

**Memorandum**

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Date: July 18, 2015

To Maxxam Partners, LLC

From: Andrew E. Kolb, Esq.

Re: Legal Opinion - Maxxam Partners, LLC – Proposed Alcoholism and Substance Abuse Treatment Facility

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We have reviewed the Zoning Ordinance of Kane County, Illinois, and have determined that from a zoning standpoint, the property, formally known as the Glenwood School for Boys, located at 41W400 Silver Glen Road, in unincorporated Kane County (the “Site”), may be used for an alcoholism and substance abuse treatment facility under applicable zoning ordinances of Kane County, provided that a special use permit is issued by the Kane County Board. We have also concluded that the proposed use as an alcoholism and substance abuse treatment facility satisfies the standards for granting a special use at the specified location. Lastly, it is our opinion that any denial of your proposed application for a special use by Kane County raises violations of the Federal Fair Housing Act, 42 U.S.C. Sec. 3604(f) as noted below. Our analysis and findings are as follows:

*Analysis*

There is no individual use expressed within the Kane County zoning ordinance that explicitly references residential alcoholism and substance abuse treatment facilities as an enumerated permitted or special use. However, an alcoholism and substance abuse treatment facility is included within several other enumerated uses set forth in the ordinance. The closest defined enumerated uses in the Kane County Zoning Ordinance that are similar to the proposed residential alcoholism and substance abuse treatment facility are as follows:

- (a) “Assisted Living Facility”, defined as: “A building and premises where the proprietor furnishes lodging and varying degrees of custodial care to persons who are elderly or who require assistance in daily living, but are otherwise in good health.”

- (b) "Convalescent or Nursing Home," which is defined as: "A private home for the care of the aged or infirm, or a place of rest for those suffering bodily disorders."
- (c) "Hospital or Sanitarium," defined as: "An institution open to the public in which patients or injured persons are given medical or surgical care; or for the care of contagious diseases," and;
- (d) "Nursing and Convalescent Home" (a separate term in the Zoning Ordinance) is defined as: "A building and premises for the care of sick, infirm, aged, or injured persons to be housed; or a place of rest for those who are bedfast or need considerable nursing care, but not including hospitals, assisted living facilities or group homes."

### *Similarity to a Hospital*

It is our opinion that the defined "hospital" use describes the medically managed detoxification proposed at your alcoholism and substance abuse treatment facility. The Kane County Zoning Ordinance defines "Hospital or Sanitarium" as "an institution open to the public in which patients or injured persons are given medical or surgical care; or for the care of contagious diseases." The reference to "medical care" in the "hospital" overlaps substantially and is compatible with the proposed facility's treatment programs. We note that the proposed facility will have a licensed medical physician as its medical director, and that a licensed medical physician may see each facility patient daily, as needed. Also, the facility must have 24-hour staffing by either a registered or licensed nurse, or a certified emergency medical technician. This level of care and professional staff indicates that the facility will share many of the same characteristics as a hospital with respect to the administration of care.

Additional evidence of the similarity to a Hospital is found within relevant provisions of the Illinois Hospital Licensing Act, 210 ILCS 85 et seq. Section 3(A) of the Hospital Licensing Act provides the legal definition of a "Hospital" in the State of Illinois:

*"Hospital means any institution, place, building, buildings on a campus, or agency, public or private, whether organized for profit or not, devoted primarily to the maintenance and operation of facilities for the diagnosis and treatment or care of 2 or more unrelated persons admitted for overnight stay or longer in order to obtain medical, including obstetric, psychiatric and nursing, care of illness, disease, injury, infirmity, or deformity."*

Section 3(A)(5) also states that:

*"The term "hospital" does not include:*

*(5) any person or facility required to be licensed pursuant to the Alcoholism and Other Drug Abuse and Dependency Act."*

Applicant's proposed use requires licensure under the Alcoholism and Other Drug Abuse and Dependency Act (separate from the Illinois Hospital Licensing Act). Devoid of the exemption provided under Section 3(A)(5) of the Illinois Hospital Licensing Act as mentioned above, the

Applicant would have to be licensed as a “Hospital.” Thus, the definitions between the treatment facility and a hospital are so similar that legislature actually had to carve out our proposed use from the Hospital Licensing Act within Section 3(A)(5) of the Illinois Hospital Licensing Act. Simply put, because the two uses are so similar, the carve-out was necessary so that alcoholism and substance abuse treatment facilities would not be burdened with any unintended hardship of being licensed as a hospital.

Additional strong and comprehensive evidence to clearly establish “similarity” between a Hospital and our proposed treatment facility is found within the expert opinion procured from Murer Consultants, Inc.

### *Similarity to a Nursing and Convalescent Home*

Additionally, the defined term “Nursing and Convalescent Home” use best describes the residential dwelling arrangements of the residents. Thus, both uses are substantially similar and appropriate to our proposed use. The Kane County Zoning Ordinance defines Nursing and Convalescent Home as “a building and premises for the care of sick, infirm, aged, or injured persons to be housed; or a place of rest for those who are bedfast or need considerable nursing care, but not including hospitals, assisted living facilities or group homes.” The patients of a residential alcoholism and substance abuse treatment facility are included in the definition of disabled and sick as defined in the zoning ordinance and will be housed in seven separate resident lodges. Each lodge is a home or dwelling unit as it contains bedrooms with private bathrooms, a kitchen and a dining/living room area. The patients’ medications are administered to them in the lodges by the facility’s professional staff, as would be the case in a Nursing and Convalescent Home.

### *Similarity Standard – Kane County Zoning Ordinance*

The subject property is located in the “F” Farming zoning district of the Kane County Zoning Ordinance. In the F District, “Hospitals” (by cross-reference to the special uses in the R-1 District) and “Nursing and Convalescent Homes” are designated as special uses. Further, pursuant to Section 5.15 of the County Ordinance, the zoning officer may allow additional, unlisted uses that he or she determines is **similar to, or compatible with**, a listed permitted or special use. Section 8.1-2(dd) of the County Ordinance expressly allows, as special uses in the F District, “**other uses similar to those permitted herein as special uses.**”

As noted above, we believe that the proposed alcoholism and substance abuse treatment facility would fall into the defined use of “hospital” and “nursing and convalescent home.” Thus, the County would indeed have the authority to approve the proposed facility as a special use. Even though the facility is not a “hospital” or a “nursing or convalescent home,” Sections 5.15 and 8.1-2(dd) would support the review of the proposal as “similar” to the recognized use categories. For these reasons, it is appropriate for the County to designate and review the proposed alcoholism and substance abuse treatment facility as a special use in the F District.

### *Special Uses in the State of Illinois*

Under Illinois zoning law, a “special use” is a type of property use that is expressly permitted within a zoning district by the controlling zoning ordinance so long as the use meets certain criteria and conditions. *City of Chicago Heights v Living Word Outreach Full Gospel Church and Ministries, Inc.*, 196 Ill 2d 1, 16 (2001). For example, in our case, this means that “Hospital” (or any use similar thereto) already has been determined to be allowed in the “F” Farming District, so long as the proposed use satisfies the statutory standards for the granting of a special use under the Kane County Zoning Ordinance. For the reasons set forth in the zoning petition (and accompanying Rider) and based upon the findings within the expert reports referenced in Section III of the application Rider, and given the physical characteristics of the site, the prior use and the fact that the Site is surrounded by natural areas, we believe that you satisfy the standards for a special use.

### *Fair Housing Act*

In making its determination of whether or not to grant a special use, the County must also consider its obligations under the Federal Fair Housing Act (“FHA”), 42 U.S.C. Sec. 3604(f). Section 5.3(b) of the Kane County Zoning Ordinance states that “no section, clause or provision of this Ordinance is intended nor shall be construed as contrary to the Federal Fair Housing Act”. Courts have repeatedly acknowledged the role a group living arrangement plays in the recovery of substance abusers. *See Corp. of the Episcopal Church in Utah*, 199 F. Supp.3d 1215, 1217-1218 (D. Utah 2000); *Oxford House, Inc. v. Town of Babylon*, 819 F.Supp. 1179, 1183 (E.D. NY 1993). The need for handicapped people to live in group arrangements for support or to pool caretaker staff has been described by courts as essential. *Brandt*, 82 F.3d at 174; *see also Smith & Lee Assocs, Inc.*, 102 F.3d at 795-96. Courts have repeatedly held that those suffering from alcoholism and drug addiction fall within the definition of “handicapped” thus to invoke the FHA. *Oxford House v. City of Baton Rouge, Louisiana*, 932 F.Supp.2d 683 (2013). Courts have held that municipal zoning that limits the housing opportunities for those undergoing drug and alcohol abuse treatment limits the opportunities for recovering individuals to live in residential communities and therefore violates certain provisions of the FHA.

Importantly, in our case, Kane County will be required to make a “reasonable accommodation” with respect to the facility, because the facility will provide residential treatment to persons with disabilities who are protected under the Act.

Respectfully,

Meyers & Flowers

By:  \_\_\_\_\_  
Andrew E. Kolb, Esq.  
Of-Counsel