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Transcript of **Public Hearing - Petition 4364 - Volume
1**

Date: November 17, 2015

Case: Kane County Zoning Board of Appeals

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BEFORE THE KANE COUNTY BOARD OF APPEALS

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In Re: :
Appeal Hearing : Petition No. 4364
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PUBLIC HEARING
Geneva, Illinois
Tuesday, November 17, 2015
7:00 p.m.

Job No.: 96454
Pages: 1 - 128
Reported By: Paula Quetsch, CSR

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Held at the location of:

KANE COUNTY CIRCUIT COURT CLERK -
BRANCH COURT
530 South Randall Road
St. Charles, Illinois 60174
(630) 232-3495

Before Paula Quetsch, CSR, and Notary Public in
and for the State of Illinois.

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PRESENT:

JOSEPH WHITE, Chairman

HAROLD BOWEN, Member

PENNY CAMERON, Member

DANIEL HEINRICH, Member

ROBERT MOGA, Member

GERALD REGAN, Member

ROXANNE STOVER, Member

ON BEHALF OF THE APPELLANT:

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ON BEHALF OF THE KANE COUNTY BOARD:

PATRICK KINNALLY, ESQUIRE

KINNALLY FLAHERTY KRENTZ LORAN HODGE & MASUR, PC

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ON BEHALF OF MAXXAM PARTNERS, LLC:

HONORABLE F. KEITH BROWN, ESQUIRE

MEYERS & FLOWERS

3 North Second Street

St. Charles, Illinois 60174

(630) 232-6333

ALSO PRESENT:

KEITH BERKHOUT, Secretary

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P R O C E E D I N G S

CHAIRMAN WHITE: I have 7:00 so I'll go ahead and call the meeting to order.

Everyone please rise for the pledge.

(The Pledge of Allegiance was recited.)

CHAIRMAN WHITE: Secretary, please call the roll.

MR. BERKHOUT: Bowen.

MEMBER BOWEN: Here.

MR. BERKHOUT: Cameron.

MEMBER CAMERON: Here.

MR. BERKHOUT: Heinrich.

MEMBER HEINRICH: Here.

MR. BERKHOUT: Moga.

MEMBER MOGA: Here.

MR. BERKHOUT: Stover.

MEMBER STOVER: Here.

MR. BERKHOUT: Regan.

MEMBER REGAN: Here.

MR. BERKHOUT: White.

CHAIRMAN WHITE: Here.

I declare a quorum for this evening's meeting.
This evening's meeting is to consider an objection to
the procedures that the zoning enforcement officer

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1 followed in accepting a petition by Maxxam, LLC.

2 I would ask at this time that you shut off
3 your cell phones so there's no interruptions, and I
4 would also ask that everybody be courteous to each
5 other.

6 This is a meeting to accept testimony to
7 this Board. It is not a meeting to debate or discuss
8 with the petitioner -- excuse me -- the objector or
9 with the County officials. I will accept public
10 testimony at the end of the proceedings, and then I
11 would ask at this time if there is a representative
12 here from Maxxam, LLC?

13 They are. And is there anyone here
14 representing the Village of Campton Hills?

15 Okay. Thank you. I may ask you to also
16 make comments.

17 Anyone who speaks will have to be sworn in
18 prior to speaking. I would ask that you state your
19 name and address for the recorder, and then we'll see
20 how things go. I will limit your testimony if I feel
21 it becomes redundant to try and move things along, but
22 I will try to let everybody who wishes to speak an
23 opportunity to speak.

24 The order that we're going to proceed this

1 evening is there will be an opening statement from the
2 appellant, then there will be a short opening
3 statement from the County of Kane, and then the
4 appellant will be able to make its presentation and
5 bring witnesses forward.

6 After he's concluded the County and Board
7 members will have the ability to cross-examine the
8 witnesses and the appellant. When that's completed,
9 the County will make their presentation. The
10 appellant can cross-examine the County, and as with
11 the first case, the Board members will be allowed to
12 ask questions of the County.

13 You'll also be -- each party will be offered
14 an opportunity for closing arguments.

15 After the closing arguments, as I mentioned,
16 I will open the floor up to the public. We just have
17 to see how much time is available.

18 With that we'll begin. So I begin with the
19 opening statement of the appellant. Please stand to
20 be sworn in.

21 MR. KOLB: Mr. Chairman, if we could, we
22 propose to submit to each of you a response on behalf
23 of the applicant, Maxxam Partners. The response was
24 just completed within minutes before the hearing

1 tonight, and we brought copies for everyone. We'd
2 just like to just have it as part of the record, and I
3 talked to Mr. Kinnally, and he indicated that we on
4 the record can circulate those materials to you.

5 CHAIRMAN WHITE: That would be fine.

6 MR. KOLB: So I will do that. What I'm
7 submitting are two opinions, one from the law firm
8 of Holland & Knight, one from the law firm of
9 Myers & Flowers, as well as a position statement of
10 the Illinois Department of Human Services setting for
11 the need for the proposed alcohol and substance abuse
12 treatment facility from the State and also addressing
13 various legal issues that were raised and factual
14 issues that were raised by the appellant.

15 So I will circulate those materials now to
16 each of you.

17 MR. CARRARA: Mr. Chairman, Kevin Carrara on
18 behalf of the appellant.

19 At this point we would object to the entry
20 or submission of any evidence by Maxxam. They have
21 not intervened in this appeal. They at this point
22 have no standing to entertain argument or evidence as
23 to the interpretation of Mr. VanKerkhoff that we are
24 here appealing this evening.

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1 Whether they have a position statement by
2 the State of Illinois has no bearing on this opinion.
3 Whatever evidence we will submit, they're of the
4 record. There are already I believe the two legal
5 opinions that they submitted as part of their
6 application. If they're planning on submitting more,
7 we would object to that.

8 At this point they haven't taken the steps
9 to intervene in this appeal, and I don't believe they
10 have standing.

11 CHAIRMAN WHITE: I would probably concur if
12 your documents aren't specifically related to the
13 procedure that the County followed in moving this
14 petition forward.

15 MR. KOLB: They're 100 percent related to
16 the procedures.

17 MR. BROWN: Possibly with the one exception
18 that we would probably exclude the letter from the
19 Department. I would consider that to be evidence.
20 The rest of it is of a legal nature on procedure.

21 CHAIRMAN WHITE: I'll allow it minus the
22 letter from the State of Illinois.

23 MR. KOLB: Would you like us to redact that
24 from the packet or just have you not consider it?

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1 CHAIRMAN WHITE: Is it possible to redact it?

2 MR. KOLB: It would be a bit messy.

3 MR. BROWN: I tell you what, I'm assuming --
4 my name is Keith Brown on behalf of the partnership.

5 I'm assuming you're not going to read this
6 while this hearing is going on and will probably be
7 something that you would consider later, so we will
8 redact that and at the appropriate time after the
9 hearing resubmit it to you.

10 CHAIRMAN WHITE: Okay. Thank you.

11 You may begin with your testimony. Please
12 stand to be sworn in. Raise your right hand.

13 Do you swear the testimony you are about to
14 give is the truth, the whole truth, and nothing but
15 the truth?

16 MR. CARRARA: Mr. Chairman, for
17 clarification, I'm not giving testimony. I'm here as
18 the attorney as their advocate, so I will be eliciting
19 testimony from witnesses here today, be presenting an
20 opening statement and closing argument.

21 So, again, if you want me to swear to that,
22 I would swear that that would be true and accurate.

23 CHAIRMAN WHITE: Then so swear.

24 MR. CARRARA: I do.

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1 CHAIRMAN WHITE: Thank you.

2 MR. CARRARA: Good evening, Mr. Chairman and
3 Commissioners. Again, my name is Kevin Carrara. I'm
4 an attorney at the law firm of Rathje Woodward in
5 Wheaton, Illinois, and I represent Abe and Joline
6 Andrzejewski and their family. They live on property
7 in unincorporated Kane County which directly abuts the
8 land which is at issue in the Maxxam special use
9 application.

10 We are here this evening appealing
11 Mark VanKerkhoff's interpretation of the zoning
12 ordinance as the zoning enforcing officer under that
13 ordinance. As you are aware, Maxxam Partners, LLC,
14 has filed an application for special use for a
15 private-pay alcoholism and substance abuse treatment
16 center for up to 120 people in the F District.

17 Maxxam in its application and its experts in
18 its application have admitted their drug treatment
19 land use is not a use that is listed anywhere within
20 the Kane County zoning ordinance. More importantly,
21 it's not listed as a permitted use in the F District
22 nor is it listed as a special use in the F District.

23 Now, Maxxam asserts it should be allowed
24 under the ordinance to have its land use proceed as

1 similar either to a hospital or a nursing home. In
2 support of that claim, Maxxam cites in its application
3 and its supporting legal opinions and memorandums
4 Section 8.1-2(dd) and Section 5.15 of the ordinance
5 which may allow for nonlisted land uses such as
6 Maxxam's to be considered similar because certain
7 steps in the ordinance are followed.

8 Section 5.15 of the ordinance specifically
9 states, "The enforcing officer may allow land uses
10 which though not contained by name in the zoning
11 district list where permitted or special uses are
12 deemed to be similar in nature and clearly compatible
13 with the listed uses."

14 Mr. VanKerkhoff has disregarded this very
15 specific section for nonlisted land uses and
16 interpreted the ordinance in a manner that
17 Section 5.15 is rendered meaningless.

18 We have cited case law in the written
19 portion of our appeal, and you're going to hear expert
20 testimony this evening that that interpretation of the
21 ordinance was not proper. And at the end of tonight's
22 hearing we'll be asking you after you hear all the
23 testimony that you overturn Mr. VanKerkhoff's
24 interpretation of the ordinance and direct County

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1 staff to follow the procedure set forth in Section 5.15
2 of the ordinance, and then at that point the County
3 can proceed on whatever course it may deem. If they
4 deem it to be similar, the ordinance says how that can
5 go forward. If they deem it not similar and not
6 clearly compatible, then the County has the ability to
7 suggest that Maxxam's application proceeds as either a
8 text amendment and/or rezoning.

9 So that's what we'll be here for this
10 evening and, again, we thank you.

11 CHAIRMAN WHITE: Thank you. County, please,
12 your opening statement.

13 MS. GAEKE: Thank you, Zoning Board of
14 Appeals, Mr. Chairman. I'm Assistant State's Attorney
15 Erin Gaeke, and we are here on behalf of the County
16 of Kane.

17 Now, the issues before you tonight are
18 simple, and the questions that you will be asked to
19 interpret are questions that come down to a plain
20 language reading of procedural requirements of the
21 Kane County zoning ordinance. We believe that the
22 evidence presented to you tonight will show that this
23 appeal should be denied and a petition for special use
24 should proceed according to the rules and procedures

1 established by the Kane County zoning ordinance.

2 Specifically, in its appeal the appellant
3 has argued that the Kane County zoning enforcing
4 officer, Mark VanKerkhoff, who is sitting next to me
5 here, used the wrong procedural requirement in
6 processing the petition by Maxxam, LLC. They will
7 argue that Mr. VanKerkhoff should have processed the
8 application pursuant to Section 5.15 of the zoning
9 ordinance.

10 However, you will hear that Section 5.15
11 does not apply to the situation here. Section 5.15
12 applies to applications for permits for nonlisted
13 uses, not to petitions for special use. As you'll
14 hear, the matter that's currently being considered in
15 the process here is a petition for experience under
16 Section 4.8 of the Kane County zoning ordinance.

17 The evidence that you will hear tonight will
18 show that Mr. VanKerkhoff accepted the petition from
19 Maxxam, LLC, and had scheduled the matter for public
20 hearing before the Zoning Board of Appeals as is his
21 duty under Section 4.8, the section that he relied on
22 and believed applied to the petition for special use.

23 There may be more evidence and arguments
24 tonight presented by the appellant that relate to the

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1 petition itself and whether the petition for special
2 use should ultimately be granted. However, as the
3 evidence and testimony will show, those arguments
4 should not be considered yet at this time. There has
5 been no determination made by anybody on whether the
6 proposed use is a special use, so there's nothing yet
7 to appeal. While those issues will ultimately be
8 considered by this Board, they will be decided at the
9 appropriate time after an opportunity for public
10 comment and hearing pursuant Section 4.8 of the zoning
11 ordinance.

12 At the conclusion of today's hearing, we'll
13 ask that you deny the appeal and permit this matter to
14 proceed through the correct procedures as set forth by
15 the Kane County zoning ordinance.

16 Thank you.

17 CHAIRMAN WHITE: Thank you.

18 Mr. Carrara, are you ready for your
19 presentation --

20 MR. CARRARA: We are.

21 CHAIRMAN WHITE: -- and call witnesses?

22 MR. CARRARA: Yes. I'd like to call
23 Keith Berkhout.

24 MS. GAEKE: Mr. Chairman, I believe that the

1 parties had stipulated we would present either by
2 affidavit or otherwise testimony of Mr. Berkhout after
3 the conclusion of today's proceeding.

4 CHAIRMAN WHITE: That's acceptable to us.

5 MR. CARRARA: So at this point we will keep
6 the record open, and then we will enter it at a point
7 in time when we have that --

8 CHAIRMAN WHITE: Correct. We'll see how
9 time goes.

10 MR. CARRARA: Thank you.

11 My next witness then would be Mr. VanKerkhoff.

12 CHAIRMAN WHITE: Mr. VanKerkhoff, please
13 stand and be sworn in.

14 (Witness duly sworn.)

15 MARK VAN KERKHOFF,
16 having been duly sworn, testified as follows:

17 DIRECT EXAMINATION BY COUNSEL FOR THE APPELLANT
18 BY MR. CARRARA:

19 Q Sir, could you please state and spell your
20 name for the record.

21 A Sure. My name is Mark VanKerkhoff; M-a-r-k,
22 V, as in "Victor," -a-n-capital K-e-r-k-h-o-f-f.

23 Q Sir, may I call you Mark this evening?

24 A Yes, you may.

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1 Q Thank you, Mark.

2 What is your title?

3 A I'm director of development and community
4 services for Kane County and also the appointed zoning
5 enforcement officer.

6 Q How long have you been with Kane County?

7 A I've been with Kane County for just over
8 21 years this past August.

9 Q And how long have you held the position you
10 are in currently?

11 A For about five years.

12 Q And prior to that five years, what were your
13 responsibilities with the County?

14 A Prior to that -- I still am actually also
15 the County's building officer. I was appointed to
16 that in 2008. Prior to that I served as, even before
17 being a building officer, director of the building and
18 community services division, and prior to that a
19 member of the planning staff of the historic
20 preservation program.

21 Q What is your educational background?

22 A I have a bachelor's of science in
23 architecture from the University of Michigan and a
24 master's of architecture also from the University of

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1 Michigan in the school of architecture and urban
2 planning.

3 Q Do you hold any professional designations
4 as part of that education?

5 A Yes. I'm an Illinois licensed architect.

6 Q Have you ever met with the Maxxam
7 representatives prior to the application having
8 been filed?

9 A Yes, I have.

10 Q When was the first meeting? Do you recall?

11 A Let me refer to my notes.

12 Our first meeting with Maxxam Partners was on
13 March 2nd of 2015 at one of our regular -- regularly
14 held Monday staff meetings at the Kane County
15 development department. At those meetings we schedule
16 an agenda; we invite other units of local government
17 such as the Village of Campton Hills to those meetings.

18 Q And is that kind of like what you would
19 conceptually call the preapplication meetings for
20 potential developers?

21 A Yes.

22 Q Who was present for Maxxam at that meeting?

23 A I -- my recollection is that Andrew Kolb was
24 at the meeting. I think there may have been one or

1 two of their other partners at that time.

2 Q And what was discussed at that meeting?

3 A Generally, they had a presentation on the
4 use of the -- proposed use of the property, the
5 buildings, and what their plans were for a potential
6 petition to the County.

7 Q Now, you mentioned that was generally. Did
8 you get into any specifics as to how that application
9 would be presented?

10 A I don't recall.

11 Q Before the application was filed, did you
12 discuss it with any other members of the County staff?

13 A Yes. At the -- well, at the meeting itself
14 we had representatives from the County health department,
15 County highway department, the water resources
16 department representing our subdivisions and storm
17 water management. I believe the Village of Campton Hills
18 was present at that meeting. We also invite the fire
19 district -- I don't recall if they were there -- and
20 the forest preserve district.

21 Q So did you discuss it with anybody outside
22 of that initial application meeting?

23 A I don't recall.

24 Q Did you discuss it with any County Board

1 members after that application meeting?

2 A With Barb Wojnicki, who was also invited to
3 the staff meeting. We generally invite the Board
4 member whose district that it's in, as well, and I
5 also advised Chairman Lauzen.

6 Q And what did you advise Chairman Lauzen?

7 A That Maxxam Partners had come in to discuss
8 a petition for the use for the former Glenwood School.

9 Q And did you discuss with Chairman Lauzen how
10 that use or how that application was going to proceed
11 through the County process?

12 A At the time I didn't know how it was going
13 to proceed through the process because they hadn't
14 submitted a petition yet, and I didn't know exactly
15 what they would be applying for.

16 Q At any point in time have you discussed with
17 Chairman Lauzen how the application would be processed
18 through the County?

19 A Yes. Once it was actually submitted as a
20 special use, I advised him that it would be reviewed
21 by staff and set for a public hearing.

22 Q And did you discuss that with any other
23 County Board members besides the one you previously
24 mentioned?

1 A I probably also discussed it with
2 Kurt Kojzarek, who is chairman of the development
3 committee whose committee petitions go to after the
4 Zoning Board.

5 Q Did you discuss it with any members of the
6 Zoning Board?

7 A I did not discuss it that I recall.

8 Q How was the application received from Maxxam?

9 A Personally delivered to our office.

10 Q And how was it processed when it was received?

11 A Could you expand on what you're asking
12 besides process? Generally, when an application comes
13 in -- in this case it was voluminous -- we look
14 through it to make sure that it has the minimum
15 requirements for the submittal and that the fee is
16 paid and -- as we do with any petition.

17 Q Are there any -- you said you review it to
18 make sure it has the minimum requirements for the
19 submittal. Is there any determination whether the
20 submittal is correct or incorrect?

21 A No. Just that it's complete or incomplete.

22 Q So it's your statement then this evening
23 that the applicant controls what entitlements it's
24 seeking from Kane County?

1 MR. KINNALLY: I object to that question.
2 It's not what he said.

3 MR. CARRARA: Mr. Chairman, I'm not sure --

4 CHAIRMAN WHITE: Can you rephrase your
5 question?

6 MR. CARRARA: I'm not sure who is objecting,
7 Mr. Chairman.

8 MR. KINNALLY: My name is Pat Kinnally. I
9 represent the Kane County Board.

10 MR. CARRARA: Okay. I'm sorry. Your
11 ruling, Mr. Chairman?

12 CHAIRMAN WHITE: I would agree. Could you
13 rephrase the question?

14 MR. CARRARA: Sure.

15 BY MR. CARRARA:

16 Q Do you ever review an application to make
17 sure it complies with the Kane County ordinance as
18 part of its submittal?

19 A We -- again, we review it for completeness.

20 Q So if it's complete, so as long as the
21 application by the applicant is complete, you allow
22 them to proceed with the application even if it could
23 potentially be incorrect, they're seeking an incorrect
24 relief under the ordinance?

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1 A In a petition to the Zoning Board Section 4.7
2 under "Amendments" and 4.8 under "Special Uses," an
3 application is to the County Board, and its first stop
4 is to the Zoning Board of Appeals for a public
5 hearing. So we do review it for completeness for the
6 application and payment of the fee.

7 Q So as the enforcing officer of the
8 ordinance, you never make any determination whether an
9 application is properly filed and seeking the proper
10 relief or entitlements?

11 MR. KINNALLY: I object to the form of the
12 question. He's already answered, Mr. Chairman. He
13 said he did it for completeness or incompleteness.
14 That's what he testified to.

15 CHAIRMAN WHITE: I'm not sure what you're
16 driving at here, sir, so I would continue with another
17 line of questioning.

18 MR. CARRARA: Sure.

19 Q I guess, Mark, in your responsibilities as
20 enforcing officer under the ordinance, are any of
21 those obligations to make sure applications are
22 seeking the proper entitlements under the zoning
23 ordinance?

24 A I do not believe that it is.

1 THE WITNESS: If the Zoning Board chairman
2 would allow, I'd like to illustrate what my authority
3 is under the zoning ordinance in partial response
4 to that.

5 CHAIRMAN WHITE: Are you going to bring that
6 up during your testimony?

7 THE WITNESS: I don't know. I would like to
8 be able to further illustrate my response to the
9 question.

10 CHAIRMAN WHITE: I'll allow it.

11 MR. CARRARA: Mr. Chairman, I would object.
12 It appears they have three able attorneys over here,
13 and they have the ability to present their case in
14 chief. So if Mr. VanKerkhoff wants to give testimony
15 or evidence, they can do that in their case in chief.

16 CHAIRMAN WHITE: I would have to agree with
17 that, Mark.

18 THE WITNESS: Okay. I will wait my turn.

19 BY MR. CARRARA:

20 Q When you received the application and
21 reviewed it for completeness, did you do a thorough
22 review of the details of the application?

23 A I read the entire application, yes.

24 Q At any point in time after reviewing the

1 application, did you think or ever even consider that
2 the Maxxam application would be better processed as a
3 text amendment, or a rezoning, or a planned unit
4 development under the ordinance?

5 A I had my personal opinions, but it's not my
6 role as zoning enforcing officer to steer or determine
7 a petitioner's petition.

8 Q What are your personal opinions as to that?

9 MR. KINNALLY: I object. How is this relevant
10 to anything you're going to determine tonight?

11 CHAIRMAN WHITE: I would agree.

12 MR. CARRARA: Mr. Chairman, he is the one as
13 the enforcing officer whose obligation it is to make
14 certain determinations. He has stated he has an
15 opinion as to the application, whether it was
16 potentially better suited as a text amendment or some
17 other relief that was sought by the applicant.

18 CHAIRMAN WHITE: He didn't say whether it
19 was his opinion that it be a text amendment or follow
20 the procedure that he ultimately followed. So I would
21 move on with the questioning. I don't follow your
22 line of questioning here.

23 MR. CARRARA: Mr. Chairman, he never gave us
24 his opinion because you won't let him answer the

1 question. That's what I'm just asking you allow him
2 to answer the question so the Board can hear his
3 opinion.

4 CHAIRMAN WHITE: I think it's evident that
5 the way the County proceeded included his personal
6 opinion without stating it specifically at this point
7 in time.

8 THE WITNESS: Mr. Chairman, I would like to
9 ask again to be able to put up that section of the
10 code that outlines the authority of the zoning
11 enforcement officer to illustrate my response.

12 CHAIRMAN WHITE: Seeing as how the counselor
13 has continued on this line of questioning, I'm going
14 to allow Mr. VanKerkhoff to submit that.

15 THE WITNESS: Blair, if you could please
16 bring up the third slide.

17 Mr. Chairman and members of the Zoning Board
18 of Appeals, this is the section from the zoning
19 ordinance that describes the authorities of the zoning
20 enforcing officer, "duty to administer and enforce the
21 provisions of this ordinance, and to that end he shall
22 have the power to make such orders, requirements,
23 decisions, and determinations as are necessary with
24 respect to applications for permits and the

1 enforcement of this ordinance." This is consistent
2 with the State statutes which also limit the abilities
3 of the zoning officer for counties to make
4 determinations, orders, requirements, decisions as is
5 necessary with respect to applications for permits.

6 Blair, if you'd go to the next side, please.

7 MR. KINNALLY: Mr. Chairman, with your
8 permission, could the record reflect that the witness
9 was reading from that particular section which I
10 believe was 4-1 which is up on the screen, and
11 everyone here could see it, with your permission?

12 CHAIRMAN WHITE: Yes. I'll allow that.

13 MR. CARRARA: Mr. Chairman, I suspect we'd
14 also ask that these be exhibits --

15 CHAIRMAN WHITE: Yes.

16 MR. CARRARA: -- as part of the record.

17 Thank you.

18 THE WITNESS: These are all contained in the
19 Kane County zoning ordinance.

20 The ordinance also under 4-3 "Permits"
21 defines permits to be obtained, "A written permit
22 shall be obtained from the building enforcing officer
23 located in the government center before starting to
24 establish any new use of property, to excavate for or

1 build any foundation, to erect, construct, to change
2 use of any buildings, or in the case of nonconforming
3 uses to change from one use to another."

4 So the ordinance is pretty well defined in
5 terms of permits and enforcement is self-explanatory.

6 Thank you.

7 CHAIRMAN WHITE: Mr. Carrara, would you like
8 to continue?

9 BY MR. CARRARA:

10 Q So based on the -- if we could go back one
11 slide. The last few words there it says, "The
12 enforcement of this ordinance." So that means the
13 entire ordinance -- correct? -- not just Section 4.3
14 dealing with permits. True?

15 A I would agree.

16 Q So as part of that enforcement of the
17 ordinance, don't you need to make sure that an
18 applicant, when they're filing a requested zoning
19 relief, that relief complies with the ordinance?

20 MR. KINNALLY: Could we have some clarity as
21 to what "zoning relief" means? I don't know what that
22 term is.

23 CHAIRMAN WHITE: Could you elaborate?

24 MR. CARRARA: More than happy to, Mr. Chairman.

1 Q Mark, if somebody files an application for
2 zoning entitlements, is it part of your responsibility
3 to make sure that the entitlements that they're seeking
4 comply with the ordinance as part of enforcing the
5 entire ordinance?

6 A Generally, they're applying for a zoning
7 relief because property in question is not in
8 compliance with the ordinance, and they have the right
9 to petition to the County Board via the Zoning Board
10 of Appeals for whatever they would like to petition for.

11 Along the way as staff we give a staff
12 report and our opinion to the Zoning Board as part of
13 the testimony that they'll eventually elicit at a
14 public hearing and pass their recommendation onto the
15 full County Board.

16 But to answer your question succinctly, no,
17 I don't believe it's the job the zoning enforcing
18 officer to make sure or require that the petition meets
19 the type of criteria that you seem to be suggesting.

20 Q So it's fair to say, then, that the
21 applicant controls the entitlement requests it's
22 seeking?

23 A I would concur with that.

24 Q So if I filed an application for a medical

1 marijuana growth facility and said it's similar to a
2 farm because we both grow crops that are going to be
3 sold to the public, would you process that application?

4 A I would process that application if it was
5 submitted after letting you know to the best of my
6 ability the language of the ordinance, but at the end
7 of the day, it would be the applicant's choice to
8 apply for -- petition the County Board for what they
9 want to petition for.

10 Q But that wasn't true until recently; correct?
11 Because didn't the County recently go through the
12 process to do a text amendment to deal with that
13 nonlisted use of a medical growth -- medical marijuana
14 growth facility?

15 A Yes. That is correct but that's a different
16 question.

17 Q Why is that a different question? Why did
18 the County take the steps when they had a nonlisted
19 land use for medical marijuana growth facilities or
20 dispensaries, take the time to go through the text
21 amendment process instead of just saying they were
22 similar to a farm or similar to a Walgreen's because
23 they both dispense controlled substances?

24 A Sir, I'd be happy to answer that question.

1 The Zoning Board is familiar with this
2 having been part of the process, but when the State of
3 Illinois passed the law for medical marijuana
4 facilities, there was quite a few questions surrounding
5 that entire issue. At that time the County Board had
6 a Committee of the Whole presentation from multiple
7 departments, the health department, myself as director
8 of development department to outline the new State
9 law, the timing of the new State law, the provisions
10 that had to do with important factors such as revenue,
11 such as registering of persons to use if they wanted
12 to sign up to be eligible to purchase medical
13 marijuana.

14 I covered the portion of it, of the State
15 law that did allow for units of local government to
16 have some level of local zoning control. We did some
17 research to see how other communities around the state
18 were dealing with the zoning issue. Some communities
19 were trying to work the zoning requirements to be
20 restrictive; some were doing it to be more wide open.

21 We also discussed the issue with the
22 development committee of the County Board at one of
23 their meetings. They directed staff to prepare what
24 zoning regulations could be done that would add

1 clarity to the location of those facilities, and that
2 ended up in the proposed language that was eventually
3 subject of a public hearing before the Zoning Board
4 and eventually adopted by the Kane County Board.

5 Q So that process allows you, the County, to
6 deal consistently with these uses as they come forward;
7 correct?

8 A That's correct, as many of the other uses
9 listed in the County zoning ordinance.

10 Q So then why not take the time and do the
11 same process and procedure you just discussed with
12 that system with the Maxxam application for a use
13 that's not listed anywhere in your ordinance so you
14 can consistently deal with those uses as they come
15 forward and avoid a patchwork kind of a piecemeal
16 process?

17 A A couple of important distinctions.

18 One, the medical marijuana amendments were
19 in response a new State law and what had been up until
20 that time been a completely illegal substance for a
21 very controlled standpoint.

22 The other reason for the medical marijuana
23 text amendments is that the State law was also, as far
24 as I know, still temporary. So the text amendment

1 also reflected the interim nature of such a zoning
2 amendment for a map amendment.

3 On the other hand, drug and alcohol recovery
4 centers have been around for a long time. It's not a
5 new use or new land use. It's never been defined
6 specifically in the Kane County zoning ordinance which
7 has been around since 1937. Since I've been zoning
8 enforcing officer no County Board member or other
9 member has approached me on the need to do so other
10 than the appealing party here tonight.

11 Q Just because no one's asked, why not take
12 the time to make sure you update your ordinance so you
13 deal with these things in a consistent manner moving
14 forward?

15 A That would be a question not just to me but
16 to the Zoning Board of Appeals and to the County Board
17 who ultimately whose ordinance it is. So I don't have
18 the answer to that question. I can't answer on behalf
19 of all those parties.

20 Q Mark, as part of your review of the
21 application, did you read the rider that was attached?

22 A Yes, I did.

23 Q Did you read the two legal opinions that
24 were provided as part of the application?

1 A Yes, I did.

2 Q Did you or your staff ask Maxxam to provide
3 you those legal opinions?

4 A No, we did not. In our subsequent
5 conversation with the petitioner when he, Mr. Kolb,
6 had discussed that they would be submitting it as a
7 special use in the F District discussed the need to
8 provide reason backing up their similarity of use.

9 Q You advised Mr. Kolb he would need to
10 do that?

11 A Excuse me. I didn't mean to say the word
12 need, but that would be helpful in the determination
13 by the Zoning Board of Appeals.

14 Q Prior to them hearing any testimony at a
15 public hearing?

16 A As part of their petition.

17 Q Did you or your staff recently ask Maxxam to
18 revise or amend its application?

19 A No, we did not.

20 Q Has Maxxam recently revised their petition?

21 A Yes, they have. They submitted by cover
22 letter and by amended documents a change to the rider.
23 All those documents have been posted on the County's
24 website as amendments to the original petition.

1 Q Do you know why they made that amendment?

2 A My understanding is a change in the list of
3 persons that are actually in the partnership.

4 Q I'm going to read from the November 4th
5 letter that you posted on the website. It says, "Dear
6 Mr. VanKerkhoff, I am writing to address questions
7 that we have received concerning the composition of
8 the ownership and management of the Applicant Maxxam
9 Partners, LLC."

10 Do you know what questions they're
11 responding to?

12 A I do not. I also don't understand the
13 relevance of that question.

14 CHAIRMAN WHITE: That's the question I was
15 just going ask. What's the relevance of this towards
16 the procedure that Mr. VanKerkhoff followed in this
17 petition?

18 MR. CARRARA: Because I'll be submitting
19 these as an exhibit, the amended rider, as part of my
20 examining of him, I just wanted to make sure he was
21 familiar with them, Mr. Chairman.

22 BY MR. CARRARA:

23 Q Mark, do you have the rider in front of you,
24 or do you need a copy of it? I saw you brought some

1 things up. I obviously have plenty of things here, so
2 if you'd like one, I can get it for you.

3 A I do not have the rider with me.

4 MR. CARRARA: Mr. Chairman, may I approach
5 the witness and hand it to him?

6 CHAIRMAN WHITE: You may.

7 MR. CARRARA: Mr. Chairman, I also have
8 copies for all the Commissioners, if you'd like them,
9 so it's easy for your review.

10 CHAIRMAN WHITE: We can accept them.

11 THE WITNESS: While you're handing those
12 out, can I ask you which tab I should be referring to?

13 MR. CARRARA: It's going to be Tab 1.

14 THE WITNESS: Do you also have a copy of the
15 cover letter?

16 MR. CARRARA: I do but I'm not -- that
17 really -- as the Chairman said, really doesn't relate
18 to what we're here for this evening.

19 THE WITNESS: No, but it will help me refer
20 to the amendments -- or is this the original rider?

21 MR. CARRARA: This is the amended rider, but
22 my questions won't have anything to do with the change
23 of the ownership that was addressed. If you'd like to
24 see the letter, I'd be happy to hand it to you.

1 THE WITNESS: Only if it's relevant to your
2 questions.

3 MR. CARRARA: It won't be. However, Mark,
4 if you believe it will be, just ask me and I'll be
5 more than happy to provide it to you.

6 BY MR. CARRARA:

7 Q Sir, this document, Exhibit 1 is titled
8 "Rider to Application for Special Use"; correct?

9 A That's correct.

10 Q Is it fair to say in your review of this
11 document in the general background question section on
12 page 1 Maxxam gives a little property history and then
13 its reasons why it believes its use as a private pay
14 alcoholism and substance abuse treatment center is
15 similar to a hospital or nursing home?

16 A You're asking me to confirm the content of
17 the rider?

18 Q No. I'm asking if that's your general
19 understanding of the initial portion of the rider and
20 general background section.

21 MR. KINNALLY: We're going to stipulate to
22 this on behalf of the County that this rider has been
23 submitted because everyone knows that. So maybe we
24 can get past this foundation.

1 CHAIRMAN WHITE: I would go ahead and agree
2 with that.

3 BY MR. CARRARA:

4 Q Could you turn to page 2 of the rider, Mark?

5 A Yes.

6 Q Under this "General Background" section it
7 goes under -- it starts on the first page -- I
8 apologize -- it's Section 1.3, "Applicable Code
9 Provisions." Do you see that on the first page at the
10 bottom?

11 A You're back to the first page?

12 Q Yes. I apologize, Mark. I didn't realize
13 it rolled over on me.

14 A Yes.

15 Q So the applicable code section goes on to
16 page 2. Near the bottom of that page you'll see a
17 paragraph that begins with "Additionally." Do you
18 see that?

19 A Yes, I do.

20 Q Could you read that paragraph for me?

21 A Sure. "Additionally, pursuant Section 5.15
22 of the County ordinance, the enforcing officer may
23 allow land uses which, though not contained by name in
24 a zoning district list of committed or special uses

1 are deemed to be similar in nature and clearly
2 compatible with the listed uses."

3 Q And then the paragraph right below that
4 says, "Applicant submits the legal opinions of Holland
5 & Knight and Myers & Flowers in support thereof"?

6 A Yes.

7 Q If you can turn to page 4 of the rider,
8 Mark, under the section titled 2.1, "Applicable
9 Ordinances," do you see that?

10 A Yes, I do.

11 Q At the bottom of that page, do you see a
12 paragraph that begins with "In further support"?

13 A Yes.

14 Q Could you read that paragraph for me?

15 A "In further support of applicant's
16 development petition, applicant requests that the
17 Commission and the Board" -- actually, Mr. Carrara, if
18 you don't mind, I'd prefer to have you read the
19 sections.

20 MR. CARRARA: Sure. I'd be happy to.

21 MR. KINNALLY: We don't need to read it,
22 Mr. Chairman, because we've already stipulated this
23 into evidence.

24 CHAIRMAN WHITE: Correct.

1 I'm not following. You've submitted this
2 document into evidence. What are you referring to
3 here? Move on here.

4 MR. CARRARA: I believe, Mr. Chairman, I was
5 just trying to point out the fact that the applicant
6 suggests that -- and uses as support for its
7 application for special use that Section 5.15 of the
8 ordinance applies to its application but I'll move on,
9 Mr. Chairman.

10 BY MR. CARRARA:

11 Q Mark, if you could flip the tab to this
12 No. 2, which will be Exhibit 2, that's the legal
13 opinion of Holland & Knight; correct, sir?

14 A Yes, it is.

15 MR. KINNALLY: We'll stipulate that this is
16 part of the application, to move this along with your
17 permission, Mr. Chairman.

18 CHAIRMAN WHITE: I would agree.

19 MR. CARRARA: Mr. Chairman, we understand
20 that the entire application as submitted is part of
21 the record that the ZBA will be considering as part of
22 the appeal. So Mr. Kinnally doesn't need to stipulate
23 to those because they are a part of the record
24 already. These will be exhibits that I will use with

1 my witnesses to try to elicit information so the ZBA
2 can understand the scope of the appeal, and I would
3 ask for a little leeway, your Honor.

4 MR. KINNALLY: The petition has been filed.
5 It's not been introduced into evidence at this time.
6 We'll stipulate to this.

7 I mean, the petitioner hasn't even put on a
8 case yet --

9 CHAIRMAN WHITE: Correct.

10 MR. KINNALLY: -- before the Zoning Board of
11 Appeals.

12 BY MR. CARRARA:

13 Q The application, I believe pursuant to the
14 Zoning Board of Appeals rules requires the entire
15 application as part of the record be brought before
16 the ZBA. Am I correct, Mark?

17 A Could you rephrase the question?

18 Q Sure. Under the appeals provision of the
19 ZBA, is the entire underlying application part of the
20 record?

21 A I would have to confer with the ordinance.

22 MR. KINNALLY: I don't want to delay this,
23 Mr. Chairman. If he doesn't want to accept my
24 stipulation, that's fine, we can go on. I know you

1 want to get to the heart of the matter.

2 MR. CARRARA: Sir, if you'll stipulate the
3 entire application is part of the record then --

4 MR. KINNALLY: I'm not going to stipulate to
5 anything because I don't represent the applicant in
6 this particular proceeding. All I know is they filed
7 something with the County, and we haven't convened a
8 hearing on that application at this time.

9 THE WITNESS: Mr. Chairman, I don't believe
10 the appeal section of your zoning ordinance reflects
11 that level of detail. It does stipulate the right of
12 persons to appeal a decision by the zoning enforcing
13 officer and for you to set a hearing for that to be
14 held in a stay of any action for the furtherance of
15 the action appealed from, but in this case it's
16 involving a petition as opposed to an administrative
17 or enforcement role that I play under the ordinance.

18 MR. CARRARA: Mr. Chairman, I'm reading from
19 4.5-1, "Scope of Appeals." The last sentence says,
20 "The enforcing officer shall forthwith transmit to the
21 Zoning Board all papers constituting the record upon
22 which the action appealed was taken."

23 If you'll refer to our appeal, Mr. Chairman,
24 we identify the application in its entirety as part of

1 the record we are -- as part of the record that is up
2 on appeal.

3 So, again, I'm not here to try to be a
4 problem. I'm just suggesting that it appears by our
5 section and by our appeal that the underlying
6 application is part of the record that you have the
7 ability to consider.

8 MR. KINNALLY: Section 4.5 says it's their
9 notice of appeal. They filed their notice of appeal,
10 from what I understand, on October 30th. That's what
11 they included. That's what we're here for.

12 But I don't want to get bogged down on
13 this. If they don't want to accept my stipulation,
14 that's fine.

15 MR. CARRARA: Paragraph 47 of our appeal on
16 page 15 states, Mr. Chairman, "hereby incorporates all
17 materials and information received by the enforcing
18 officer relating to the application as fully set forth
19 herein and should be considered part of the papers
20 constituting the record upon which this appeal is
21 taken."

22 MEMBER STOVER: What page are you on?

23 MR. CARRARA: Page 15, paragraph 47.

24 CHAIRMAN WHITE: So what are you asking?

1 MR. CARRARA: I'm not asking anything. I
2 was just suggesting -- Mr. Kinnally is objecting to
3 these stipulations trying to do something, and I'm
4 suggesting there's no need for him to stipulate.
5 These documents are all part of the underlying record,
6 and I'm just trying to work through my questioning
7 with Mark.

8 CHAIRMAN WHITE: Why do you keep referring
9 back to the application, the amended application?

10 MR. CARRARA: I don't. I'm referring to
11 Exhibit 2 that I've presented here this evening, the
12 Holland & Knight legal opinion, and Mr. Kinnally keeps
13 objecting to that; he's stipulating saying, "It's
14 here. Why don't we move on." I'm saying it's here,
15 yes; it's part of the record, but I would like to ask
16 specific questions of the witness here this evening.
17 That's a fair and reasonable request to allow me due
18 process rights to inquire of my own witness as to the
19 application materials.

20 MR. KINNALLY: I didn't object to anything.
21 I offered a stipulation. That's what I did. So I
22 don't know what he's talking about.

23 CHAIRMAN WHITE: I will allow you to ask
24 questions, but don't be surprised if you don't get

1 answers.

2 MR. CARRARA: Thank you.

3 BY MR. CARRARA:

4 Q Mark, on page 1 of the Holland & Knight
5 application under Section 1 there's a paragraph that
6 starts, "There is" and it goes, "There is no
7 individual use in the County zoning ordinance that
8 explicitly references residential alcoholism and
9 substance abuse treatment facilities"; is that
10 correct?

11 A That's what it says, yes.

12 Q Is that legal opinion correctly interpreting
13 the ordinance that there is no --

14 MR. KINNALLY: He's not a lawyer. That's an
15 improper question. He's not a lawyer.

16 CHAIRMAN WHITE: That would be out of order.

17 Q Mark, do you agree with that statement?

18 A I guess, Mr. Chairman, to cut to the chase,
19 while I have the highest respect for the opinions that
20 were submitted with the petition, I don't believe and
21 is the case in my response to this appeal hearing that
22 it's my position or authority as the zoning enforcing
23 officer to utilize Section 5.15.

24 I do respect the fact that they included in

1 their petition the arguments they wanted to make
2 before you as the Zoning Board and before the County
3 Board as to why this is a similar use, but I do not
4 believe it is my role to make a determination in
5 Section 5.15. So maybe that helps cut to the chase.

6 Q I believe it does. I'll just do one quick
7 follow-up question then.

8 Mark, so it's fair to say that you agree
9 that in the Maxxam application under legal opinions
10 they suggest Section 5.15 should be used or should
11 apply to the application process?

12 A They certainly make that case for that, but
13 the nature of your appeal and saying that that was a
14 mandatory step that needed to be followed before the
15 petition could be processed and set for a public
16 hearing is what I disagree with. It makes total sense
17 in terms of my review of building permit applications
18 that come in, and I review it for conformance with the
19 zoning ordinance.

20 As an example, our B District specifies
21 banks as allowed use. A savings and loan or credit
22 union is not specifically listed in our ordinance, but
23 if the bank or a credit union or savings and loan came
24 in for a building permit to construct a building, I

1 feel like that section of the zoning ordinance gives
2 me the leeway to make a determination that that's a
3 similar use to others specifically listed.

4 But, again, this is under my authority in
5 reviewing building permits, not processing petitions.
6 If it were, I would expect it to be in Section 4.8
7 under "Special Uses."

8 Q But Section 5.15 is in Section 5 of the
9 ordinance; correct?

10 A Correct, in general provisions.

11 Q And is it a true statement or do you agree
12 with the statement that the general provision apply to
13 the whole ordinance?

14 A They apply to appropriate sections of the
15 whole ordinance, yes.

16 Q What do you mean by "they apply to
17 appropriate sections"?

18 A That they don't necessarily apply to
19 sections that are more restrictive or restricted in
20 other areas. That would be the authority of the
21 building -- or the zoning enforcing officer.

22 MR. CARRARA: Mr. Chairman, to try to move
23 things along, just for clarification purposes so I
24 don't have to ask for all these, the exhibits you have

1 in the binder in front of you, are they going to be
2 deemed part of the record that the ZBA will consider?

3 And by way of clarification, these are
4 documents we pulled solely from the application
5 material submitted by Maxxam and the Kane County
6 ordinance. Or do I need to go through --

7 CHAIRMAN WHITE: I haven't had time to
8 review what these documents are, so I have no --

9 MR. CARRARA: I understand. I'll just
10 briefly kind of touch base with them with Mark so we
11 can kind of try to expedite the meeting.

12 BY MR. CARRARA:

13 Q Mark, if you could look at Tab No. 3 real
14 quickly, is that the Myers & Flowers opinion I think
15 you were referencing earlier?

16 A Yes, it is.

17 Q Anything you stated before different after
18 looking at this in terms of the Section 5.15 statements
19 you made?

20 And if that confused you, I apologize. All
21 I'm trying to get at, Mark, is I think you made a
22 statement that the applicant submitted its materials,
23 and they suggested 5.15 applies, but you don't think
24 that's under your authority as the zoning ordinance.

1 That's the statement you made earlier?

2 A Yeah. That's consistent with what I've
3 said, and it's consistent with the way I processed
4 this petition.

5 Q Okay.

6 A And it's consistent with the way other
7 petitions have been processed in the past.

8 MR. BROWN: Mr. Chairman, if it would be of
9 any benefit, on behalf of the applicant we would
10 stipulate that these are documents that were part of
11 the package, if that would be of assistance to move
12 this along.

13 CHAIRMAN WHITE: Have you had time to review
14 these documents?

15 MR. BROWN: I've looked through them and
16 unless they've changed something -- I think they made
17 copies.

18 CHAIRMAN WHITE: That's my concern.

19 MR. CARRARA: Mr. Chairman, I would
20 stipulate as an officer of the court and as I took an
21 oath earlier, these documents were taken off of the
22 Kane County website that were posted there as PDF
23 documents.

24 CHAIRMAN WHITE: Okay.

1 MR. CARRARA: Thank you, Mr. Chairman.

2 BY MR. CARRARA:

3 Q Mark, after the application was filed, did
4 you receive a letter from the Village of Campton Hills
5 addressing their concerns on how the application was
6 processed?

7 A Yeah, thank you for asking that question.

8 After the application petition was received,
9 we did let the Village of Campton Hills know that a
10 petition had been received and that it was going to be
11 processed. We hadn't set a date for the hearing yet
12 but subsequently received a call from the Village
13 administrator asking for a meeting with herself and
14 the Village attorney for us to explain why we were
15 processing the petition.

16 We did meet with them. Kathy Watson from
17 the State's Attorney's office was present, as well,
18 and explained generally what you've been hearing so
19 far tonight, that Section 5.15 applies to building
20 permits and not petitions.

21 They respectfully disagreed and subsequently
22 initially sent that letter and then later prepared a
23 resolution for the Campton Township board which has
24 also been made part of the record.

1 MR. CARRARA: And for the Commissioners this
2 evening, that's Tabs No. 5 and 6 in the binder. It's
3 the letter you mentioned and the resolution that they
4 ultimately filed.

5 THE WITNESS: Did you want me to turn to
6 those?

7 BY MR. CARRARA:

8 Q Just if you want to confirm that those are
9 the documents you were just speaking of, it's up to
10 you, Mark. We have already kind of stipulated
11 generally that these are the documents that were
12 pulled off the website.

13 A Yes, those are the documents.

14 Q Thank you.

15 And then you responded in the November 6th
16 letter, which is Tab No. 7, basically outlining what
17 you just discussed, that 5.5 doesn't apply; it's
18 really a Section 4.3 situation?

19 A That's correct.

20 MR. CARRARA: Now, there is one document in
21 here, Mr. Chairman, it's Tab No. 8. I'm not sure if
22 this has actually been posted to the County's website
23 as of yet. It looks like it was received on November 13
24 by the Kane County development department.

1 BY MR. CARRARA:

2 Q This is the Township of Campton's resolution
3 objecting to the way the County is proceeding with the
4 application; is that correct, Mark?

5 A That's correct.

6 Q You reviewed that resolution when it came
7 into your office, Mark?

8 A Yes, I did.

9 Q It's fair to say that they're also
10 suggesting that Section 5.15 applies in their opinion?

11 A That's correct. It seems to be an opinion
12 that's being promulgated throughout the community.

13 Q It's fair to say, Mark, that -- let's just
14 do a quick count. We have the Applicant Maxxam
15 believes 5.15 applies in its application; we have
16 their two legal opinions, so that's now three people;
17 we have, obviously, us as the appellants, that's four;
18 we have the Village of Campton Hills and the Township
19 of Campton. So that's now six people who believe that
20 Section 5.15 of the ordinance in their plain reading
21 applies. The only person that doesn't believe that
22 applies is you; correct, sir?

23 A I do not think that's correct.

24 Q Who else are you aware of that doesn't

1 believe Section 5.15 applies?

2 THE WITNESS: I object to this line of
3 questioning. He's wanting to pin this as if I'm the
4 only person who believes that this section does not
5 apply.

6 CHAIRMAN WHITE: Correct. We don't to straw
7 polls, and that's essentially what you're trying to
8 accomplish here.

9 THE WITNESS: If I can say, Mr. Chairman,
10 that's the reason for this hearing for appealing to
11 you as the Zoning Board of Appeals as to whether or
12 not I handled this correctly or not in terms of
13 whether that applies or not.

14 BY MR. CARRARA:

15 Q Mark, as part of the preparation for this
16 evening you prepared a memorandum to the ZBA; correct?

17 A That's correct.

18 Q If you could turn to Tab No. 9 in the
19 binder, sir. Is that your memorandum?

20 A Yes, it is. Thank you for providing me
21 another copy.

22 Q And I believe your memorandum, as well as
23 your testimony here tonight, is pretty clear that you
24 believe Section 5.15 is only dealt with when

1 Section 4.43 permits come into play; is that correct?

2 A That's correct.

3 CHAIRMAN WHITE: You will have the ability
4 to cross-examine him after he makes his presentation.
5 So if this line of questioning deals directly with his
6 memo that he's going to present in his testimony, you
7 will have the opportunity to cross-examine him.

8 MR. CARRARA: I understand but I prefer to
9 present him as my opinions witness so I can elicit the
10 testimony I want and not be limited by the
11 cross-examination of the questions they may present,
12 Mr. Chairman.

13 CHAIRMAN WHITE: Go ahead.

14 THE WITNESS: For the record, I'm fine with
15 that, as well, Mr. Chairman.

16 BY MR. CARRARA:

17 Q Mark, in your review of the language in
18 Section 5.15, do you see any reference to the word
19 "permit"?

20 THE WITNESS: Blair, could you go back to
21 the slide? There we go.

22 A No, not a direct reference to permit.

23 Q And, actually, this says, "The enforcing
24 officer may allow land uses which though not contained

1 by name in a zoning district list of permitted or
2 special uses are deemed similar in nature and clearly
3 compatible with the listed uses"; correct?

4 A That's correct. But the only way the
5 enforcing officer may allow land uses is through the
6 permit process. The zoning officer does not give any
7 approvals to petitions. That's a function of the
8 County Board.

9 Q Let's delve down into this statement just a
10 little bit.

11 A permitted use, a permitted land use is a
12 list of uses in a zoning district that are allowed as
13 a matter of right; correct?

14 A Correct.

15 Q And a special use are a list of uses that
16 are allowed subject to public hearings and proving of
17 certain factors and findings; correct?

18 A Correct.

19 Q So knowing that, what reference or indirect
20 reference do you see up there that deals with a land
21 use that's not in one of those lists that is a permit?

22 A Under the function of "may allow land uses,"
23 that would be the authority of the zoning enforcing
24 officer to approve such permits in that capacity.

1 And through the permit process people apply
2 for permits for uses that may be specifically on the
3 list of permitted uses, or on the list of special
4 uses, or in the case where a special use has
5 previously been granted by the County Board but the
6 new owner, or occupant, or user of that special use
7 may not be exactly the same as the other. And then
8 the zoning enforcing officer can make a determination
9 whether or not to approve their permit to occupy or
10 whether or not the applicant -- deny that application
11 and direct the applicant to apply for a new special
12 use or new zoning classification or the zoning
13 ordinance following Section 4.8 "Special Uses."

14 Q And you say that authority is all derived in
15 Section 4.3 "Permits"?

16 A No. It's stipulated in 4 --

17 THE WITNESS: Can you go back, Blair, to the
18 first -- I'm sorry -- second slide?

19 A (Continuing.) Section 4.1.

20 Q Okay. And 4.1, when you're enforcing the
21 entire ordinance, 4.3 is one of those sections you're
22 enforcing?

23 A Correct.

24 Q And 5.15 would also be one of those sections

1 you would be enforcing?

2 A Correct. To apply 5.15 to the petition
3 process leads to an illogical loop.

4 THE WITNESS: If you could go back, Blair,
5 to the interpretations of use list.

6 A (Continuing.) So it says, "However, such
7 nonlisted uses shall not be approved until the
8 applicant per such has been reviewed by the County
9 development department staff and a favorable report
10 has been received by the zoning enforcing officer.

11 "The nonlisted uses which are approved shall
12 be added to the appropriate use at the time of
13 periodic updating and revisions" seems to suggest that
14 to do it in a petition would be approving a use before
15 it's been heard by the County Board. And in this case
16 the applicant actually did apply for a use specifically
17 listed in the list of special uses, that being BD uses
18 similar to other uses here therein.

19 Q If you could turn -- I think it's like the
20 9th page in, Section 4.3 "Permits" that we've been
21 discussing.

22 A Yes.

23 Q Okay. And do you see any reference in
24 Section 4.3 any direction that Section 5.15 applies or

1 controls this section?

2 A I'm not sure I'm following your question.

3 Q Sure. In the bottom of Section 4.3 -- or,
4 actually, throughout the entire Section of 4.3 do you
5 see Section 5.15 referenced anywhere?

6 A No. Nor do I see it in Section 4.8 "Special
7 Uses."

8 Q But in Section 4.3 you do see one effort by
9 the County to try to suggest that there's cross-
10 references for this section refers to "Buildings"
11 Chapter 6?

12 A Correct. That's our building code.

13 Q So then why didn't the County also either do
14 one of two things, either include Section 5.15
15 specifically as a section under 4.3, or why didn't
16 they make a reference to Section 5.15 to support your
17 interpretation?

18 MR. KINNALLY: I object to that question.
19 How would he know what the County wants to do or what
20 they should do?

21 CHAIRMAN WHITE: I would agree.

22 MR. CARRARA: Mr. Chairman, I believe the
23 reason why is it's his job to make these decisions as
24 part of the enforcing obligations to enforce the

1 entire ordinance.

2 CHAIRMAN WHITE: I'm not sure what you're
3 trying to drive at here. I think he's tried to answer
4 this question multiple times on the provisions of 5.15
5 and how they apply to the zoning ordinance, and you've
6 attacked it from about three different directions, and
7 here again you try to put words, actually, in Mark's
8 mouth that you would like him to say. And I think
9 he's answered this question, and we really need to
10 move on.

11 MR. CARRARA: With all due respect,
12 Mr. Chairman, I guess you're sustaining the objection
13 and not allowing him to answer.

14 CHAIRMAN WHITE: I would have sustained that
15 objection.

16 MR. CARRARA: Thank you.

17 THE WITNESS: For the record, Mr. Chairman,
18 I would note, though, that the County's zoning
19 ordinance was first drafted --

20 MR. CARRARA: I object to him now just
21 making statements.

22 CHAIRMAN WHITE: I agree, Mark.

23 Go ahead, Counselor, continue with your
24 questioning.

1 MR. CARRARA: Thank you.

2 BY MR. CARRARA:

3 Q Mark, back on your memorandum at Tab No. 9,
4 on the second page of your memorandum, at the top
5 under the Section 5-15, you underline the word
6 "Application" and bold that word; correct?

7 A Yes, I did.

8 Q And is that -- is the reason you bolded
9 that, is that because that reflects your understanding
10 of 4.3 and the application for a permit?

11 A That's correct.

12 Q Then further on at the bottom of page 2 you
13 make the statement, "Maxxam Partners, LLC, has
14 petitioned the County Board for a special use. They
15 have not made an application for a permit." Is that
16 what you state there?

17 A That is correct.

18 Q Thank you.

19 If you could take a quick look at Exhibit 11,
20 Mark, I'll represent to you that's the first five pages
21 of the application we pulled off the website. What is
22 that document titled?

23 A "Application for Zoning Map Amendment and/or
24 Special Use."

1 Q Anywhere in that application do you see the
2 word "petition"?

3 A No, I do not.

4 Q If you could turn to Page No. 2 of -- Page
5 No. 2 of Exhibit 11, you'll see at the bottom right
6 above the signature there's a sentence. It says,
7 "I/we certify that this application and the documents
8 submitted with it are true and correct to the best of
9 my/our knowledge of belief"; correct?

10 A Correct.

11 Q Again, no reference to the word "petition"?

12 A Correct.

13 Q If you could look back at Exhibit 1 in the
14 binder, what is that document titled, Mark?

15 A "Rider for Application for Special Use."

16 Q Not "Rider to Petition for Special Use";
17 correct?

18 A That is correct.

19 Q In your memorandum in Exhibit 9, I think
20 it's on the fourth page of that, down near the bottom
21 you reference, I think to try to deflect some of the
22 criticism potentially from the Village of Campton
23 Hills --

24 MR. KINNALLY: I object to that statement.

1 Q -- that Campton Hills previously filed -- or
2 previously dealt with an application similar to the
3 Maxxam application; is that correct?

4 MR. KINNALLY: I object to the form of that
5 question. He's not trying to deflect anything. It's
6 an improper characterization.

7 CHAIRMAN WHITE: Could you rephrase your
8 question?

9 MR. CARRARA: Sure, Mr. Chairman.

10 Q In your memorandum you basically set forth
11 that the Village of Campton Hills previously dealt
12 with a similar situation to the Maxxam application as
13 a special use?

14 A Yes, I did.

15 Q What was the purpose of identifying that?

16 A Identified because it was included in the --
17 their objections include it in the appeals document,
18 as well as the letter from the Village of Campton
19 Hills' attorney which was the -- as I mentioned
20 before, as follow-up to a meeting that we had with
21 their Village administrator and attorney to explain
22 the process. So I think it was worthwhile pointing
23 out that they have the same ordinance that the County
24 has; they adopted it when they became a village and

1 had the same type of land use, and the same facility,
2 and had the same similar uses applied for.

3 Q And really the gist of the disagreement --
4 or call it what you will -- is that Campton Hills
5 believes Section 5.15 applies and you do not; is that
6 in essence the gist of it?

7 A Well, at this point in time. But it seems
8 like a whole lot of people at the Village of Campton
9 Hills agreed with that it didn't apply back in 2012.

10 Q That's an interesting statement, Mark. Can
11 you turn to the last page of your memorandum? You've
12 attached a face page to an ordinance from Campton Hills;
13 correct?

14 A Correct.

15 Q And that's to support the discussion or claims
16 you just made; correct?

17 A It's factual information, yes.

18 Q Okay. If you could look at the fifth
19 whereas paragraph in that ordinance, I'll read it for
20 you, "Whereas, the Village zoning officer has determined
21 that the proposed use of the subject property or the
22 operation of the alcohol and substance abuse treatment
23 facility is similar to the uses of a nursing and
24 convalescent home, assisted-living facility, and

1 group home."

2 That whereas statement states specifically
3 their zoning enforcement officer made the determination
4 that it was similar; correct?

5 A That's what it appears to say, yes.

6 Q So it appears they did use Section 5.15 of
7 the ordinance then. Correct, Mark?

8 A I don't know that. There was no information
9 or documentation of that on their website. So unless
10 you have that as an exhibit, I would be happy to
11 examine it.

12 Q This is your face page, and I'm just reading
13 the whereas statement. But would you agree that it
14 appears that their zoning officer made a determination?

15 A That's what the resolution says, but I don't
16 have any evidence of that.

17 Q That's actually an ordinance, not a
18 resolution; correct, Mark?

19 A Yes, special use ordinance --

20 Q Thank you.

21 A -- excuse me.

22 MR. CARRARA: Mr. Chairman, I believe that's
23 all I have for Mark.

24 CHAIRMAN WHITE: Thank you. Do you have

1 other witnesses you'd like to call?

2 Mark, you're excused.

3 MR. CARRARA: I do. I guess just to
4 streamline things, did you want them to present while
5 he's there, or would you like to --

6 CHAIRMAN WHITE: Do you want to
7 cross-examine now or wait until after all --

8 MR. KINNALLY: We'll do ours right now if
9 you want us to.

10 CHAIRMAN WHITE: Go ahead and proceed.

11 MR. KINNALLY: Go ahead.

12 MS. GAEKE: To be clear, Mr. Chairman, are
13 we limited to cross-examination of this witness at
14 this time, or can we go ahead and elicit --

15 MR. KINNALLY: We're going to put in our
16 exhibits if that's okay.

17 MR. CARRARA: Mr. Chairman, I won't object
18 to that to try to move things along.

19 CHAIRMAN WHITE: That's fine.

20 CROSS-EXAMINATION BY COUNSEL FOR THE COUNTY

21 BY MS. GAEKE:

22 Q Mr. VanKerkhoff, you've testified that you
23 are the, among other things, zoning enforcing officer
24 for Kane County; is that correct?

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1 A That's correct.

2 Q And as the enforcing officer --

3 CHAIRMAN WHITE: Erin, could you hold it
4 closer to your mouth, please.

5 MS. GAEKE: Sorry about that. Thank you,
6 Mr. Chairman.

7 Q As the zoning enforcing officer, are you
8 familiar with the Kane County zoning ordinance?

9 A Yes, I am.

10 Q Do you consult it regularly?

11 A Yes, I do.

12 Q I'd like to present you with a copy of what
13 we would reference as Exhibit 1.

14 MR. KINNALLY: Can I approach?

15 CHAIRMAN WHITE: Yes, you may.

16 MR. KINNALLY: This is the zoning ordinance.

17 Q And I'll represent to you that that's a copy
18 of the bound Kane County zoning ordinance. Does that
19 appear to be correct?

20 A Yes.

21 CHAIRMAN WHITE: Dated what?

22 THE WITNESS: Last amended July 8th, 2014.

23 CHAIRMAN WHITE: Thank you.

24 MR. CARRARA: Mr. Chairman, for clarification,

1 is this the zoning ordinance that's posted online
2 under your website?

3 THE WITNESS: Yes, it is.

4 MR. CARRARA: Thank you.

5 MS. GAEKE: I believe the Board should each
6 have a copy of the exhibit, and if possible we'd like
7 to tender that as Exhibit 1 for the County.

8 CHAIRMAN WHITE: Go ahead and continue. It
9 will be accepted.

10 BY MS. GAEKE:

11 Q Mr. VanKerkhoff, I'd like to direct your
12 attention, please, to page 24 of that blue booklet
13 which is Section 4.8 "Special Uses."

14 A I believe it's the maybe fifth slide.

15 Q Okay. Mr. VanKerkhoff, in your words by
16 reading this ordinance what is a special use as
17 understood by the Kane County zoning ordinance?

18 A Well, I'll quote from it, "To provide for
19 the location of special classes and uses which are
20 deemed desirable for the public welfare within a given
21 district or districts but which are potentially
22 incompatible with particular uses herein permitted
23 within them, classification of special uses is hereby
24 established."

1 Q Okay. If I could please direct your
2 attention to page 35 of that booklet which is the
3 Section 5.15. Could you please read that section that
4 we've talked about?

5 A Section 5.15, "Interpretation of Use Lists:
6 The enforcing officer may allow land uses which,
7 though not contained by name in a zoning district list
8 of permitted or special uses, are deemed to be similar
9 in nature and clearly compatible with the listed uses.
10 However, such nonlisted uses shall not be approved
11 until the application for such use has been reviewed
12 by the County development staff and a favorable report
13 has been received by the enforcing officer. The
14 nonlisted uses which are approved shall be added to
15 the appropriate use list at the time of periodic
16 updating and revision."

17 Q Based on your reading and your experience as
18 zoning enforcing officer, do you believe that the
19 special uses as reflected in Section 4.8 are the same
20 thing as nonlisted uses as described in Section 5.15?

21 MR. CARRARA: I'd object, Mr. Chairman.
22 Again, now we're calling for him to make a legal
23 determination under the ordinance.

24 MS. GAEKE: Mr. Chairman, it's simply a

1 processing question in terms of his experience and
2 understanding of what the ordinance is. I think we've
3 talked about the distinction between the two.

4 CHAIRMAN WHITE: I will overrule the
5 objection.

6 Go ahead. Continue Mark.

7 THE WITNESS: Could you repeat the question?

8 MS. GAEKE: Sure.

9 BY MS. GAEKE:

10 Q Mark, are special uses the same as nonlisted
11 uses as laid out in Section 5.15?

12 A No.

13 Q Why not?

14 A Because special uses would be listed in the
15 list under each zoning district.

16 Q Okay. And is it your understanding that
17 what's requested here by the petitioner is for a
18 special use?

19 A Yes.

20 Q And how do you know that?

21 A Because that's what their application to the
22 County Board says, that it's for a special use.

23 Q So had an application for a nonlisted use
24 been processed by your office, what would have been

1 the next step in the application process after an
2 application was received?

3 A For a permit?

4 Q For a permit, uh-huh.

5 A The application for a nonlisted use?

6 Q Yes.

7 A Then as the zoning enforcing officer I would
8 have reviewed their proposed -- would have reviewed
9 their proposed use against the listed uses and make a
10 determination on whether it's similar or not. If it
11 was similar to one of the uses in the permitted uses
12 or special uses, after review of the entire permit,
13 which is done -- in this case it's listed by the
14 development department staff. When this portion of
15 the ordinance was put into the zoning ordinance in
16 1976, that was the construct of the staffing. Since
17 then other departments have been created; other
18 ordinances have been enacted. So currently that
19 application for permit would also be reviewed by other
20 departments as necessary based on the use.

21 It could include water resources department,
22 division of transportation, health department for
23 certain uses. We also consult with the local fire
24 districts that also have a sense of authority over

1 uses and life safety codes in the unincorporated areas
2 of the County.

3 So after all those appropriate other agencies
4 or department of the County have been consulted, then
5 a permit would be issued.

6 If I find -- determine that it's not similar
7 to one of the uses on the use list, then they would be
8 directed to petition the County Board through the
9 process of either a map amendment or special use.

10 Q And for a petition for special use, what is
11 the process after your office receives a petition?

12 A We check the petition for completeness and
13 payment of the fees, and then we follow the procedure
14 outlined in Section 4.8 Special Uses and other
15 appropriate sections for giving notice to adjacent
16 property owners, other units of government, and
17 setting the public hearing before the Zoning Board of
18 Appeals.

19 Q And in this case with respect to the
20 petition from Maxxam, LLC, had you taken any of those
21 steps after receipt of the application?

22 A Yes. We reviewed the petition for
23 completeness, as well as I read the entire petition,
24 which I mentioned was voluminous, and began the

1 process of setting the date and time for the public
2 hearing.

3 Q However, is it your testimony that you did
4 not file a report as would have -- as you would have
5 under Section 5.15 if a permit had been requested? Is
6 that correct?

7 A Correct. There was not a report or
8 determination under Section 5.15 because it was not an
9 application for a permit.

10 Q And you've mentioned that you thoroughly
11 reviewed the application submitted by Maxxam, LLC.
12 Are you familiar with under what section they're requesting
13 a special use?

14 A Yes, I am.

15 Q And what section is that?

16 A That's Section (dd), similar uses to others
17 listed in the ordinance.

18 Q Okay. Has Kane County or your office ever
19 processed a petition for a special use under that
20 section before -- under that Section (dd), "other uses
21 similar to those permitted herein"?

22 A Yes. Kane County has received and processed
23 other applications for similar uses under that
24 Section (dd.)

1 MS. GAEKE: At this time, Mr. Chairman, I'd
2 like to tender Exhibit 2, which I'll represent is a
3 memorandum prepared by Mr. VanKerkhoff.

4 CHAIRMAN WHITE: So accepted.

5 MR. CARRARA: Mr. Chairman, I think we may
6 want to take a brief recess. I believe one of your
7 commissioners just left the podium.

8 CHAIRMAN WHITE: That would be fine. We can
9 take a short recess.

10 (Recess taken, 8:26 p.m. to 8:38 p.m.)

11 CHAIRMAN WHITE: If everyone can please take
12 your seats, we'll call the hearing back to order.

13 And, Erin, would you like to continue?

14 MS. GAEKE: Thank you, Mr. Chairman.

15 BY MS. GAEKE:

16 Q Mr. VanKerkhoff, we've provided you, and
17 counsel, and members of the Board a copy of what we've
18 marked as Exhibit 2. What is this document,
19 Mr. VanKerkhoff?

20 A Members of the Zoning Board, this is a memo
21 to you dated today to outline or give you a list of
22 some petitions that -- for special uses that have been
23 processed in the past. This is not an all-inclusive
24 list. This is a list that we came to both from

1 knowledge of these locations and with my 21-year
2 involvement with the County a recollection of uses,
3 special uses that didn't have a spot exactly on the
4 list but used the Section (dd) Other Uses.

5 Q So, for example, you have Petition 3303,
6 "Proposed special use not listed in the ordinances,"
7 which is outdoor paint ball competition and sales of
8 supplies and equipment, and in the second column
9 similar to the following listed use of outdoor
10 athletic fields?

11 A Correct. And that was taken off the
12 petition itself.

13 Q For each of these five examples that you've
14 given, were any appeals ever filed to the Zoning Board
15 of Appeals arguing that you did not process those
16 petitions using Section 5.15?

17 A No. And for clarification, for three of
18 those petitions I was not the zoning enforcing officer.

19 Q Are you aware of whether those three
20 petitions were processed using Section 5.15?

21 A No. To my knowledge, none of those were
22 provided according to Section 5.15 but followed the
23 same process that I described for this petition of
24 having a preapplication, prepetition submittal

1 meetings giving the input from staff prior to setting
2 a public hearing for those petitions.

3 Q Were you the zoning enforcing officer on
4 Petition 13-0009, the last item listed there?

5 A Yes, I was.

6 Q And what is that petition?

7 A That's for an elderly retreat center and
8 vacation program that is in Blackberry Township off of
9 Seavey Road. Their proposed use didn't fit the list
10 exactly, so they applied for it under (dd), Similar
11 Uses.

12 Q Do you recall what that area was zoned?

13 A It had previously been a single-family
14 residence, a very large one. So it was quite
15 adaptable for the use of bringing elderly folks from a
16 more urban environment out for a long weekend or
17 extended week vacation stay.

18 Q So the Zoning Board of Appeals and the
19 Kane County Board determined that it was similar to
20 the listed use of monasteries, nunneries, religious
21 retreats, nursing, convalescent homes, et cetera?

22 A Yes, they did so by their approval of the
23 petition.

24 Q And you're not aware that any appeal was

1 filed that you did not follow Section 5.15 in
2 processing that petition?

3 A I can specifically say that no appeal was
4 determined for that zoning petition.

5 Q Mr. VanKerkhoff, we talked a little bit
6 earlier about a memorandum that you prepared for the
7 Zoning Board of Appeals specific to the appeal
8 hearing.

9 MR. KINNALLY: This is People's Exhibit 3,
10 his memorandum previously identified as Exhibit 9 in
11 the Objector's. It's dated November 12th, 2015.

12 CHAIRMAN WHITE: I'll accept it.

13 Q And, Mark, am I correct in saying that you
14 prepared this in response to the appellant's appeal?

15 A Yes, I did.

16 Q And within that document you set forth your
17 positions on why you processed this petition according
18 to Section 4.8; is that right?

19 A That's correct.

20 Q I'd like to please direct your attention to
21 page 4 of your memorandum, Exhibit 3, and as we
22 discussed earlier, down at the bottom there you
23 discuss the Village of Campton Hills and a process and
24 application they had had previously?

1 A Correct.

2 Q Can you tell me why you included that?

3 A I included that because the appealing
4 party's attorney had included the letter and
5 resolution in their appeal to you and also included
6 information relevant to the similar use question. And
7 in terms of the processing by myself as the zoning
8 enforcing officer, you know, even despite the fact
9 that 5.15 does not apply, contrary to the Village of
10 Campton Hills' objections, they had processed a very
11 similar use as a special use in the F District.

12 I did note as the -- and consider, as the --
13 Mr. Carrara had pointed out, that their ordinance did
14 include reference to their zoning enforcing officer
15 making a determination, but it does not state whether
16 a determination was made per Section 5.15 or he had
17 just rendered his opinion in some form of a staff
18 report to their planning commission or Village
19 trustees.

20 Q Earlier Mr. Carrara asked you some questions
21 about amending the County zoning ordinance. As zoning
22 enforcing officer, do you have authority to amend the
23 County code?

24 A No, I do not. Amendments are done per

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1 Section 4.7 amendments, which includes text amendments
2 or map amendments.

3 Q Who ultimately makes those determinations?

4 A Those are approved by the County Board.

5 Q Looking at Exhibit 11 which counsel
6 previously provided you with in your binder, there is
7 a document entitled "Application for Zoning Map
8 Amendment and/Or Special Use." Is that a form created
9 by the development department?

10 A Yes, it is. It's a form that -- I don't
11 know exactly how long it's been used, but older
12 petitions in our records before the administrative
13 form was provided to them would provide such a
14 petition request as a letter, oftentimes proposed by
15 their attorney.

16 Q Does the title of this form have any bearing
17 on what it is an applicant is either applying for,
18 whether it's a permit, a petition, anything else
19 like that?

20 A No, it does not.

21 MR. KINNALLY: We'd offer Exhibits 1, 2, and
22 3 for the People -- for the County.

23 CHAIRMAN WHITE: I've already accepted them.

24 MR. KINNALLY: Thank you, Mr. Chairman.

1 MS. GAEKE: Mr. Chairman, could we also
2 reserve the right to the recall Mr. VanKerkhoff in
3 rebuttal, if necessary, in response to any of counsel's
4 other witnesses?

5 CHAIRMAN WHITE: Yes, you may.

6 MS. GAEKE: Thank you.

7 MR. KINNALLY: We don't have any further
8 questions of this witness.

9 MR. CARRARA: Just a couple follow-ups so we
10 don't have to bring Mark back up.

11 CHAIRMAN WHITE: All right.

12 REDIRECT EXAMINATION BY COUNSEL FOR THE APPELLANT
13 BY MR. CARRARA:

14 Q Mark, have you processed nursing homes as
15 PUDs in the county?

16 A Could you rephrase the question? What do
17 you mean by "you"?

18 Q No. Has the County, you as the enforcing
19 officer or the staff that enforces the ordinance, have
20 you processed nursing homes as PUDs under the
21 ordinance?

22 A Since I've been zoning enforcing officer I
23 do not recall that we have.

24 Q Thank you.

1 A If you have information to refresh my memory,
2 I'd be happy to examine it.

3 So I take it that's a no.

4 Q I'm sorry, Mark, I wasn't --

5 A I said if you have information to the
6 contrary to refresh my memory, I'd be happy to
7 examine it.

8 MR. CARRARA: I don't have anything at this
9 point, Mark. I believe you responded no to certain
10 FOIA requests we did but unrelated to planned unit
11 developments. So we'll deal with that in a future
12 time if we need to.

13 I believe that's all I have.

14 CHAIRMAN WHITE: Thank you. You're excused.

15 (Witness excused.)

16 CHAIRMAN WHITE: Mr. Carrara, do you have
17 other witnesses?

18 MR. CARRARA: I do. I'd like to call
19 Mr. Joseph Abel.

20 CHAIRMAN WHITE: Please stand to be sworn in.

21 (Witness duly sworn.)

22 CHAIRMAN WHITE: Please state your name for
23 the record.

24 THE WITNESS: Joseph H. Abel.

1 CHAIRMAN WHITE: Please speak into the
2 microphone.

3 MR. CARRARA: Do you want him to go to the
4 witness chair?

5 CHAIRMAN WHITE: Yes, please, if you would.
6 Thank you, you may proceed.

7 MR. CARRARA: Thank you, Mr. Chairman. I
8 was just looking to counsel.

9 Erin and I spoke earlier. I believe we
10 stipulated to Exhibit 12 in our binder that that's
11 Mr. Abel's curriculum vitae so we don't have to go
12 through the foundation of proving him to be an expert
13 in the field of land planning to try to facilitate
14 this the evening's hearing.

15 MR. KINNALLY: That's fine.

16 CHAIRMAN WHITE: Please continue.

17 MR. CARRARA: Thank you, Mr. Chairman.

18 JOSEPH H. ABEL,
19 having been duly sworn, testified as follows:

20 DIRECT EXAMINATION BY COUNSEL FOR THE APPELLANT
21 BY MR. CARRARA:

22 Q Joe, I'm not sure if the mic picked you up
23 earlier. Could you please state your name and spell
24 it for the record.

1 A Joseph H. Abel, A-b-e-l.

2 Q And, Joe, by whom are you employed?

3 A Joline Andrzejewski and also I also work
4 very closely with -- I call him Abe.

5 Q Thank you. Those are the -- I guess the
6 appellants in tonight's hearing; correct?

7 A Correct.

8 Q As we just mentioned, Joe, the Commissioners
9 have your detailed curriculum vitae, but could you
10 just kind of give us a general background of your
11 history in the land planning arena?

12 A Very briefly, I'm a planning zoning and
13 economic development consultant. I've been doing this
14 for approximately 50 years. I have a degree in city
15 and regional planning, done graduate work at the
16 University of Chicago in urban studies and completed
17 my economic development work at a special program at
18 the University of Arizona -- or Oklahoma.

19 I was employed by Lake County planning
20 department. I then became a private planning
21 consultant and worked with numerous municipalities and
22 counties in preparing comprehensive plans and
23 implementing ordinances, zoning and subdivision
24 regulations for at least a couple dozen municipalities

1 and did the first zoning ordinances for Grundy County,
2 Kankakee, Iroquois, a number of counties.

3 I then left the firm called Gardner &
4 Associates and became the director of planning for
5 DuPage County. I was the planning director for
6 17 years from 1970 to '87, which was the fastest
7 growth rate in that county; went from 250- to almost
8 800,000 when I left. I was in charge of the planning,
9 building, zoning, economic development, community
10 development, block grant programs for the entire
11 70-member development department was under my control,
12 and I was responsible for working with the State's
13 Attorney's office to do a comprehensive amendment to
14 the zoning ordinance for DuPage County. So we
15 completely redid it.

16 So, like I say, I've done numerous --
17 prepared numerous zoning ordinances and comprehensive
18 plans. I then became the executive director of the
19 economic development division for the City of Chicago
20 for three years, and after that I started my own firm
21 in 1992.

22 Q Thank you, Joe. Do you hold any professional
23 designations?

24 A Member of the American Institute of

1 Certified Planners.

2 Q Have you had the opportunity to review the
3 Kane County ordinance?

4 A Yes.

5 Q Have you had the opportunity to review the
6 application filed by Maxxam Partners as part of
7 tonight?

8 A Yes.

9 Q Have you had the opportunity to review the
10 memorandum which was Exhibit 3 which was prepared
11 by Mark?

12 A Yes.

13 Q Are you prepared to provide your
14 professional opinions as to the application of the
15 zoning ordinance and the memorandum?

16 A Yes.

17 Q If we can, sir, let's start with the
18 ordinance.

19 Are there any specific sections of the
20 ordinance that you think are important for the
21 determination of the appeal here this evening?

22 A Specifically, since we're all talking about
23 it, I feel that the most important provision --
24 although, there are numerous ones, whether you look at

1 the use list in the Farming District or the R-1
2 because they're referenced, there's definitions -- but
3 to me probably the most important is 5.15.

4 CHAIRMAN WHITE: Joe, could I get you to
5 speak into the microphone, please?

6 THE WITNESS: Yes.

7 A (Continuing.) 5.15. It's important to me,
8 especially having drafted many zoning ordinances with
9 the Village attorneys or State's attorneys depending
10 on the case involved, is that Article 5 starts out
11 with the most important legend, which is a description
12 which is "General Provisions."

13 I sort of disagree that general provisions
14 have very limited application, which was sort of
15 implied by Mark. It has always been my professional
16 opinion in working with all of the attorneys, whether
17 in the counties or municipalities, that the general
18 provisions set the base for the ordinance. It's point
19 of beginning because it is applicable to every district
20 in the ordinance. They are the point of beginning.

21 And when I would prepare new ordinances,
22 whether I was working with a zoning board, or a County
23 board, or a village board, I would always take them
24 through the general provisions section very carefully

1 so they knew exactly where they were starting. Then I
2 always found the definitions section was very critical,
3 and then on and on, you finally get into use lists and
4 things of that nature.

5 But I have to -- like I say, my professional
6 opinion is that general provisions do apply to the
7 total enforcement and interpretation of the zoning
8 ordinance.

9 You then go into 5.1 which, again, is the
10 very next paragraph after the title of "General
11 Provisions" and its interpretations, purposes, and
12 conflicts. And, again, you can go through and read
13 all of those, and they apply generally and to the
14 entire interpretation of the ordinance.

15 And then all of a sudden you come to 5.5,
16 and it's always been important to me in terms of
17 there's always going to be new uses. One of them in
18 the list that was handed out, paintball. I remember
19 when I was with the County the big new thing was
20 Pac-Man. How do you handle a Pac-Man restaurant? Is
21 it going to cause problems, you know, because of kids
22 being in there all day playing Pac-Man?

23 And what we did is we went out and went to
24 the new uses -- it happened to be in Milwaukee -- and

1 we did a thorough study, and then we came back, and we
2 did a comprehensive addition to the zoning ordinance
3 that added to the use list after looking at it very
4 carefully.

5 This is the common procedure, and all of a
6 sudden when you read 5.15, it falls right into that.

7 Now, I don't know who originally wrote this
8 ordinance, but I've been familiar with the Kane County
9 ordinance since 1970. As I said, I was director of
10 planning from '70 to '87. We had a policy then, all
11 the planning directors met on a monthly basis, and we
12 went over common problems, whether they were zoning,
13 or land use, or whatever, and for 17 years we met once
14 a month at NEPC, the Northeastern Planning Commission,
15 and involved them in the process, also.

16 Since leaving the County I've done many,
17 many zoning cases in municipalities and in the county
18 of Kane. So this 5.15 I feel is a very critical
19 provision in your ordinance, and there is no way that
20 I professionally can interpret that this only applies
21 to building permits or various permits.

22 If you go back to the very beginning, as I
23 read, it states that in interpreting and applying --
24 this is 5.1 interpretations, purposes, and conflicts,

1 and that's what we have here is a conflict. "In
2 interpreting and applying the provisions of this
3 ordinance, they shall be held to be the minimum
4 requirements for the promotion of the public health,
5 safety, morals, comfort, and general welfare." That's
6 the basis for zoning right there.

7 So how you can possibly then in the same
8 article go to 5.15 and make the interpretation that it
9 only applies to building permits or other permits,
10 it's a quantum leap. It applies anytime you have to
11 make a determination as to whether a use is similar.
12 And it's interesting that the word "similar" appears
13 in this and a number of other places in the ordinance
14 where that word is used.

15 So it is my professional opinion that you
16 have to even go beyond. So far we always -- in all
17 the presentation up to now I notice everybody seems to
18 stop after it says "clearly compatible with the listed
19 uses." Of the most important part is, "However, such
20 nonlisted uses shall not be approved until the
21 application for such a use has been reviewed by the
22 County development staff and a favorable report has
23 been received by the enforcing officer." That has not
24 been done.

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1 "The nonlisted uses which are approved shall
2 be added to the appropriate use list at the time of
3 periodic updating and revision," which has to go
4 through the public hearing process. You can't amend a
5 zoning ordinance and add new things to it without
6 going through a public hearing. It almost makes it
7 sound like this (dd) all of a sudden becomes the
8 wherewithal for getting around letting the public know
9 what's being added to the zoning ordinance. I mean,
10 it just makes no sense whatsoever.

11 I can give you a very up-to-date project
12 that I'm involved in now in the Village of Carol
13 Stream where a truck -- and I'm talking about a real
14 truck facility came in for rezoning, and they were
15 told there is no place for a major truck facility
16 which has, you know, washrooms, and game rooms, and
17 restaurants, and all kinds of things like that.

18 Their ordinance allowed a gasoline service
19 station with truck pumps, but the staff said no, that
20 is not similar, no way is it similar, and required
21 that there be a study. They did a study and
22 determined where truck terminals of this magnitude,
23 what district it should be allowed in, what kinds of
24 standards should be applied, and the staff did a very

1 thorough study, and then it was done as a -- then they
2 decided where it could be, and they did a text
3 amendment. And then the petitioner could apply either
4 for a map amendment at any time, or maybe the staff
5 study would even say it's a permitted use. It wasn't;
6 it became a special use because of the magnitude
7 of it. But, again, that's the proper way to do this.

8 Now, the fact that there are four or five that
9 have been done in the past that nobody has bothered to
10 challenge doesn't make it correct. And some of them
11 seem, you know, rather insignificant compared to what
12 we're talking about today. I mean, we are talking
13 about a major type of facility, and it's a unique use
14 and it's unique enough that it's been determined that
15 it will be a special use.

16 So, again, it seems to me that the process
17 that should have taken place is exactly what is
18 written in the ordinance. "However, such nonlisted
19 uses shall" -- not may -- "shall not be approved until
20 the application for such use has been reviewed by the
21 County development staff and a favorable report
22 received." And then you go to the next step to update
23 the ordinance, whether you do it right away -- well,
24 periodically means you do it right now or you have a

1 schedule. When I was with the County, we reviewed our
2 zoning ordinance once a year, and we found things that
3 had to be changed or corrected or just made more
4 readable, and we'd do our public hearings and do our
5 text amendments.

6 So that's -- that to me is a very critical
7 part of this appeal is 5.15 but looking at it in the
8 context of all of Article 5.

9 Q Thank you, Joe.

10 You heard Mr. VanKerkhoff reference
11 Section 4.3 "Permits." What is your professional
12 opinion as it relates to Section 4.3 "Permits" and its
13 interaction, if any, with Section 5.15?

14 A I'm assuming you could use it. But, again,
15 it's an entirely different process. One is talking
16 about permits, and the rest of the ordinance deals
17 with amendments, special uses, general provisions. I
18 keep going back to the general provisions which ties
19 you back into having to use 5.15 for an interpretation.

20 Whether it's an interpretation for when
21 someone comes in for a permit -- and there it's a
22 little touchy. If I were the zoning administrator,
23 I'm not sure I'd want to make that determination by
24 myself to assume it only applies to permits. I think

1 the process applies to permits and determining what's
2 the proper name of a use in a use list. So it applies
3 to both.

4 Q In terms of the Maxxam application, do you
5 have a professional opinion as to their referencing
6 the Section 5.15 of the ordinance in the application?

7 A Oh, I think they realize, just like I do,
8 that it's important and that everything ties to this
9 word "similar."

10 Q Do you have a professional opinion on
11 whether Mr. VanKerkhoff properly interpreted the
12 zoning ordinance?

13 A It's my professional opinion that I don't
14 think I agree with his interpretation that it only
15 applies to permits. As I said, this is a general
16 provision, and it's in that general provisions
17 section, and, therefore, it applies to the entire
18 zoning ordinance.

19 As I said, it's the minimum standard that
20 has to be followed and it's there. I don't see how
21 you can walk away from it, disregard it, and then go
22 even to the worst case scenario and say it only
23 applies to permits.

24 I can't find -- I've gone through this

1 ordinance -- as I say, I prepared many -- I can't find
2 a justification for his interpretation that 5.15 only
3 applies to permits.

4 Q Do you have a professional opinion on how
5 you think the Maxxam application should be processed
6 and handled by the County?

7 A As I said, I think it should be handled
8 similar to what I said just happened in the Village of
9 Carol Stream when they came in and said that they
10 wanted to -- I mean, they're the ones -- the applicant
11 is the one that came in and tried to prove to the
12 zoning officer that they were similar to a hospital or
13 a convalescent center or what else.

14 So an awful lot of time was spent -- I'm
15 just amazed at how much time is put in to justifying
16 the similarity with those two uses. In the time all
17 that transpired staff could have done their own study,
18 looked into these -- I've looked into the two that
19 they referred to in their study, the Rosecrance and
20 the other one down in Lemont, and start looking at
21 what are appropriate locations.

22 The other thing that bothers me as a planner
23 is that I've always been under the belief that the
24 zoning ordinance is an implementation for the

1 comprehensive plan. The comprehensive plan very
2 clearly states that putting a facility like this out
3 in the middle of nowhere is contrary to the
4 comprehensive plan. The plan states that it should be
5 primarily in a more heavily traveled area, and
6 especially it says along the Randall Road/Orchard
7 corridor.

8 So you've got even the fact that an awful
9 lot of work has gone into this, and I think the staff
10 should do what 5.15 says, do a thorough study and then
11 come back with a report to the ZBA and say, "This is
12 an appropriate use in the following districts; here's
13 the kind of standards that should be applied in terms
14 of how much parking is required, how much security is
15 required," all the kind of things that you would
16 normally look at when you're trying to determine
17 whether a use is compatible, and it says here that it
18 has to be a use that's compatible with the other uses
19 in the district.

20 We are talking about the F Farming district.
21 This is not an office of research or a highway
22 commercial use. This is an area that is unique in
23 itself, and so this study should have been done, bring
24 it all back to the ZBA, have a public hearing, and

1 then have a text amendment.

2 MR. CARRARA: Thank you, Joe.

3 Mr. Chairman, I have nothing more for
4 Mr. Abel at this point.

5 CROSS-EXAMINATION BY COUNSEL FOR THE COUNTY
6 BY MR. KINNALLY:

7 Q Mr. Abel, my name is Pat Kinnally and I
8 represent the County.

9 How long have you spent working on
10 this case?

11 A About three weeks.

12 Q So how many hours? Can you tell the Board?

13 A I'd say reviewing the applications and --
14 I've only submitted a retainer letter so far, and
15 that's what I was paid for.

16 Q We'll get to that.

17 A In terms of total hours, I would say
18 maybe 30.

19 Q 30 hours of time that you spent personally
20 on this?

21 A Yes.

22 Q And how much do you get paid?

23 A 225 -- 235 an hour.

24 Q And you wrote a report in this case?

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1 A A memo, yes.

2 Q And in the report you indicated that you
3 represented the objectors here; is that right?

4 A Yes.

5 Q They hired you?

6 A Yes.

7 Q When they hired you, did you talk to them?

8 A Not very much. I wanted to know --

9 Q That's fine.

10 Were you aware that this particular facility
11 was sought to be sited in Campton Township or the
12 Village of Campton Hills?

13 A I'm aware of that from reading the reports.

14 Q And have you been to the facility?

15 A Yes.

16 Q Can you describe to the Board what the use
17 was prior to its closing?

18 A It was a boy's school. The reason I know it
19 very well is I was the planner representing the
20 developer of all of the land that was annexed into
21 Elgin. I was hired to work on the western expansion
22 of Elgin and spent a tremendous amount of time out in
23 that area. We worked on the site plan for all of the
24 residential development, and at the time we went

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1 through this whole property and everything.

2 CHAIRMAN WHITE: Joe, I've got to repeat
3 again, could I get you to speak into the mic, please?

4 Q We appreciate all that information. Could
5 you describe what the use was with respect to this
6 particular facility before it closed in 2012?

7 MR. CARRARA: Mr. Chairman, I'm going to
8 object to being beyond the scope of my direct
9 examination. I don't see what this has to do with the
10 appeal what the prior use was.

11 MR. KINNALLY: It's cross.

12 A Either way, it was a boys school.

13 Q It was a boys school?

14 A Yes.

15 Q And that was in a farming district?

16 A Yes.

17 Q And it was residential?

18 A Yes.

19 Q So boys were housed there on a residential
20 basis?

21 A Yes.

22 Q How many?

23 A I forget the exact number.

24 Q How many beds?

1 A Don't remember.

2 Q And have you visited the facility since it's
3 closed?

4 A No.

5 Q Now, when Mr. -- the objectors in this case --
6 and I'm sorry I can't pronounce their name; I'm
7 probably going to really screw it up -- Mr. Andrzejewski
8 and his spouse, when they hired you, did they tell you
9 they were against the siting of this facility?

10 A Oh, I assumed that, yes.

11 Q And that's the opinion that you came back
12 with after you did your work in this case?

13 A What opinion?

14 Q The opinions that you just gave that you
15 don't think this should be sited. You think this
16 should be a text amendment; correct?

17 A I was asked to review the process. So I'm
18 not at this point stating whether I agree with the use
19 or not. What I'm saying is that there is a process
20 that has not been followed. That's what we've been
21 talking about, 5.15, and did the zoning administrator
22 interpret that provision correctly. And it's my
23 professional opinion he has not, that it does not
24 apply to just permits; it applies to everything in the

1 ordinance. It's that simple.

2 Q That's not what's in your report, is it?

3 A My memo is a memorandum that goes into, you
4 know --

5 Q I'll ask a question. Doesn't your report --

6 A Amendments and --

7 Q Doesn't your report say that you do not
8 believe that hospitals and nursing and convalescent
9 homes are consistent with the similar uses?

10 A Oh, yes. Yes.

11 Q Now, I want you to tell the Board -- do you
12 have the zoning ordinance in front of you?

13 A Yes.

14 Q Okay. I want you to turn to page 46.

15 CHAIRMAN WHITE: I need you to speak into
16 the mic. We have some Board members that are having a
17 hard time hearing you.

18 MR. KINNALLY: Can you hear me? Okay. I'm
19 sorry.

20 Q Page 46.

21 A Yes.

22 Q All right. Now, as I understand the zoning
23 ordinance -- and you can tell the Board since you're
24 the expert -- this is a listing of special uses. Is

1 that right?

2 A On page 46?

3 Q Yeah.

4 A Well, it starts on -- it starts way
5 before that.

6 Q I know but there's special uses listed on
7 page 46; true?

8 A Oh, yes. Yes.

9 Q Okay. And under paragraph (dd) says "other
10 uses similar to those permitted herein as special
11 uses"; is that right?

12 A That's true.

13 Q So it's your testimony and you're telling
14 the Board that with respect to that particular
15 provision that Section 5.15 applies to every scenario
16 involving similarity; isn't that true?

17 A Yes.

18 Q That's your opinion?

19 A Yes.

20 Q Now, Mr. VanKerkhoff has an opinion; isn't
21 that true?

22 A Yes.

23 Q Reasonable people can disagree with respect
24 to the interpretation of an ordinance; would you agree

1 with that? Reasonable people could disagree with
2 respect to the interpretation of an ordinance? You're
3 not always right, are you?

4 A Most of the time.

5 Q Most of the time you're right, huh. Really?

6 A That's my record.

7 Q That's your record? And you said your
8 record is extensive in Kane County; right? Tell the
9 Board where on your résumé that you've done any work
10 in Kane County at any time.

11 A Well, I represented Inland Realty on a big
12 zoning case.

13 Q But that's not on your résumé, is it?

14 A My résumé -- I've probably done 500 or
15 1,000 cases in the last 50 years. I couldn't possibly
16 put them all in one place.

17 Q And it's your job to do land use studies in
18 your business and get paid for them; correct? That's
19 your job?

20 A Yes.

21 MR. KINNALLY: Thank you. I don't have any
22 further questions.

23 CHAIRMAN WHITE: Thank you.

24 MR. CARRARA: I have nothing to clarify as

1 to that, Mr. Chairman.

2 CHAIRMAN WHITE: You're excused, Joe.

3 Thank you.

4 THE WITNESS: Thank you.

5 (Witness excused.)

6 MR. CARRARA: That's all the witnesses we
7 have for our case in chief, but just like the County I
8 reserve the right to recall a rebuttal witness should
9 I need to respond to their case.

10 CHAIRMAN WHITE: Yes, you may.

11 MR. CARRARA: Thank you.

12 Do Board members have any questions at this
13 time of any of the witnesses that have testified?

14 (No response.)

15 CHAIRMAN WHITE: Seeing none, is the County
16 ready to proceed with your testimony?

17 MR. KINNALLY: We've already put our
18 exhibits in, Mr. Chairman. We don't have any other
19 witnesses.

20 CHAIRMAN WHITE: We'll go with closing
21 arguments then.

22 We'll begin with you.

23 MR. CARRARA: Mr. Chairman, again just a
24 point of clarification, I believe the applicant's

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1 attorneys had provided me those additional two
2 documents that they wish to present to the Board. If
3 they want to do that now, I'm fine with that, and I
4 would just ask for a reasonable amount of time to
5 respond in writing to these updated memorandums that
6 they're trying place in front of the ZBA here today.

7 CHAIRMAN WHITE: You have to define
8 "reasonable time."

9 MR. CARRARA: Understanding we're coming
10 into the holiday, so I could have it probably before
11 the Thanksgiving break. If you could give me until
12 next Tuesday, that would be satisfactory.

13 MR. BROWN: And we would make a request that
14 they provide us with copies at the same time they
15 file them.

16 MR. KINNALLY: I don't know what it is. We
17 haven't seen it.

18 MR. BROWN: We will have a copy for the
19 County.

20 MR. KOLB: May I approach?

21 CHAIRMAN WHITE: Yes, you may.

22 MR. CARRARA: Mr. Chairman, what I was
23 thinking of doing, if you'd like to entertain some
24 brief argument -- closing statements tonight, I'd be

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1 happy to do that. But maybe because of the submission
2 of these documents, if the County agrees, maybe we
3 just do written closing arguments for the ZBA to
4 consider as part of its deliberations.

5 CHAIRMAN WHITE: As opposed to --

6 MR. CARRARA: If the Commissioners would
7 like to hear a brief response to that, I can. But, in
8 truth, Mr. Chairman, we're attorneys, I think we can
9 all try to reclassify what you heard here today, but
10 you're all very knowledgeable and make your own
11 decisions, so I'm prepared to stand by written closings
12 in response to the applicant's updated memorandums and
13 to the testimony you heard here this evening.

14 CHAIRMAN WHITE: I would accept written
15 comments on these documents that the applicant just
16 provided, but I would like you to make some closing
17 comments this evening on what's been testified to.

18 MR. CARRARA: Sure. We'll be more than
19 happy to do that. Thank you, Mr. Chairman. If I
20 could just have one moment.

21 Mr. Chairman, Commissioners, I and my
22 clients would like to thank you for the opportunity
23 to --

24 MR. BROWN: Can I just have a point?

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1 Because you said when there was no more testimony you
2 were going to give us an opportunity to speak, and it
3 kind of went real fast and you never really addressed
4 us for that opportunity.

5 CHAIRMAN WHITE: Did you want to speak prior
6 to his closing? I was going to give you the opportunity
7 to speak after his closing.

8 MR. BROWN: Oh, is that when you were going
9 to do it?

10 CHAIRMAN WHITE: Yes.

11 MR. BROWN: Okay. We're fine with that.
12 Just wanted to make sure.

13 MR. CARRARA: Thank you, Mr. Chairman.
14 Again, thank you for the opportunity to be here this
15 evening. We appreciate your time and deliberations
16 moving forward.

17 We believe the record is clear, Maxxam filed
18 an application for a special use for a land use that's
19 not listed either in the permitted use list or the
20 special use list for the F District.

21 The County has set forth its intent on how
22 such a situation should be handled in a very specific
23 section of the ordinance, Section 5.15 you heard a lot
24 of testimony about here this evening.

1 You heard expert testimony the County put
2 Section 5.15 in the general section of the ordinance,
3 so it relates to any situation where applicants like
4 Maxxam have a land use that's not listed and what
5 procedures should be followed by the County staff
6 during such a situation.

7 You heard expert testimony from Mr. Abel,
8 who has participated in numerous interpretations and
9 drafting of ordinances, that Section 5.15 applies to
10 the Maxxam application. You've also seen the record
11 of the documents before you. The applicant also has
12 put Section 5.15 directly in its application and its
13 two legal opinions as to how that applies to this
14 application process.

15 Any interpretation of the ordinance to the
16 contrary is improper. You heard expert testimony that
17 Section 5.15 does not rely solely on the 4.3 permits
18 as Mr. VanKerkhoff has so opined, and with all due
19 respect, I think you heard Mr. Abel and I think you
20 heard Mr. VanKerkhoff testify there was no support to
21 Mr. VanKerkhoff's testimony or in the documents that
22 supports his claim that 5.15 only applies to permits.

23 Additionally, I think you heard the expert
24 testimony from Mr. Abel as to how this process should

1 be done. It's no different than the County has done
2 in other situations where they've had nonlisted land
3 uses, and they wanted to make sure they could
4 consistently deal with these uses as they come
5 forward. They do the studies; they do the text
6 amendments, and they move forward.

7 This allows them to deal with these uses on
8 a consistent basis, and that's just solid and proper
9 land planning techniques. Simply throwing something
10 up to be mere similarity without any kind of analysis
11 or study doesn't lead to consistent results; it leads
12 to the potential of inconsistent results because
13 there's no list of uses, and definitions, and the
14 necessary conditions, restrictions, and all the things
15 that would be part of the text amendment in the
16 ordinance.

17 Now, that's important because at this point
18 the ZBA has the ability to overturn Mr. VanKerkhoff's
19 decision, address this back to the staff to make
20 them -- or to have them do the proper analysis under
21 Section 5.15, make the staff reports, make the
22 findings, and move forward. They can correct this
23 action now much earlier in the process than
24 potentially later in the process, and here's what I

1 mean by that.

2 It just makes common sense if you read
3 Section 5.15 it should apply to the Maxxam application
4 for a nonlisted land use. More importantly, this will
5 allow the applicant as it moves forward to know what
6 entitlements it's trying to seek so it knows what
7 evidence and experts it needs to present to the County
8 and at the public hearing to get those approvals.

9 It also allows the County to follow the
10 procedures it has set forth in its ordinance,
11 specifically Section 5.15, and this could potentially
12 save tens of thousands of dollars, potentially hundreds
13 of hours of protracted testimony moving forward, and,
14 ultimately, the ZBA may decide, guess what, "We don't
15 think it's similar and clearly compatible; we think
16 there should be a text amendment."

17 Now what happens? The poor Applicant Maxxam
18 has got to go back to ground zero. They've got to
19 start anew to start the text amendment process to get
20 their use moved forward throughout the process.

21 That's not fair to the applicant; it's not
22 fair to the neighbors. It will allow this additional
23 time to study and make the appropriate changes to the
24 ordinance should there be changes described. It will

1 also allow the County the ability to make sure that
2 their public notices are clear and accurate so there
3 won't be any questions. The public will know what's
4 happening, what's moving forward, and allow everybody
5 to move forward and, again, put in place the proper --
6 and use the proper land planning techniques to add
7 this use if it's so determined to be added as a text
8 amendment. This will allow the County to move forward
9 on a consistent basis.

10 This is -- whether you see it in the
11 newspapers, whether you see it in the news, drug and
12 alcohol treatment facilities are a growing business in
13 the country. This probably won't be the first nor the
14 last that Kane County will see. Why not take the time
15 now to make sure your ordinance is properly prepared
16 to deal with these moving forward so you don't have
17 this patchwork system where we're going to be dealing --
18 excuse me -- you'll be dealing with these kinds of
19 potential issues moving forward.

20 Take the time now. Develop the uses,
21 develop the situations in the ordinance as you did
22 earlier as was suggested for medical marijuana growth
23 facilities and dispensaries. Those are a difficult
24 concept to deal with. The County dealt with it in a

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1 reasonable manner and did the proper planning to get
2 that done. This is the same opportunity to deal with
3 a use that's not listed, has potential situations that
4 you're going to be dealing with further on throughout
5 the analysis process. So why not do it now, follow
6 the ordinance, send this back to the staff and have
7 them do what's outlined in Section 5.15.

8 Thank you, Mr. Chairman and Commissioners.

9 CHAIRMAN WHITE: Thank you.

10 Does County have closing arguments?

11 MR. KINNALLY: On behalf of the County --

12 CHAIRMAN WHITE: Please speak into the
13 mic, Pat.

14 MR. KINNALLY: Oh, I'm sorry.

15 On behalf of the County, I want to thank all
16 of you for coming out here tonight and listening to
17 the appeal that has been filed by the objector.

18 I find it somewhat unusual that the objector
19 would be saying that our process is not fair to the
20 applicant. The applicant has submitted an application,
21 and Mr. VanKerkhoff told you specifically what he does
22 with this type of special use application. He
23 reviewed it for completeness or incompleteness, and
24 then the determination of a special use is not for him

1 to make; it's for to you make a determination after a
2 public hearing. That's what he did; he scheduled it
3 for a public hearing, and then the objectors came in
4 and filed their notice of appeal, and that's all we're
5 here for tonight.

6 And on that appeal, it's Section 4.5 of our
7 ordinance on page 21, and it says a person aggrieved
8 can appeal to the Zoning Board to review any order,
9 requirement, or decision, or determination.

10 Mark VanKerkhoff didn't make a
11 determination. All he did was process an application,
12 and at some point in the future as he indicated he and
13 his staff will make a report to the Zoning Board of
14 Appeals after -- at the special use hearing. I don't
15 know what he's going to say. Nobody knows what he's
16 going to say. Maybe he'll be right; maybe he'll be
17 wrong. In the end it's your determination to make a
18 recommendation, and, finally, at the end of the day
19 it's going to be up to the County Board. You will
20 make findings of fact and recommendations to the
21 County Board with respect to the special use
22 application.

23 Mark explained to you he's done this before,
24 the County has done it before. Please look at

1 Exhibit 2. Exhibit 2 explains how he's handled
2 special uses in the past, and no one has ever
3 complained about it.

4 They have a right to file an appeal. So
5 what do they do? They go out and hire Mr. Abel. I'm
6 sure he's a very capable man. He's hired by the
7 objectors, and he comes back with a decision that is
8 favorable to them, and that's what he gets paid for,
9 and that's his opinion, and apparently he's
10 always right.

11 The point of the matter is that really
12 doesn't make -- that's his opinion. Mark has an
13 opinion. Reasonable people can disagree.

14 At the end of the day, our zoning ordinance
15 is what it is. They say they want it -- that we
16 should change it, it's going to lead to inconsistent
17 results. The only inconsistent result they claim is
18 because they filed appeal here, and they don't like
19 the way we process these applications. Well, that's
20 the way we do it. We've always done it that way. We
21 didn't do anything different.

22 And at the end of the day, it seems to me
23 that Mark did not make a determination because he told
24 you that was not his authority to do so. Whether

1 these are similar uses or not is for another day, but
2 for today the issue is whether or not he made a
3 decision and they are aggrieved by the decision that
4 he made. Well, he didn't make a decision, that's all
5 there is to it.

6 So we don't think the appeal is well
7 founded. We appreciate all the information that has
8 been provided by the objectors. We disagree with them
9 and we ask that the appeal be denied and that in the
10 future the special use hearing be scheduled at a time
11 that's convenient for all the parties.

12 Thank you.

13 CHAIRMAN WHITE: Thank you. And I did offer
14 the floor to the petitioner, so at this time I'll open
15 the floor up to the petitioner. I'm going to ask you
16 to state your name for the record.

17 MR. BROWN: My name is Keith Brown. I'm
18 here with Andrew Kolb and we are the attorneys who
19 represent Maxxam Partners.

20 Anyone who knows me knows it's pretty hard
21 for me to stay quiet for two hours but I did it, and
22 in this process, though, the reason why we've taken
23 the position that we are being quiet is because we do
24 not believe you're really attacking the petition;

1 you're attacking the process of the County.

2 I fully agree with the position of the
3 County that Mr. VanKerkhoff did not make a
4 determination. So, therefore, this appeal has no
5 standing for purposes of -- from a procedural
6 standpoint actually is not proper before the Board
7 here and should be denied.

8 Secondly, there was a reference to the
9 medical marijuana and the fact that the County was in
10 the process of dealing with that. Under the Medical
11 Marijuana Act, that was required because State law
12 required them to do so, and that was not something
13 that was discretionary.

14 I'm now going to turn it over to Andrew Kolb
15 who's going to be addressing some of the other issues
16 that were brought up.

17 MR. KOLB: Andrew Kolb for Maxxam Partners.
18 The law that he just referenced is called the Illinois
19 Compassionate Use of Medical Cannabis Pilot Program
20 Act, and the actual act itself indicated a unit of
21 local government may enact reasonable zoning ordinances
22 and resolutions not in conflict with the act or with
23 the Department of Agriculture regulating the
24 registered medical cannabis cultivation and medical

1 cannabis dispensing organizations.

2 In sum, our State legislature was suggesting
3 strongly to municipalities to enact that type of
4 legislation, and we saw it throughout the state of
5 Illinois. There exists no such act mandating
6 municipalities and local governmental units to enact
7 legislation regarding alcoholism and substance abuse
8 treatment facilities. I think the example is not well
9 founded on that point.

10 Secondly, I think if you believe Mr. Abel's
11 argument that Section 5.15 is the foxhole you have to
12 jump down each time you have a similarity analysis,
13 you essentially render (dd) moot. There would never
14 be an instance where the Zoning Board of Appeals has
15 the ability to determine similarity because before it
16 ever got to that point, the zoning enforcing officer
17 would be put in front of the firing line to make that
18 decision ahead of time. Mr. Kinnally nicely elicited
19 that admission behalf Mr. Abel. I think when you look
20 at the code, it's nonsensical to interpret the code in
21 that manner. You're essentially taking Section (dd)
22 and making it completely moot.

23 Lastly, I think it's important to note, why
24 was Section 5.15 referenced by the applicant? That

1 may be a question in the back of your minds.

2 I think the applicant clearly referenced
3 that section to demonstrate the overall spirit and
4 intent of the Kane County zoning ordinance is to
5 entertain similarity at multiple levels within its
6 code. It's within the fabric of your code.

7 Did it intend to force the process down the
8 5.15 path? No. In fact, nowhere in the application
9 itself do we ask for relief under 5.15. The applicant
10 simply says 5.15 is also informative on the issue of
11 similarity. I think what you see is the objectors
12 taking advantage of that insight that we provided to
13 the Zoning Board in an effort to derail an otherwise
14 properly noticed special use provision under Section 8.

15 So with that we'd ask that the appeal be
16 denied.

17 CHAIRMAN WHITE: Thank you. And I did
18 mention earlier that if Campton Hills -- a
19 representative from Campton Hills wishes to speak at
20 this time, since you were mentioned in the discussion
21 under testimony this evening, I would afford you that
22 opportunity.

23 Please come forward. Please state your name
24 for the record.

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1 MR. BLECKER: My name is Harry Blecker,
2 B-l-e-c-k-e-r. I'm president of the Village of
3 Campton Hills.

4 Mr. Chairman and members of the Board --

5 CHAIRMAN WHITE: Mr. Blecker, I need to
6 swear you in.

7 (Witness duly sworn.)

8 CHAIRMAN WHITE: Thank you.

9 MR. BLECKER: Mr. Chairman, members of the
10 Board, I would like to thank you for the opportunity
11 to speak tonight at this appeal hearing related to the
12 special use petition submitted by Maxxam Partners,
13 LLC.

14 AUDIENCE MEMBER: Use a better microphone.

15 MR. KINNALLY: There you go.

16 MR. BLECKER: As you may be aware, the
17 Village of Campton Hills, Townships of Campton and
18 Plato have all recently unanimously -- and I state
19 unanimously -- agreed upon resolutions opposing a
20 special use petition submitted by Maxxam.

21 I'd like to take a step back. This
22 statement was prepared before we knew what was going
23 to be presented tonight by both sides, so I may be a
24 little redundant, and I do ask your indulgence. We

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1 were going to submit the resolutions to you tonight
2 for the Village of Campton Hills and the Township of
3 Campton, but my understanding is that they're already
4 submitted and we don't have to do that again.

5 As noted in the County staff report related
6 to the appeal, the Village previously processed a
7 similar use permit for Kiva in 2012 and 2013. This
8 special use permit was defeated in a vote of 2 to 4,
9 which is a correction from what is written in the
10 staff report.

11 Following the denial, the Village insurance
12 carrier was -- chose to settle a claim filed by Kiva
13 for \$500,000 without regard to the Village's position.
14 This is a correction from what appeared in a recent
15 Kane County article.

16 Since the Kiva petition, the Village now has
17 a new president, new board, new attorney, Village
18 administrator and staff that have all taken a position
19 different from the prior president and attorney. The
20 Village's past position in a settlement made by the
21 Village's insurance carrier should not be a reflection
22 of the Village's current position nor an indication
23 that the special use process is proper.

24 As clearly stated in the resolutions, it is

1 the Village's position that the current process is
2 flawed in the following ways which agree with the
3 appeal being considered today.

4 First, the proposed use is not listed within
5 the County zoning ordinance. As such, this use should
6 either be added through a Section 5-15 or text
7 amendment. The Village does not believe it is proper
8 procedure to allow the ZBA to add the use through a
9 special use public hearing as staff report is claiming.

10 Section 8-2 of this County's ordinance, the
11 Village believes that in order to hold a special use
12 hearing, the zoning enforcing officer should have
13 accepted the application for a special use permit and
14 made a determination the proposed use is, quote,
15 "similar in nature and clearly compatible with the
16 listed uses," closed quote, as required by
17 Section 5-15.

18 Section 4-1 grants the zoning enforcing
19 officer the power to make determinations on
20 applications for permits including special use
21 permits. If Sections 5-14 and 4-1 do not apply to the
22 special use permits as the staff report is claiming,
23 the Village believes that the only other appropriate
24 process would be to require a text amendment to add

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1 the use to the F Farm District.

2 Second, the staff report issued for the
3 appeal hearing states that the proposed use is, quote,
4 "similar enough," closed quote, to other uses within
5 the F District. It is the Village's position that the
6 proposed use is not similar to any of the uses listed,
7 specifically, a hospital or nursing home or
8 convalescent home. The definition of hospital under
9 the County zoning ordinance does not contemplate the
10 type of residency proposed by the Maxxam facility.

11 Both the Illinois law and courts have
12 acknowledged these uses are not similar and have
13 treated them differently under the law. As such, the
14 Village believes the text amendment process should be
15 required for the proposed use.

16 Third, the proposed use is not consistent
17 with the underlying proposed and intent of the.
18 F District with the Kane County 2040 plan. The
19 Village has located examples of such uses in PUD,
20 business, residential districts but not identified any
21 such uses within agricultural districts. The
22 Kane County 2040 plan calls for the active
23 preservation of farmlands. The 2040 plan also calls
24 for the proposed use to be located along the Randall

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1 and/Orchard Road corridors.

2 In closing, the Village's position that the
3 process include a text amendment and map amendment
4 creates a more open process that would afford the
5 residents of the area additional opportunities to
6 weigh in on the proposed use. All the Village is
7 asking at this point is that the process be open and
8 fair as possible.

9 Again, I would like to thank you for your time
10 and opportunity to speak on behalf of the Village of
11 Campton Hills. Thank you.

12 CHAIRMAN WHITE: Thank you.

13 Is there anyone else of authority or
14 representing a larger group that would like to make a
15 comment this evening? And I have to remind you that
16 that comment would be strictly on the procedure that
17 the County has followed in accepting this petition. I
18 don't want to get into any of the arguments on the
19 validity of the petition. That's for another meeting.

20 So is there anyone seeking the floor at this
21 time? Sir.

22 MR. STRAUSS: I'm just a citizen so I don't
23 know if my organization is large enough to warrant
24 being able to speak, but I would just like to say --

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1 CHAIRMAN WHITE: Let me swear you in if
2 you're going to present testimony. Please raise your
3 right hand.

4 (Witness duly sworn.)

5 CHAIRMAN WHITE: State your name for the
6 record, please, and your address.

7 MR. STRAUSS: My name is John Strauss.

8 CHAIRMAN WHITE: And what's your residence,
9 sir, your address?

10 MR. STRAUSS: I live at 39W680 Deer Haven
11 Trail in Campton Hills, Illinois 60175.

12 CHAIRMAN WHITE: Thank you.

13 MR. STRAUSS: I'd just like to say I've been
14 watching these proceeding, and it seems to me that
15 it's quite clear that Mr. VanKerkhoff never made a
16 decision, and if a decision hasn't been made, I don't
17 know how you can make an appeal of a decision that
18 never occurred. Thank you.

19 CHAIRMAN WHITE: Thank you. I didn't see
20 any other hands go up. So at this time I'll close the
21 public hearing.

22 MR. CARRARA: Mr. Chairman?

23 CHAIRMAN WHITE: Yes.

24 MR. CARRARA: I'm not sure -- just for point

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1 of view clarification, if you're closing the public
2 hearing, are you still going to allow the written
3 responses to the Maxxam memorandums?

4 CHAIRMAN WHITE: Well, that's what I want to
5 get into. I want to go into executive session and
6 speak with our counsel. I made that determination
7 prior to seeing those documents, and I'm not sure that
8 they're pertinent to this debate.

9 So is there a motion to go into executive
10 session?

11 MEMBER BOWEN: So moved, Mr. Chairman.

12 MEMBER CAMERON: Second.

13 CHAIRMAN WHITE: Moved and seconded. All in
14 favor say aye.

15 (Ayes heard.)

16 CHAIRMAN WHITE: Opposed, same sign.

17 (No response.)

18 CHAIRMAN WHITE: Motion carries and I'd ask
19 that our legal assistants go into executive session.

20 MR. CARRARA: Mr. Chairman, for clarification,
21 I've had this conversation with the State's attorneys
22 prior to this. We deem it a conflict, that the
23 State's Attorney represents Mr. VanKerkhoff. They met
24 with him and discussed the memorandum and the issues

1 he posed to this memorandum which are part of the
2 appeal, and they are now in, because of that, conflict
3 with giving you independent advice as to the
4 situations that are the matter of this appeal.

5 That's just for the record, and we'll allow
6 you to do as you deem, Mr. Chairman.

7 CHAIRMAN WHITE: Pat, I think you offered
8 your services.

9 MR. KINNALLY: Sure.

10 CHAIRMAN WHITE: We'll accept that.

11 (At 9:43 p.m., the Board adjourned into
12 executive session. Open session proceedings resumed
13 at 9:55 p.m., as follows:)

14 CHAIRMAN WHITE: I would entertain a motion
15 at this time to come out of executive session.

16 MEMBER BOWEN: I move, Mr. Chairman.

17 MEMBER STOVER: Second.

18 CHAIRMAN WHITE: Motion carries.

19 The only topic we discussed was the
20 documents that I accepted into testimony, giving the
21 attorney time to respond, and I would like to check
22 with you on a couple of dates that may or may not
23 work. The 23rd or the 24th is what we're trying to
24 achieve.

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1 MR. CARRARA: Mr. Chairman, I could commit
2 to having it the 24th to both the ZBA and to the
3 applicant and to the State's Attorney's office.

4 CHAIRMAN WHITE: That's the worst choice for
5 us, so is it possible to do it Monday the 23rd?

6 MR. CARRARA: As you've requested, I will
7 make sure it happens, Mr. Chairman.

8 CHAIRMAN WHITE: Thank you very much.
9 Is there a motion to continue the meeting?

10 MEMBER BOWEN: So moved, Mr. Chairman.

11 CHAIRMAN WHITE: Motion is to continue the
12 meeting to Monday, November 23rd, 7:00 p.m., and it
13 will be held at the government center if that fits the
14 calendar at the government center. We don't feel it's
15 necessary to meet here again. We do feel there's
16 accommodations at the government center that can
17 accommodate this crowd.

18 MR. CARRARA: Mr. Chairman, I apologize. I
19 thought the 23rd date was a date for me to have the
20 written response. I just took the opportunity to look
21 at my calendar. I may already be committed in
22 Northfield on another matter. If you can -- let's
23 hold the 23rd and I will make sure I have a partner or
24 somebody else cover that, but I wasn't aware of that

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1 when I said it earlier. I apologize.

2 CHAIRMAN WHITE: And the fallback date would
3 be the 24th, the Tuesday.

4 MR. CARRARA: Correct. Thank you.

5 CHAIRMAN WHITE: We won't have a full board
6 here is our concern.

7 MR. CARRARA: We'll do everything in our
8 power to make sure it's the 23rd then.

9 CHAIRMAN WHITE: Okay. Thank you.

10 Does everyone understand the motion?

11 MR. KINNALLY: We'll notice it for the
12 23rd then, with your permission, the noticing and
13 the -- for 7:00 we'll send out the notices.

14 CHAIRMAN WHITE: Any discussion on the motion?

15 (No response.)

16 CHAIRMAN WHITE: All in favor say aye.

17 (Ayes heard.)

18 CHAIRMAN WHITE: Opposed, same sign.

19 (No response.)

20 CHAIRMAN WHITE: Motion carries. There
21 being no further business this evening, I call this
22 meeting adjourned.

23 (Off the record at 9:57 p.m.)

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CERTIFICATE OF SHORTHAND REPORTER

I, Paula M. Quetsch, Certified Shorthand Reporter No. 084-003733, CSR, and a Notary Public in and for the County of Kane, State of Illinois, the officer before whom the foregoing proceedings were taken, do certify that the foregoing transcript is a true and correct record of the proceedings, that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision, and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 23rd day of November, 2015.

My commission expires: October 16, 2017



Notary Public in and for the
State of Illinois

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