COUNTY OF KANE)
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STATE OF ILLINOIS)

APPLICATION FOR SPECIAL USE
[M.A. CENTER (MATA AMRITANANDAMAYI CENTER)]
41W501 KESLINGER ROAD, ELBURN, ILLINOIS

Supplemental Memorandum in Opposition to Amended Petition for Special Use

Objectors, JEFF and MICHELE MUELLNER, JAMES and J.BRADLEY POLIVKA, and EDWARD RICHARDSON, by their attorneys, COOPER STORM & PISCOPO, file this Supplemental Memorandum in Opposition to the Amended Petition for Special Use for the M.A. CENTER (MATA AMRITANANDAMAYI CENTER), 41W501 KESLINGER ROAD, ELBURN, ILLINOIS, stating as follows:

This Memorandum is intended to supplement the Memorandum previously filed by the Objectors in this matter. (A copy of that Memorandum is attached as Exhibit A). Each of the points, authorities and objections set forth therein are hereby adopted and incorporated into the Supplemental Memorandum.

Before the Development Committee, the Petitioner and/or some committee members raised the following in response to the points and arguments set forth in the Objector's initial memorandum. Those points or arguments are: (1) Section 8.1-2 (q) of the Zoning Ordinance Provides the Authorization for the Requested Special Use; (2) the Prohibition Against Constructing or Maintaining More Than One Residential Building on a Subdivided Lot Do Not Apply in a Farming District; and (3) drainage Issues Need Not Be Addressed In Deciding to Grant a Special Use. For the following reasons, each of those points is inconsistent with the Zoning Ordinance and should not be considered by the Board.

1. Section 8.1-2 of the Zoning Ordinance does not authorize the requested Multi-Family Residences as a Permitted Special Use within a Farming District.

In a struggle to find authorization for the requested re-development, both the Zoning Board of Appeals and the Development Committee have overlooked a fundamental flaw in the underlying Petition as it relates to the permitted special uses which may be granted within a Farming District. In answer to the Objector's arguments on this point, the Petitioner claims that the enumerated special use they are trying to fit within is found in Section 8.1-2(q) of the Zoning Ordinance, which authorizes the following as possible permitted special uses within a Framing District:

> q. Monasteries, nunneries, religious retreats, nursing and convalescent homes, assisted living facilities, boarding schools and orphanages.

(Kane County Zoning Ordinance, § 8.1-2(q).) However, that section clearly does not authorize or even mention multi-family dwellings as a permitted special use within a Farming district.

To try to sidestep this issue, before the Development Committee, the Petitioner wrongly argued that the requested multi-family residences are no longer apartment buildings or duplexes as their original Petition states, but now are really something else, namely "temporary housing" or are merely replacements of the boarding school housing previously authorized for the subject property. Neither characterization is accurate or supported by the evidence offered by Petitioner. More important, neither position provides the necessary underlying authorization under the zoning ordinance to expand the permitted special uses within a Farming District to include the multi-family residences which the Petition is seeking to construct.

There is no dispute that neither the F-1 regulations nor the Special Use regulations permit multi-family housing within a Farming District. If it were otherwise, the property would simply cease to be a Farming District property. Petitioner's claim that this is merely "temporary housing" strains credulity. Apartment buildings which permit occupancies of at least six (6)

months are not "temporary housing." However, nothing in either Section 8.1-1 or Section 8.1-2 provides for "temporary housing." Three-story apartment buildings or 72 residential units in buildings are fundamentally multi-family dwellings under § 3.1 of the Kane County Zoning Ordinance. Nothing in the Ordinance provides that multi-family dwellings become something else based upon the term of occupancy by the tenant.

Our initial Memorandum sets forth a detailed explanation of why the proposed apartment building or duplexes/townhomes cannot qualify as the lodging that might be permitted for a boarding school. Nothing in Section 8.1-2(q) or any other provision of the zoning ordinance authorizes multi-family dwellings as an additional permitted use for any of the enumerated uses listed in 8.1-2(q). This is obviously why the Petitioner, in response to this issue attempted to shift the focus to a claim that the apartment buildings are merely a replacement for the dormitories that were previously on the property. This argument completely fails to explain what authorization would then exist for the 72 multi-family dwellings that are also proposed to be constructed in the form of townhomes.

Moreover, the sections on nonconforming uses expose the flaw in Petitioner's arguments regarding "replacements" for the former boarding school. Specifically, a nonconforming building may not be moved to any other location unless the entire building is moved and the use conforms to the regulations of the new district. (Zoning Ordinance, § 6.3-2.) Furthermore, if the nonconforming use is discontinued for a continuous periods of six months, it shall not be renewed. (Zoning Ordinance, § 6.3-4.) Article VI is intended to gradually eliminate the nonconforming uses of structures within the district. (Zoning Ordinance, § 6.5.) Here the nonconforming uses were discontinued many, many years ago, but the Petitioner now wants to resurrect them. This is not authorized by the Zoning Ordinance.

For all of these reasons, there simply is no enumerated special use which this Board can rely upon to authorize the construction of three apartment buildings and 72 multi-family residences on property that is within a Farming District. A special use for that purpose is not available and cannot logically be considered to be included within the enumerated special use being relied upon, namely Section 8.1-2 (q). If this Board were to exceed its clearly defined statutory authority and act to grant such an unauthorized and unpermitted use, Objectors will have no recourse but to file an action for Administrative Review.

2. The prohibition against more than one residence per zoning lot bars this Petition.

Next, at the Development Committee, Petitioner suggested that in a Farming District, there is no prohibition against constructing or maintaining more than one residential building on a single subdivided lot. Section 5.5 of the Zoning Ordinance provides that "Except in the case of a planned unit development, not more than one residential building shall be located on a recorded zoning lot, and not more than two (2) detached structures accessory to a dwelling shall be located on a recorded or zoning lot." (Zoning Ordinance, § 5.5.) Contrary to the Petitioner's argument, nothing in this provision exempts residences located in Farming Districts or limits its application to Residential Districts.

Moreover, the only residences allowed in a Farming District are those described in the ordinance itself, which require single parcels of land significantly larger than those under the R-1 District R-1. Specifically, even one-family uses are only allowed if (1) it existed prior to December 11, 1979; (2) the use would be on a parcel of land recorded prior to December 11, 1979, **and** containing 20,000 square feet with 75 feet in width; (3) the parcel is not less than 15 acres **and** was recorded between December 11, 1979 and September 8, 1992; or (4) the parcel is not less than 40 acres with 250 feet in frontage, **and** the principal use of the parcel is agricultural.

Uses allowed in the Farming District expressly exclude single family homes (except as noted above) and subdivision developments. (Zoning Ordinance, § 8.1-1(a). There is no question that the Petitioner's proposal fails to meet any of these requirements.

Thus, nothing in Section 5.5, requiring only one residential structure per zoning lot, or Section 8.1-1, purports to limit its application to Residential Districts or exempt Farming Districts. In fact, the Farming District itself does not allow multi-family housing and limits the ability to construct even single-family homes. The suggestion that the Zoning Ordinance does not prohibit the building of two residential structures on the same lot is contrary to the Ordinance's plain language and lacks merit.

As the Objectors' initial Memorandum indicates, the foregoing issue, together with the lack of an enumerated permitted special use for multi-family dwellings within a Farming district underscore why Petitioners' attempt to obtain authorization for this development through the special use process is totally misplaced. This mixed use proposed development is properly suited for a Planned Unit Development and/or a Petition for Rezoning of portions of the subject property to a multi-family residential use in accordance with the regulations governing an R9 Residential District. Simply stated, these is no authority under the zoning ordinance for this Board to grant permission for such a mixed use development outside the procedures for a planned unit development.

3. Any decision by the County Board to approve the requested Special Use would be contrary to the evidence presented to the Zoning Board of Appeals because the drainage issues have not been adequately addressed.

Finally, it is undisputed that the Petitioner has failed to present any plans depicting the parking for the proposed apartment buildings or townhomes, and has failed to present any plans detailing how such parking areas and the excavation and construction of those parking areas will impact the drainage and storm water management on the subject property. Under the current

proposal and the existing provisions of the Zoning Ordinance, the Petitioner will be required to provide 144 parking spaces for the 72 proposed townhome units and 384 parking spaces for the 192 multi-family units in the three proposed apartment buildings. This is a total of 528 new parking spaces that are not depicted anywhere on any of the plans submitted by the Petitioner to date.

This is a crucial but totally missing element of the proposal, especially because of the proximity the new parking facilities will have on Blackberry Creek and its surrounding watershed. Petitioner has presented no evidence nor any plans to date which would have allowed either the Zoning Board of Appeals or the Development Committee to consider the impact of such a significant expansion of the parking facilities will have on the drainage and storm water management on the subject property, and correspondingly, on Blackberry Creek, its watershed and the drainage and storm water management on surrounding and adjacent properties.

At the Development Committee level, the Petitioner conceded that no such plans had been submitted. In fact, at one point Petitioner's representative made the surprising revelation that underground parking would likely be a part of their ultimate plans. Notably, no evidence or plans for such underground that would result from the excavation for, construction or and use and maintenance of such underground parking have been presented. Thus, the Zoning Board of Appeals could not possibly have determined that the impact these facilities would have on the drainage for the subject property or its impact on the Blackberry Creek watershed.

At the Development Committee, both Petitioner and AIA Director Mark VanKerkhoff suggested that it was unnecessary for the Petitioner to address these drainage and storm water management issues in connection with a Petition for Special Use, because that is not part of the Special Use process and can instead be addressed at the permit and building phases of the re-development of the property. This position is directly at odds with the express requirements this

County has adopted for considering and granting special uses. Ironically, this position also admits that the Petitioner has failed to meet at least three of the express criteria for the County Board to grant the proposed special use.

Section 4.8-2 of the Zoning Ordinance expressly requires the Petition to present sufficient evidence to the Zoning Board of Appeals from which the Board could find that the proposed parking facilities and drainage were being provided in connection with the proposed re-development of the property. Specifically, Section 4.8-2(d) of the Zoning Ordinance provides, in pertinent part, as follows:

> *4.8-2 Public Hearing.*
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> Uses as hereinafter enumerated, which may be proposed for classification as "special uses", shall be considered at a public hearing before the Zoning Board, and its report of findings of fact and recommendations shall be made to the County Board following the public hearing; provided, that the County Zoning Board, in its report of findings or facts and recommendations to the County Board, shall not recommend a special use unless the Zoning Board shall find:
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> * * *
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> (d) That adequate utility, access roads, drainage and/or other necessary facilities have been or are being provided;

(Zoning Ordinance, § 4.8-2(d).) The Zoning Board of Appeals is also required to find that the proposed use would not (a) endanger the public health (b) be injurious to the use and enjoyment of other property in the immediate vicinity or (c) impede the normal and orderly development and improvement of surrounding property. However, without specific evidence of the proposed reconfiguration of the parking facilities, and the impact on drainage and storm water management and its ultimate impact on the Blackberry Creek watershed, there is no possible way the Zoning Board of Appeals or now this County Board could possibly consider and decide any of the foregoing issues. The impact on Blackberry Creek and its watershed from an unknown but possible proposed underground parking structure alone demonstrates that there is insufficient

evidence to make the necessary findings to grant the proposed use on any of the above outlined issues. To suggest that these issues can be bypassed at the Special Use level would render the word "drainage" and a significant portion of Section 4.8.2 utterly meaningless.

No jurisdictional determination or waiver has been obtained by the Petitioner from the Army Corps of Engineers. This fact alone should signal to this Board that the cart is way before the horse in connection with this proposed development. Blackberry Creek and its watershed are clearly under the jurisdiction of the Clean Water Act. In *Bricks, Inc. v. EPA*, 426 F.3d 918 (7th Cir. 2005) the Seventh Circuit Court of Appeals held that jurisdiction for the Army Corps existed where wetlands were adjacent to an unnamed tributary of Blackberry Creek, which itself was a tributary of Fox River, an interstate water within the jurisdiction of the CWA. The court further held that a significant hydrological or ecological connection is not required to support the Corps' jurisdiction over particular adjacent wetlands.

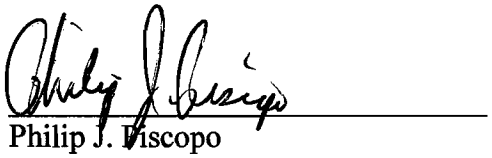
Here, moreover, there is a significant hydrological or ecological connection between the storm water management and drainage for the proposed re-development of the subject property and Blackberry Creek and its surrounding wetlands and watershed. Thus, there cannot be any doubt that the Corps has jurisdiction over the drainage and storm water management and any proposed re-development of the property that would impact those issues. Accordingly, without the approval of the development plans for the property by the Army Corps or a waiver of their jurisdiction, neither the Zoning Board of Appeals nor this County Board could possibly consider, determine and/or made the necessary findings with respect the drainage, public health, and the other related issues for the subject property outlined above.

For all of the above reasons, the recommendations of the Zoning Board of Appeals and the Development Committee are clearly contrary to the manifest weight of the evidence that was presented to the Zoning Board of Appeals. This Board has a duty to protect the adjacent and

surrounding properties and property owners, as well as the value and use and enjoyment of those properties by being required to assure that before such a special use is granted, the Petitioner has presented evidence to support a finding that the drainage for the proposed development is adequate. Nothing in the Zoning Ordinance permits this consideration of this issue to be deferred or bypassed.

It is clear that this Board cannot make the required findings regarding the drainage for the proposed development given the status of the record supporting this Petition. For this additional reason, we respectfully request that the Petition be denied and/or that this matter be returned to the Zoning Board of Appeals to require that sufficient evidence, plans and studies be presented to meet the criteria for granting a special use, including especially the proposed parking and drainage for the subject development.

Respectfully submitted,



Philip J. Piscopo
Attorney for Objectors

Philip J. Piscopo
Cooper, Storm & Piscopo
117 South Second Street
Geneva, IL 60134
(630) 232-6170
pjp@csp-law.com