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October 30, 2015

VIA HAND DELIVERY

Mark VanKerkhoff
Director & Zoning Enforcing Officer
Kane County Development and
Community Services Department
719 S. Batavia Avenue
Building A, 4th Floor
Geneva, IL 60134

Joseph White
Chairman
Kane County Zoning Board of Appeals
719 Batavia Avenue
Geneva, IL 60134

Re: Maxxam Partners, LLC – Special Use Permit, Petition No. 4364

Dear Mr. VanKerkhoff and Mr. White:

Enclosed herewith please find the Notice of Appeal of Joline T. Andrzejewski, as Trustee of the Joline T. Andrzejewski Trust #2004 and Abram Andrzejewski relating to the decision by the Enforcing Officer, Mark VanKerkhoff, in relation to the Maxxam Partners, LLC Special Use, Petition No. 4364. I look forward to receiving the date and time for the Zoning Board of Appeals to receive and hear testimony on this appeal.

Upon receipt and review of this correspondence and the enclosed Notice of Appeal should you have any questions or concerns feel free to contact me at my office at your convenience.

Sincerely yours,

RATHJE & WOODWARD, LLC

Kevin Carrara

KMC/acc
Encls.

cc: Client (via email)

ZONING BOARD OF APPEALS

KANE COUNTY, ILLINOIS

IN RE MAXXAM PARTNERS, LLC APPLICATION FOR SPECIAL USE	))))))	Petition No. 4364

NOTICE OF APPEAL

Pursuant to Section 4.5-1 of the Kane County Zoning Ordinance (the "ORDINANCE"), Joline T. Andrzejewski, as Trustee of the Joline T. Andrzejewski Trust #2004 and Abram Andrzejewski (collectively the "Andrzejewskis"), hereby file this Notice of Appeal with the Zoning Board of Appeals (the "ZBA") as persons aggrieved by the decision of the Enforcing Officer, Mark VanKerkhoff, AIA Director, Kane County Development and Community Services Department (the "Enforcing Officer") and in support thereof state the following:

INTRODUCTION

1. On information and belief, the Enforcing Officer received an Application for Special Use and supporting materials from Maxxam Partners, LLC (the "Applicant") for the property commonly known as the 41 W 400 Silver Glen Road, St. Charles, IL 60175 (the "Application").

2. The Andrzejewskis live immediately adjacent to the property listed by the Applicant in the Application, 41 W 400 Silver Glen Road, St. Charles, IL 60175 (the "Facility").

3. Within the Application the Applicant lists the proposed use of the Facility to be a "Private-pay alcoholism and substance abuse treatment Use" (the "Use").

4. The location for the Facility is zoned F District-Farming.

5. The Use is not listed as a Special Use within F District in Section 8.1-2 of the ORDINANCE.

6. Section 8.1-2 also allows Special Uses allowed in the R1 District within the F District.

7. The Use is not listed as a Special Use within the R1 District in Section 9.5-2 of the ORDINANCE.

8. Section 8.1-2(dd) allows for "[o]ther uses similar to those permitted herein as special uses." ORDINANCE § 8.1-2(dd).

9. Applicant claims that hospitals and nursing and convalescent homes are similar to the Use.

10. Applicant also cites Section 5.15 of the ORDINANCE which states, "the Enforcing Officer may allow land-uses which, 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."

11. Applicant, however, left out the remainder of Section 5.15 which states, "[h]owever such non-listed uses shall not be approved until the applicant for such use has been reviewed by the County Development Department staff and a favorable report has been received by the Enforcing Officer. The non-listed uses which are approved shall be added to the appropriate use list at the time of periodic updating and revision." ORDINANCE § 5.15

12. Applicant, as part of its Application, submitted two written legal opinions, one by Holland & Knight and one by Meyers & Flowers (the "Opinions").

13. Applicant attempts to use the Opinions to support its claim that the Use is closest to a hospital and/or a nursing home and convalescent home and, therefore, should be allowed.

14. The Opinions also specifically cite that the Use is not a listed use within the Ordinance and rely upon Section 5.15 of the ORDINANCE, which as discussed above, allows non-listed uses to proceed to the ZBA for hearing subject to the requirements that staff issue a favorable report and the Enforcing Officer make a determination that such a use is similar in nature and clearly compatible with the listed uses in the zoning district.

15. There is no question the Applicant in its Application, as supported by the Opinions, acknowledges the Use is not a listed use within the ORDINANCE, and it is relying upon the Sections 5.15 and 8-2-1(dd) which allow for uses similar to the ones listed in the zoning district to seek its approval.

16. However, on October 7, 2015 the Enforcing Officer, through a voicemail message, advised counsel for the Andrzejewskis that he has made the decision he does not need to follow the requirements of Section 5.15 of the ORDINANCE. On information and belief, the Enforcing Officer claims to be merely processing the Application as submitted, and Section 5.15 relating to non-listed land uses does not apply to the Application. A transcript of the Enforcing Officer's October 7, 2015 voicemail is attached hereto and made a part hereof as Exhibit 1.

17. The decision of the Enforcing Officer to not follow the procedures set forth in Section 5.15 is in contravention of the ORDINANCE and must be reversed.

ARGUMENT

I. The Enforcing Officer's Decision To Not Follow Section 5.15 of the Kane County Zoning Ordinance Must Be Reversed.

18. In Illinois, the general rule is that the construction and interpretation of an ordinance follows the same general rules used by Courts in interpreting statutes. *City of Marengo v. Pollack*, 335 Ill.App.3. 981 (2nd Dist. 2002). The goal of such judicial interpretation is to determine the intent of the ordinance-making body rather than for the Court to substitute its

own views. *Id.* Typically, the best indicator of the intent of the lawmaking body is the actual language of the ordinance. *VG Marina Management Corp. v. Wiener,* 378 Ill.App.3d. 887 (2nd Dist. 2008). Courts will avoid a construction leading to an absurd result, and they will strive to construe an ordinance sensibly even though the universality of the ordinance's language is qualified by such a construction. *City of East St. Louis v. Union Electric Co.,* 37 Ill.2d 537 (1967).

19. Importantly, as in this case where an individual blatantly ignores criteria listed in the zoning ordinance, and effectively, "set[s] the legislative intent expressed in the zoning ordinance to one side" the action must be reversed. *See City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.,* 196 Ill.2d 1, 19 (2001); *see also Heitzman v. Bd. of Zoning Appeals of City of Rock Island,* 17 Ill. App. 711, 717 (1974) (providing that "the Court cannot ignore the controlling provisions of an ordinance under the guise of liberal interpretation."). It is well-settled that an administrative body must not act contrary to the intent of the zoning ordinance. *Id*; *see also LeCompte v. Zoning Bd. of Appeals for Village of Barrington Hills,* 2011 IL App (1st) 100423 (2011); *Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals,* 25 Ill.2d 65, 73 (1962). Further, when two parts of an ordinance conflict and one deals with the subject matter in a general way while the other deals with the subject matter in a specific way, Courts will follow the more specific provision. *See Faville v. Burns,* 2011 IL App (1st) 110335 (2011) (emphasizing that "it is a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision both relating to the same subject—either in the same or another act—the specific provision controls and should be applied."); *Warren v. Zoning Bd. of Appeals of City of*

Fairfield, 255 Ill. App. 3d 482, 486 (1994) (stating that the rules of statutory construction apply to zoning ordinances).

20. In this matter, the ORDINANCE has a very specific section to deal with a non-listed land use such as the Use – Section 5.15. Furthermore, the Applicant relies upon Section 5.15 in its Application to support its claim for the Use. Nonetheless, despite this clear expression by the County Board of its intent with how non-listed land uses should be treated pursuant to Section 5.15 – the Enforcing Officer decided to set aside and ignore this controlling provision, thereby rendering that specific provision which deals with non-listed land uses meaningless and leading to an absurd result in violation of establish zoning law.

21. This error must be corrected and the decision of the Enforcing Officer to ignore Section 5.15 must be reversed.

22. The Village of Campton Hills has taken a similar position to the Andrzejewskis. The municipality, after learning of the actions by the Enforcing Officer through its Village Attorney, filed a letter with the Enforcing Officer stating in relevant part "[i]t is the Village's position that the County violated its own Zoning Ordinance in scheduling Maxxam's Special Use petition for a public hearing without first going through the proper procedure for approving the addition of a nonlisted "similar" special use to the F District regulations. As a result the ZBA has no authority to hear Maxxam's petition for a Special Use that (i) is not listed in the Zoning Ordinance as a special use or (ii) has not yet been approved as a "similar" nonlisted use pursuant to 25-5-15. By skipping a necessary step in the process, the County calls into question all future proceedings on Maxxam's petition and exposes the County to the risk of a procedural challenge to any future decisions on that petition…." A copy of the Village of Campton Hills letter is attached hereto and made a part hereof as Exhibit 2.

23. The Andrzejewskis will further support their Appeal with the written and oral testimony of Joseph H. Abel, AICP of Joseph H. Abel & Associates, LLC at the hearing on this Appeal. Mr. Abel is a planning, zoning and economic development expert with over 50 years of experience and has been involved in all aspects of the initial drafting, interpretation and amendments to the planning standards of zoning ordinances and the preparation of comprehensive plans as a staff member of the Lake County Regional Planning Commission, Director of the DuPage County Regional Planning Commission and Development Department, and the development of an economic development process as the Director of the Economic Development Commission of the City of Chicago and as a consultant in private practice to municipalities and counties alike. Mr. Abel participated in the drafting and implementation of the Kendall, Grundy, LaSalle, Iroquois and Kankakee Counties zoning ordinances. A synopsis of Mr. Abel's expected testimony is attached hereto and made a part hereof as Exhibit 3. However, at the hearing on this Appeal, Mr. Abel will provide oral testimony on all matters relating to the ORDINANCE, the Appeal, the Application and the Use to allow the ZBA to make a full and informed deliberation and decision on this Appeal.

II. The Use Is Not Sufficiently Similar To Any Use Defined In The Kane County Zoning Ordinance.

24. The Application and Opinions argue that the Use should be granted a special use permit under Section 5.15, which states that the County Zoning Enforcement Officer "may allow land-uses which, 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." ORDINANCE § 5.15. They also point to Section 8.1-2, which allows as a special use in the F Zoning District "[o]ther uses similar to those permitted herein as special uses." ORDINANCE § 8.1-2(dd).

25. Under Illinois zoning law, "[s]ince a special use permit allows property owners or developers to use their land in an express exception to the zoning code, the application must prove that the property falls squarely within that exception." *Shipp v. County of Kankakee*, 345 Ill. App. 3d 250, 253 (3d Dist. 2003). Because Applicant clearly cannot provide such proof in their Application, the Use should not be processed as a special use.

26. The appropriate course of considering the proposed Use would be for the County to initiate an amendment to the ORDINANCE to (i) define this type of Use; (ii) identify what zoning districts are best suited for the Use; and (iii) identify what conditions are necessary to protect the public health, safety and welfare in considering the proposed Use and other similar facilities that will be proposed in the future.

A. The Use Is Fundamentally Different Than A Hospital.

27. **First**, under the ORDINANCE, a "hospital" is "an institution open to the public in which patients or injured persons are given medical treatment or surgical care; or for the care of contagious diseases." ORDINANCE § 3.1. One fundamental difference between the Use and a "hospital" is immediately apparent right from that definition: a "hospital" is "[a]n institution ***open to the public***." As Illinois law recognizes, "[h]ospitals, whether privately or publicly owned, are institutions ***operated largely for the benefit of the community*** by the care and treatment of bed patients." *City of Champaign v. Roseman*, 15 Ill. 2d 363, 366 (1958) (emphasis added). The "private pay luxury treatment" Use described in the Application, on the other hand, is not intended to be open to the public but open to only "certain members of the public" as explained by Murer Consultants, Inc., within the Application.

28. **Second,** the definition of "hospital" in the ORDINANCE – unlike the definition of "group home" – does not contemplate the residential nature of the Use. According to data

compiled by the federal Center For Disease Control and Prevention, the average hospital stay is 4.8 days. Centers for Disease Control and Prevention, FastStats: Hospital Inpatient Care, *National Hospital Discharge Survey: 2010 Table, Number and Rate of Hospital Discharges*, http://www.cdc.gov/nchs/data/nhds/1general/2010gen1_agesexalos.pdf. Data supplied by the Petitioner in their Application indicates that "The average stay will be between 30 to 90 days." The residential nature of the proposed Use with stays potentially 625% or 1,875% longer than the average hospital stay makes it clearly distinct and dissimilar from a hospital.

29. ***Third,*** existing Illinois law recognizes that substance abuse treatment facilities and hospitals are different. The legislature was clear when they set forth hospitals are regulated under the Hospital Licensing Act. 210 ILCS 85/3(A)(5); and substance abuse treatment facilities are regulated under the Alcoholism and Other Drug Abuse and Dependency Act. 20 ILCS 301/15-5. Further, hospitals are exempt from the licensure requirements of the Alcoholism and Other Drug Abuse and Dependency Act only to the extent that their substance abuse treatment services "are covered within the scope of the Hospital Licensing Act." 20 ILCS 301/15-5.

30. The Facility will not set broken bones, perform minor or major surgeries, fight infection, take X-rays, perform MRI's, deliver babies, or provide other basic services commonly associated with a public hospital. While hospitals and substance abuse treatment facilities may have some very narrow overlap in services, the luxury and largely nonpublic nature of the proposed Use, its provision of services such as meditation, yoga, massages, personal trainers and Zumba classes to a residential clientele, and the clearly disparate treatment of such a Use under Illinois law and our state's regulatory framework do not permit it to be considered "similar in nature and clearly compatible" as required by the ORDINANCE.

B. The Use Is Fundamentally Different Than A Nursing Home.

31. The ORDINANCE defines a "nursing and convalescent home" as "a building and premises for the case 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." ORDINANCE § 3.1. Illinois law is clear that a substance abuse treatment Use is also fundamentally different than a nursing home.

32. ***First***, the Illinois Supreme Court has acknowledged that nursing homes are distinct from detoxification and recovery centers. In *Palella v. Leyden Family Service & Mental Health Center*, 79 Ill. 2d 493, 498 (1980), the Court considered whether a special use ordinance permitting a nursing and convalescence home also authorized the owner to establish a detoxification center on the property. *Id.* Although the Court noted that both nursing homes and detoxification centers were dedicated to "the rehabilitation of a sick human being in mind and body or both," it found that the detoxification center was functionally and operationally different than the nursing home use. *Id.* at 500 ("it is clear that there is no similarity between the operation of the Use as a convalescence or nursing home under the permitted special use permit and the operation of a detoxification center."). Accordingly, the Court held that the special use permit allowing for the establishment and operation of a nursing home did not also allow for the operation of a detoxification center. *Id.*

33. ***Second***, Illinois' regulatory structure also reflects the reality that substance abuse treatment facilities and nursing home facilities are fundamentally different. The two types of facilities are subject to distinct sets of regulations administered by different state agencies. Nursing homes are licensed and regulated by the Illinois Department of Public Health in accordance with the Nursing Home Care Act. *See* 210 ILCS 45/1-101 *et seq.* In contrast, as

explained above, substance abuse treatment facilities are licensed and regulated by the Illinois Department of Alcoholism and Substance Abuse pursuant to the Alcoholism and Other Drug Abuse and Dependency Act. *See* 20 ILCS 301/1-1 *et seq.*

34. Nursing homes are subject to different reporting and compliance requirements than rehabilitation and recovery centers. These reporting and compliance requirements provide both their residents and nearby property owners with certain protections not afforded under the law to the neighbors of drug and alcohol rehab centers. For example, nursing homes are required to conduct mandatory background checks for all patients. 210 ILCS 45/2-201.5. No such requirement exists for rehabilitation centers. In addition, nursing home administrators are subject to testing and licensure requirements on topics specific to nursing facilities. 210 ILCS 45/3-117. From a regulatory standpoint, these two types of facilities are clearly treated as distinct. Their substantial dissimilarity subjects them to different rules and requirements.

C. The Use Is Most Similar To A Clinic Or A Group Home.

35. Two uses conspicuously absent from the analyses in the Application and Opinions are "clinic" and "group home" because they are not permitted uses in the underlying F district. ORDINANCE § 3.1. However, those are the two defined uses that the Use most closely resembles.

36. A "clinic" is "an individual or organization offering medical, psychological and/or dental services." ORDINANCE § 3.1. Clinics are a permitted use in the RB Zoning District. ORDINANCE § 10.1(c). Further, the RB Zoning District permits "mixed use" properties – *i.e.*, "[a] building under one ownership which contains dwellings either located above the ground floor or to the rear of the building and permitted restricted business uses, per this ordinance, located on the ground floor or to the front of the building." ORDINANCE §

10.1(h). In fact, Illinois case law already holds that a methadone clinic falls within an ordinance permitting use of land for "[o]ffices of professional persons such as physicians, dentists, health practitioners (but not including veterinarians), attorneys, architects and engineers, and including out-patient medical and dental clinics, but not hospitals." *Vill. of Maywood v. Health, Inc.*, 104 Ill. App. 3d 948, 953 (1st Dist. 1982). It is easy to see how a mixed use property in an RB Zoning District could accommodate a residential substance abuse treatment Use.

37. A "group home" is "a dwelling occupied by no more than eight (8) persons with a handicap as the word 'handicap' is defined in the Federal Fair Housing Act." ORDINANCE § 3.1. That, based on the information provided in the Application, is what the Use will be: a set of "group homes." However, one issue for the Use is that the definition limits the occupants of a single group home to no more than eight in number. The Use, as described, appears to contemplate more than eight persons per dwelling.

38. A second issue for the Use, and for the County, is that the ORDINANCE does not identify in which zoning districts group homes may be established or whether such homes are permitted uses or special uses. Instead, it states that "[n]o section, clause or provision of this Ordinance is intended, nor shall be construed, to be contrary to the Federal Fair Housing Act as amended. (42 USC 3601 *et seq.*), including but not limited to those provisions contained in the Federal Fair Housing Act which may apply to 'group homes' as defined herein." ORDINANCE § 5.3(b). The ordinance thus implies that group homes are allowed uses to the extent necessary for compliance with the federal Fair Housing Act ("FHA"), as long as no more than eight persons occupy the group home. The lack of clarity concerning the appropriate locations for "group homes" in Kane County could lead to a patchwork of inconsistent (and incompatible) uses that defeats the County's thorough master planning efforts.

III. The Federal Fair Housing Act Does Not Require The Issuance Of A Special Use Permit For The Use

39. Despite the consideration that must be paid to applicable federal anti-discrimination laws, the FHA does not require that the Application be granted. The Meyers & Flowers and Holland & Knight Opinions are incorrect in arguing that the County will be "required" to grant the Application and accept the Use as a special use of the Parcel so as to make a "reasonable accommodation" required under the FHA. In fact, the goal of the FHA is "equal opportunity," and

> The "equal opportunity" element limits the accommodation duty so that not every rule that creates a general inconvenience or expense to the disabled needs to be modified. Instead, the statute requires only accommodations necessary to ameliorate the effect of the plaintiff's disability so that she may compete equally with the non-disabled in the housing market. We have enforced this limitation by asking whether the rule in question, if left unmodified, hurts handicapped people *by reason of their handicap,* rather than by virtue of what they have in common with other people, such as a limited amount of money to spend on housing. *Wis. Cmty. Serv., Inc. v. City of Milwaukee*, 465 F.3d 737, 749 (7th Cir. 2006) (emphasis in original; quotations and citations omitted); 42 U.S.C. § 3604(f)(3) (B).

40. The "mere fact" that a substance abuse treatment Use does not fit within the definitions of allowable uses in a zoning district "does not automatically require a reasonable accommodation. The accommodation sought must be related to the disability: the FHA does not grant protected classes carte blanche in determining where they can live in total disregard of local zoning codes." *Advocacy & Res. Ctr. v. Town of Chazy*, 62 F. Supp. 2d 686, 689 (N.D.N.Y. 1999). Accordingly, for example, "an accommodation should not extend a preference to handicapped residents relative to other residents, as opposed to affording them equal opportunity and accommodations that go beyond affording a handicapped tenant an equal

opportunity to use and enjoy a dwelling are not required by the [FHA]." *Sporn v. Ocean Colony Condo. Ass'n*, 173 F. Supp. 2d 244, 250 (D.N.J. 2001) (quotations omitted; alteration adopted).

41. The Applicant's Opinions incorrectly imply that denying the Application will automatically result in a violation of the FHA. Under federal anti-discrimination laws, in order to prove a reasonable accommodation claim in the context of a zoning dispute, "a plaintiff must prove that: (1) a modification of the enforcement of a local government's zoning code is necessary because plaintiff's disability is what causes his deprivation of the activities, services, or benefits desired; and (2) such modification is reasonable in that it is both efficacious and proportional to the costs to implement it." *Daveri Dev. Group, LLC v. Vill. of Wheeling*, 934 F. Supp. 2d 987, 1005 (N.D. Ill. 2013) (discussing the ADA) (quotations omitted). Further, if the plaintiff meets that burden, "a defendant may show that a modification to its policy is unreasonable if it is so at odds with the purpose behind the rule that it would be a fundamental and unreasonable change. It is necessary that the Court take into consideration all of the costs to both parties." *Id.* (quotations and citations omitted; alteration adopted).

42. Importantly, there is no requirement that when the County must make a "reasonable accommodation," it is limited to consideration of the accommodation requested by the Applicant. Under the FHA, the County may not "refus[e] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). However, the County may choose what accommodation to make, as long as such accommodation is "reasonable." *See Corp. of Episcopal Church in Utah v. W. Valley City*, 119 F. Supp. 2d 1215, 1222 (D. Utah 2000). As such, if an accommodation to ameliorate the handicap suffered by the intended clients of the Use is necessary, the County does have options

as to such accommodation. For example, depending on the exact circumstances, the County to fulfill its obligation of providing a reasonable accommodation could consider a permit for a mixed use clinic property in an RB Zoning District. Alternatively, the County could fulfill its requirements by considering a permit for a group home or homes in any zoning district.

43. A third entirely appropriate and reasonable accommodation by the County might be the consideration of a text amendment to the ORDINANCE that specially addresses residential substance abuse treatment facilities within the County's zoning plan. It is important to recognize that there is no obligation of the County under the FHA or ADA to grant this *particular* application for a special use, and that there are multiple viable options that are more orderly and consistent with the County's existing zoning ordinance and long history of deliberative and consistent land use planning.

IV. The Kane County 2040 Plan

44. A text amendment is likely the most appropriate course of action because, despite the ORDINANCE's failure to address residential substance abuse treatment facilities and other rehabilitation center uses, the Kane County 2040 Plan places a priority on preventing alcohol abuse. (*See* 2040 Plan p. 79.) The plan also establishes a policy to "[c]reate environments that prevent excessive consumption of alcohol." (2040 Plan p. 98.) Notably, this policy is also identified as the first priority in Kane County's 2012 – 2016 Health Improvement Plan, which is directly incorporated into the Kane County 2040 Plan. (*See* Exec. Summary, 2012-2016 Health Improv. Plan p. 6.) Beyond identifying substance abuse prevention as a policy goal, the Plan also identifies where health care uses should be located: within the Randall / Orchard Road corridor. (2040 Plan p. 215).

45. Notably, the 2040 Plan designates the future use of the Parcel as "Institutional / Private Open Space." (*See* 2040 Plan, 2040 Land Use Map) The Plan states that the Parcel is intended to provide "important scientific, cultural and educational opportunities to the residents of Kane County." (2040 Plan p. 221) Health care, medical or rehabilitation uses are not contemplated in this future land use designation. The consideration of a text amendment would allow the County the opportunity to reasonably accommodate the Use and other rehabilitation and treatment centers within its larger planning framework and avoid further struggles over this issue in the future

46. Interestingly, in 2014 the Enforcing Officer was faced with a potential use which was not a listed use within the Ordinance—that use was generally referred to as a medical marijuana dispensary. Instead of just saying the medical marijuana dispensary use was similar to a Walgreens drug store as both dispense controlled substances the Enforcing Officer took the time to study the matter and prepare text amendments to the ORDINANCE and presented the text amendments to the ZBA in July of 2014 for public hearing and approval. The Enforcing Officer should use the same diligence for the Use as he implemented for the medical marijuana dispensary use.

47. The Andrzejewskis hereby incorporate all materials and information received by the Enforcing Officer relating to the Application as is fully set forth herein and it should be considered part of the papers constituting the record upon which this appeal is taken.

48. Pursuant to Section 4.5.2 of the ORDINANACE, all proceedings in furtherance of the Application must be stayed during the pendency of this Appeal.

CONCLUSION

49. In conclusion, the Applicant itself has admitted in its Application the Use is not a permitted or special use in the F Zoning District. The case law discussed above confirms that the Enforcing Officer must follow the ORDINANACE and not proceed in a fashion which would render Section 5.15 meaningless. The ORDINANCE has a very specific section to deal with the Applicant's non-listed land use – Section 5.15. However, according to Section 5.15, before the Use can be considered "similar" to a hospital or nursing home and convalescent home three things must occur: (1) the County Development Department staff must review the Application; (2) the staff must issue a favorable report to the Enforcing Officer; and (3) upon receipt of the favorable staff report, the Enforcing Officer may allow the Use to proceed.

50. Moreover, if the Enforcing Officer does not follow Section 5.15 for a non-listed land use, the Applicant must proceed with appropriate amendments to the ORDINANCE to identify: (1) in what zoning districts such facilities may be established; (2) whether such facilities will be allowed as a permitted or special use; and (3) what conditions should be applied to such facilities to protect the public health, safety and welfare. A comprehensive analysis of the external impacts generated by such facilities should be conducted to ensure the County accounts for the impacts of not just this Use, but for the many other similar proposals that will likely be forthcoming based on decisions made on the current Application

WHEREFORE, Joline T. Andrzejewski, as Trustee of the Joline T. Andrzejewski Trust #2004 and Abram Andrzejewski, prays Zoning Board of Appeals:

A. Enter an order staying all proceedings in furtherance of the Application during the pendency of this Appeal; and

B. Set a time for hearing and to receive testimony from all parties; and

C. After a full hearing and receiving all testimony and arguments enter an order reversing the decision of the Enforcing Officer and require the Enforcing Officer to follow the procedures set forth in Section 5.15 of the ORDINANCE for the Application and Use.

Dated: October 30, 2015

Respectfully submitted,

Joline T. Andrzejewski, as Trustee of the Joline T. Andrzejewski Trust #2004 and Abram Andrzejewski

By:_______________________________

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Kaitlyn Anne Wild
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EXHIBIT 1

(see the following pages)

Transcript of Voicemail from Mark VanKerkhoff
October 7, 2015 at 4:09 p.m.

MV: Mark VanKerkhoff with Kane County returning your call in response to your email. I just wanted to advise you that the staff report has not been completed so there is no new documents related to that on the website, and then also you'd asked about the determination pursuant to Section 5 – 15 and just out of courtesy wanted to let you know that um that that doesn't really apply. We're processing this under Section 4.8 Special Uses, so I don't expect it to be given a determination pursuant to that section. Uh, if you have any questions, give me a call (630) 232-3451. Thanks.

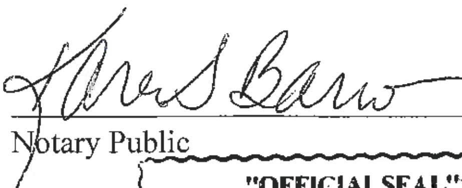
Message Stamp: Message received October 7th at 4:09 p.m. at phone number (630) 444-1066.

AFFIDAVIT

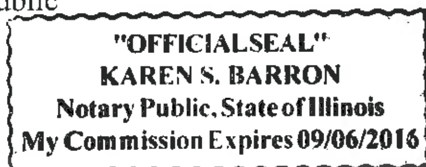
I, Angela C. Christopher, an assistant/paralegal at Rathje & Woodward, LLC, state under oath and penalty of perjury that I am of sound mind and capable of making this Affidavit, and that if called to testify, I could competently testify that the transcript above is a true and correct transcription of the audio from a voicemail dated October 7, 2015.

Angela C. Christopher

Subscribed and sworn to before me this 30th day of October, 2015



Notary Public



"OFFICIAL SEAL"
KAREN S. BARRON
Notary Public, State of Illinois
My Commission Expires 09/06/2016

EXHIBIT 2

(see the following pages)

Diamond Bush DiCianni & Krafthefer

A Professional Corporation
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Chicago, IL 60603
www.ancelglink.com

Julie A. Tappendorf
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October 23, 2015

Via Email: vankerkhoffmark@co.kane.il.us
Mark VanKerkhoff, Director & Zoning Enforcing Officer
Kane County Development and Community Services Dept.
719 S. Batavia Ave., Building A
Geneva, IL 60134

Re: Maxxam Partners, LLC – Special Use Permit Petition No. 4364

Dear Mr. VanKerkhoff:

I serve as the Village Attorney for Campton Hills. The Village Board has asked that I send a letter to the County regarding zoning petition 4364. We ask that you include this letter as part of the application file and the record of the County's hearing on this petition.

According to the application filed by Maxxam Partners, LLC ("***Maxxam***") in late August, Maxxam is requesting that the County approve a special use permit to allow it to use and operate a residential substance abuse treatment facility ("***Facility***") on property located at 41W400 Silver Glen Road in unincorporated Kane County and zoned in the F Farming District ("***Property***").

As you know, the Facility is not listed as a permitted or special use in the F District. Consequently, Maxxam has applied for a special use permit for the Facility under section 25-8-1-2(DD). That provision states as follows:

> DD. Other uses similar to those permitted herein as special uses.

Section 25-8-1-2(DD) does not identify who is responsible for determining what uses are "similar" to the listed special uses or how "similar" uses are to be determined. However, section 25-5-15 of the Zoning Ordinance does:

> **25-5-15: INTERPRETATION OF USE LISTS:**
>
> The enforcing officer may allow land uses which, 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. However, such nonlisted uses shall not be approved until the application for such use has been reviewed by the county development department staff and a favorable report has been received by the enforcing officer. The nonlisted uses which are approved shall be added to the appropriate use list at the time of periodic updating and revision.

According to this section, before a use can be deemed "similar" to the listed special uses in the F District, 3 things must happen. First, the county development department staff must review the application for the proposed use. Second, staff must transmit a favorable report to the enforcing officer. Third, only after receipt of the favorable report from staff can the enforcing officer approve adding the nonlisted "similar" use to the special use list in the respective zoning district (in this case, the F-District). Thus, until the enforcing officer has approved the Facility as a

nonlisted "similar" use, Maxxam's petition for approval of a special use for the Facility cannot and should not be scheduled for hearing. The Facility is simply not an authorized special use in the F-District because you (as the enforcing officer) have not yet approved it as a similar use.

At our meeting on October 7, 2015, the Village asked if you (the enforcing officer) had approved the proposed Facility as a "similar" use under section 25-8-1-2(DD). You responded that no such determination had been made by you or County staff. Rather, you stated that County staff was simply forwarding the petition to the ZBA, and that the ZBA would be responsible for determining whether the use was a "similar" use.[1]

However, the County's Zoning Ordinance places the responsibility for approving a "similar" use with you (the enforcing officer) not the ZBA. That approval can only happen after a favorable report has been forwarded to you (the enforcing officer) from community development staff. By transmitting Maxxam's petition to the ZBA without first approving the Facility as a "similar" use, the County has violated its own ordinance procedures.

It is the Village's position that the County violated its own Zoning Ordinance in scheduling Maxxam's special use petition for a public hearing without first going through the proper procedure for approving the addition of a nonlisted "similar" special use to the F District regulations. As a result, the ZBA has no authority to hear Maxxam's petition for a special use that (i) is not listed in the Zoning Ordinance as a special use or (ii) has not yet been approved as a "similar" nonlisted use pursuant to 25-5-15. By skipping a necessary step in the process, the County calls into question all future proceedings on Maxxam's petition and exposes the County to the risk of a procedural challenge to any future decision on that petition.[2]

We would also like to express our disappointment that County staff did not contact the Village when it scheduled Maxxam's petition for a meeting on November 17, 2015. At our meeting on October 7th, we were assured that you would keep the Village informed of future proceedings. Instead, we had to learn about the meeting while researching another County petition.

If you have any questions about this letter, please contact me.

Sincerely,

Julie A. Tappendorf

cc: Village President and Board of Trustees, Village of Campton Hills
Village Administrator, Village of Campton Hills
4845-4808-1193, v. 1

[1] If your position has changed, and you have since issued the required approval, please forward a copy of that determination to me.

[2] It is not clear why County staff skipped this necessary step in the process. Maybe County staff believes that if it does not put its approval or determination in writing, it can somehow avoid a formal appeal of that decision, as authorized by 25-4-2-3?

EXHIBIT 3
(see the following pages)

MEMORANDUM

Date: October 28, 2015

To: Kane County Zoning Board of Appeal

From: Joseph H. Abel, AICP

Re: Zoning Analysis Maxxam Partners, LLC Application for a Special Use for a Proposed Private-Pay Alcoholism and Substance Abuse Treatment Facility, Kane County, IL –Petition No. 4364

The undersigned represents Joline T. Andrzejewski, as Trustee of the Joline T. Andrzejewski Trust #2004 and Abram Andrzejewski. This memo shall serve as a partial response to the materials submitted by Maxxam Partners, LLC with its application for a special use permit for its proposed residential substance abuse treatment facility to be constructed on the site of the former Glenwood Academy, located in unincorporated Kane County on an F District - Farming Zoned Parcel. For purposes of preparing this response, I have reviewed Maxxam Partners' special use permit application, their three expert opinions offered in support of their Application, an aerial photograph of the site and the Kane County Zoning Ordinance.

It is my professional opinion that the Enforcing Officer has made an incorrect interpretation of the Zoning Ordinance by allowing the Maxxam Partners, LLC application for a Private-Pay Alcoholism and Substance Abuse Treatment Facility (the Facility) to proceed as a Special Use based on the premise that the use is similar to a Hospital, or a Nursing and Convalescent Home which are classified as Special Uses in the F-Farming District while completely ignoring Section 5.15 of the Zoning Ordinance.

The Zoning Ordinance clearly defines what constitutes a Special Use, Initiation of Amendments and Interpretation of Use Lists as follows:

Sec. 4.8. Special Uses

4.8-1 Purpose

The development and execution of this Ordinance is based upon the division of this County into districts within which districts the use of land and buildings, and the bulk and location of buildings and structures in relation to the land are substantially uniform. It is recognized, however, that there are certain uses which, because of their unique characteristics, cannot be properly classified in any particular district or districts, without consideration, in each case, of the impact of those uses upon neighboring land and of the public need for the particular use in the particular location.

To provide for the location of special classes of uses which are deemed desirable for the public welfare within a given district or districts, but which are potentially incompatible with typical uses herein permitted within them, a classification of "special uses" is hereby established.

Sec. 4.7. Amendments

4.7-1 Initiation of Amendments

For the purposes of this section, the term "text amendment" means an amendment to the test [sic] of this ordinance, which affects the whole county, and the term "map amendment" means an amendment to the zoning map which affects an individual parcel or parcels of land. Amendments may be proposed by the County Board, the Zoning Board of Appeals or by any person, firm, corporation, or other legal entity having a freehold interest in the subject property, or a possessory interest entitled to exclusive possession, or a contractual interest which may become a freehold interest and which is specifically enforceable. Proposed amendments shall be directed to the Zoning Board of Appeals for consideration and report to the County Board.

Sec. 5.15. Interpretation of use lists

The Enforcing Officer may allow land-uses which, 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. However, such non-listed uses shall not be approved until the application for such use has been reviewed by the County Development Department staff and a favorable report has been received by the Enforcing Officer. The non-listed uses which are approved shall be added to the appropriate use list at the time of periodic updating and revision. (Ord. No. 79-229, § 3, 12-11-79)

Maxxam Partners, LLC admits the Facility is not a listed use within the Zoning Ordinance and identifies Section 5.15 as a process to be followed for reviewing the Facility. I agree and it is my professional opinion the Enforcing Officer must follow Section 5.15 for non-listed land uses and if that Section is not followed the only process to obtain approval of a non-listed use would be a Text Amendment.

Additionally, it is my professional opinion that should the Enforcing Officer correct his mistake and attempt to utilize Section 5.15 for the Facility the proposed Facility is a unique use that is not similar to a hospital or a nursing and convalescent home. A new use entry accurately naming, defining and capturing the character of the use including development standards should be added to the Zoning Ordinance utilizing the Text Amendment process. The resources of the County Development Department should be utilized to prepare the Text Amendment report and recommendations for the Zoning Board of Appeals. Based on my experience in working with the Kane County Development Department staff, dating from 1970, they have the ability to carry out this provision of the Ordinance.

From my perspective as a land use planner, it is important to also review the Kane County 2040 Plan, since one of the objectives of a Zoning Ordinance is to implement the communities' Comprehensive Plan. The Kane County 2040 Plan places a priority on preventing alcohol abuse. (*See* 2040 Plan p. 79). The plan also establishes a policy to "[c]reate environments that prevent excessive e consumption of alcohol." (2040 Plan p. 98). Beyond identifying substance abuse prevention as a policy goal, the Plan also identifies where health care uses should be located: within the Randall/Orchard Road corridor. (2040 Plan p. 215).

The 2040 Plan designates the future use of the Parcel as "Institutional/Private Open Space." (2040 Land Use Map). The Plan recommends that the Parcel be utilized to provide

"important scientific, cultural and educational opportunities to the residents of Kane County." (2040 Plan p. 221). Health care, medical or rehabilitation uses are not enumerated in this future land use designation.

In conclusion, the proposed Facility is not a permitted or special use in the F-Farming District and is not similar to a hospital or any other use allowed in the District. The proposed use is a unique which has some of the operational characteristics of a mixed use clinic, an extended stay hotel, and a luxury spa and resort, none of which are allowed in the F-Farming District. Although hospitals and nursing and convalescent homes encompass various components of the proposed use that clearly does not make them similar uses. Because the Zoning Ordinance does not contemplate residential substance abuse treatment facilities in any defined district, the County should initiate a Text Amendment to the zoning regulations. The Text Amendment should identify: (1) the use entry accurately naming and capturing the character of the use; (2) in what zoning districts such facilities may be established; (3) whether such facilities will be allowed as a permitted or special use; and (4) what conditions and standards should be applied to such facilities to protect the public health, safety and welfare, including bulk standards and off street parking and loading requirements.