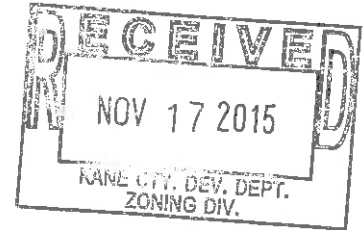


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## Memorandum

Date: November 17, 2015  
To: Kane County Zoning Board of Appeals  
From: Steven M. Elrod  
Hart M. Passman  
Cc: Mark VanKerkhoff, County Zoning Enforcement Officer  
Re: Response to Appeal – Special Use Petition No. 4364



At the request of Maxxam Partners, LLC, the Applicant for Special Use Petition No. 4364 (the "*Petition*"), we have reviewed the appeal filed by Jolene Andrzejewski and Abram Andrzejewski concerning the applicability of Section 5.15 of the County Zoning Ordinance to the Petition (the "*Appeal*"), along with the responsive memorandum from Mark VanKerkhoff, County Zoning Enforcing Officer (the "*Response*"). We agree with Mr. VanKerkhoff's conclusions in the Response, and offer the following in support of Mr. VanKerkhoff and in opposition to the Appeal.

### *Section 5.15*

The County Zoning Ordinance is intended to be a comprehensive set of regulations governing the development and use of property in unincorporated areas of Kane County. However, such an ordinance cannot anticipate every single possible use that may be introduced in the County, or every new use that either evolved from an existing use or that could not have been anticipated by the drafters of the ordinance. Accordingly, Section 5.15 is designed to provide a mechanism for review and administration of such evolving uses in an efficient manner without the need for engaging in the legislative process that is associated with a text amendment. Simply, it vests in the Enforcing Officer the authority to consider and approve unlisted uses that, "though not contained by name in a zoning district list of permitted or special uses, are deemed to be similar in nature and clearly compatible with the listed uses." Zoning Ordinance, § 5.15. To approve those unlisted uses, the Enforcing Officer must first receive a "favorable report" from the County's Development Department, which must have reviewed the application for the proposed unlisted use.

Provisions such as Section 5.15 are common in zoning ordinances throughout the metropolitan region, precisely because, in every jurisdiction, there are uses and situations that demand a more flexible and efficient method of processing. Without provisions like Section 5.15, no unlisted use in any jurisdiction could proceed except upon completion of a lengthy

amendment process. The County Board saw fit to include Section 5.15 as a sensible and standard means of resolving questions involving similar-but-unlisted uses in the County. Section 5.15 thus stands as the general, County-wide, district-wide regulation for treatment of unlisted zoning uses. The intent of this Section is clearly intended to provide an administrative process for existing, currently issued permits and special use permits. Therefore, Section 5.15 is not applicable in this case because the Applicant is petitioning the County for the issuance of a brand new special use permit.

*Section 8.1-2(dd)*

The topic of unlisted zoning uses also appears in Section 8.1-2(dd) of the Zoning Ordinance. That provision allows, as a special use in the F (Farming) District, “other uses similar to those permitted herein as special uses.” Section 8.1-2(dd) is *specific* to the F District, and there is no analogous provision of the Zoning Ordinance for any other zoning district. Section 8.1-2(dd) thus sets forth a unique process for the processing of a unique set of unlisted uses: namely, if a use is unlisted, but proposed *for* the F District, and is similar to a use that *is* listed as a special use in the F District, then the unlisted use may also be processed as a special use.

There is a general principle of law in Illinois that, when two provisions of a statute or ordinance conflict, the specific provision controls over the general one.<sup>1</sup> In this situation, Section 5.15 is general: it applies to *all* unlisted uses, in *all* zoning districts, and to permitted and special uses alike. In contrast, Section 8.1-2(dd) applies on a very limited basis: only to special uses, and only in the F District. For this reason alone, Mr. VanKerkhoff was correct to rely upon the authority granted in Section 8.1-2, and to disregard Section 5.15.

If the County Board, as drafters of the Zoning Ordinance, had seen fit to require the procedures of Section 5.15 to apply to *all* unlisted uses, then the Board would have included a reference to Section 5.15 within Section 8.1-2(dd). Indeed, in the *absence* of such a cross-reference, the appellants’ interpretation of Section 8.1-2(dd) makes no sense, and renders such provision meaningless – because Section 5.15 *already* allows any unlisted use to proceed, under that provision’s administrative procedure. If the County Board intended unlisted special uses in the F District to be treated like any other unlisted use, Section 8.1-2(dd) would not be necessary.

The better interpretation is the one advanced by Mr. VanKerkhoff, in his capacity as the County’s chief zoning officer. Section 8.1-2(dd) presents an alternate and highly-limited procedure for the consideration and processing of special uses in the F District. That procedure allows the unlisted use to proceed, and to be reviewed, as part of the *legislative* determinations of the Zoning Board and the County Board, each of which is empowered to reach its own conclusions on the similarity of the proposed use to the listed special uses. The *administrative* procedures of Section 5.15 do not bear on those legislative proceedings.

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<sup>1</sup> The appellants recognize this doctrine of statutory construction, yet twist it to conclude that, somehow, Section 5.15 is the specific law that should be followed. When juxtaposed with Section 8.1-2(dd), it is clear that Section 5.15 is not the more specific provision, but rather is the more generally applicable provision.

### *Similarity*

On the issue of similarity, though not relevant to the core question concerning the applicability of Section 5.15, the appellants devote much space in the Appeal to argue why the proposed use identified in the Petition is not similar to other listed special uses in the F District. To that, we renew our findings set forth in our August 19, 2015 Memorandum (included as part of the applicant's Petition). Specifically, it is our finding that the proposed residential alcoholism and substance abuse treatment facility is similar to a "hospital" (with respect to the medical treatment of residents of the facility) and to a "nursing and convalescent home" (with respect to the residential dwelling arrangement planned for the facility). The appellants point out that the proposed facility is not *identical* to hospitals or nursing homes. However, that is not the appropriate inquiry. The facility need not be *identical* to a listed use; it need only be *similar* to other identified uses in order for it to be determined to be a special use. As more fully detailed in our August 19 Memorandum, when measured against the appropriate standard of similarity, the proposed residential alcoholism and substance abuse treatment facility clearly passes the test.

The Appeal relies heavily on the Illinois Supreme Court decision in *Palella v. Leyden Family Service & Mental Health Center*, 79 Ill.2d 493 (1980) for the argument that a "detoxification facility" is not similar to a Nursing Home. It is our opinion that the Appeal does not correctly apply the Supreme Court's holding in *Palella*. That case involves the interpretation of an existing special use permit for a nursing home in an effort to determine if that existing permit can be expanded to also allow the operation of a detoxification center without further action. That is not the case here. Applicant is petitioning for a brand new special use permit to be issued for its residential alcoholism and substance abuse treatment facility and is not attempting to expand a previously issued permit without legislative action. Additionally, we note that the Court in *Palella* actually supports Applicant's claim that alcoholism and substance abuse treatment facilities and hospitals are similar when it observed that both nursing homes and detoxification centers are "both dedicated to the rehabilitation of a patient with sick mind or body or both".

As noted in its application, the applicant recognizes that its use is not specifically listed in the F District of the Zoning Ordinance, and for that reason, as Mr. VanKerkhoff properly understands, the special use process offered through Section 8.1-2(dd) is the proper vehicle for determining whether the proposed facility is indeed "similar" to the listed special uses. As set forth above, the determination of similarity is a component of the legislative review to be conducted by the Zoning Board and the County Board as part of each body's consideration of the Petition, and it is at that time – and not as part of the pending Appeal – that the Zoning Board should engage in such a review.

For these reasons, we support the conclusions of Mr. VanKerkhoff, as set forth in his Memorandum, and urge this Zoning Board to reject the Appeal.