-tenanting vacant space within a shopping center with a personal or business service that is analogous to a beauty salon within an approved shopping center involves no new or different utility demands.

Consideration of impacts on surrounding property. Re-tenanting vacant space within a shopping center in a commercial zoning district, and surrounding commercial districts, with a personal or business service will have no impacts on surrounding properties.

Therefore, the proposed blood plasma collection center meets the definition of a personal or business service and should be permitted in the MU-CH zoning district. The Planning Director should not have deferred a decision to a future date when the Common Council might consider amending the USDO. Under the test in the USDO, the evidence establishes that: 1) the use is permitted as a personal or business service, and 2) the use is permitted as consistent with size,

scale, operating characteristics, and external impacts of a listed use that it should be treated as the same use.

### **CONCLUSION**

The terms of the USDO are derogation of the common law and “must be strictly construed against the municipality that drafted them”. Consequently, for the reasons set forth herein, the Applicant respectfully requests that the Board of Zoning Appeals approve the application and issue a favorable interpretation that the proposed use, a donation/collection center for blood and blood products, is a permitted use in the MU-CH zoning district as a “personal or business service”, “hospital”, and/or a “retail, residential, and commercial use”, consistent with the purposes of the MU-CH zoning district.