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Via E-mail Transmittal and
U.S. First Class Mail
vankerkhoffmark@co.kane.il.us

Mark VanKerkhoff, AIA
Director
Kane County Development and
Community Services Department
719 S. Batavia Avenue, Building A
Geneva, IL 60134

RE: Maxxam Partners, LLC Special Use Application

Dear Mr. VanKerkhoff:

The undersigned represents Joline T. Andrzejewski, as Trustee of the Joline T. Andrzejewski Trust #2004 and Abram Andrzejewski. This letter shall serve as partial response to the materials submitted by Maxxam Partners, LLC with its application for a special use permit for its proposed residential substance abuse treatment facility (the "Facility") to be constructed on the site of the former Glenwood Academy (the "Parcel"), located in unincorporated Kane County on a Farming/Agricultural Zoned Parcel. We ask that this response be made part of the application file. For purposes of preparing this response, we have reviewed Maxxam Partners' special use permit application (the "Application"), their three expert opinions offered in support of their Application (the "Opinions"), and applicable local, state, and federal law.

The proposed use outline in the Application requires an Amendment to the Kane County Zoning Ordinance or an Amendment to the Kane County Zoning Map. For the reasons explained in this letter, it would be improper for the County to allow the Applications to be processed as a Special Use. As a review of case law, facts in the Application, standing Illinois legislation, and existing regulatory laws show, the Facility is not substantially similar to any special use in the F zoning district.

The appropriate course of considering the proposed use of this Farming/Agricultural Zoned parcel would be for the County to initiate an amendment to its zoning code to 1) define this type of use; 2) identify what zoning districts are best suited for the use; and, 3) identify what conditions are necessary to protect the public health, safety and welfare in considering the proposed Facility and other similar facilities that will be proposed in the future.

ANALYSIS

I. The Facility Does Not Fit Within Any Special Use Defined In The Kane County Zoning Ordinance.

The Kane County Zoning Ordinance ("K.C.Z.O.") does not contemplate the use of land for residential substance abuse treatment facilities such as the Facility. That is true with respect to all zoning districts, including the F Zoning District (Farming/Agricultural District) in which the Parcel is located. In the K.C.Z.O., there is a specific list of defined "special uses" that may be permitted in a zoning district with specific approval from the County. The Facility does not fit within the definition of any listed special use for any zoning district. Under Illinois zoning law, "[s]ince a special use permit allows property owners or developers to use their land in an express exception to the zoning code, the application must prove that the property falls squarely within that exception." *Shipp v. County of Kankakee*, 345 Ill. App. 3d 250, 253 (3d Dist. 2003). Because Maxxam Partners clearly cannot provide such proof in their Application, the Application should not be processed as a special use.

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

The Opinions argue that the Facility should be granted a special use permit under Section 5.15, which states that the County Zoning Enforcement Officer "may allow land-uses which, though not contained by name in a zoning district list of permitted or special uses, are deemed to be similar in nature and clearly compatible with the listed uses." K.C.Z.O. § 5.15. They also point to Section 8.1-2, which allows as a special use in the F Zoning District "[o]ther uses similar to those permitted herein as special uses." K.C.Z.O. § 8.1-2(dd).

There is no specific set of factors listed in K.C.Z.O. that the Enforcement Officer should or must consider with respect to non-listed uses, other than those that are generally applicable to zoning decisions. "However, such non-listed uses shall not be approved until the application for such use has been reviewed by the County Development Department staff and a favorable report has been received by the Enforcing Officer." *Id.*

The allowance of a non-listed use ultimately has much the same effect as a text amendment, but without the orderly public policy analysis, study, and planning that typically attend the proposal and passage of a K.C.Z.O. text amendment. The K.C.Z.O. states that "non-listed uses which are approved shall be added to the appropriate use list at the time of period updating and revision". In the meantime, allowance of the proposed special use on this parcel would create a precedent for a similar use on any parcel bordering R1 zoned properties and for all parcels in the F1 Farming and Agricultural zoned districts. Establishing such a precedent, which might apply across the wide swaths of Kane County for uses similar to the Applicants, in an unplanned and ad-hoc manner is unwise and inconsistent with the typically orderly and deliberative land use planning process of Kane County. As such, the standards and considerations applicable to text amendments should be applicable to the consideration of non-listed uses.

The Opinions attempt to shoe-horn the Facility into one of the specifically defined special uses permitted in F Zoning Districts, so that it may be considered sufficiently "similar." The Opinions focus on the "hospital" and "nursing and convalescent home" special uses, but the Facility should not be considered sufficiently "similar" to either type of use. If the Facility is "similar" to any type of defined special use, it is most analogous to a "clinic" or a "group home."

A. The Facility Is Fundamentally Different Than A Hospital.

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

Second, the definition of "hospital" in the K.C.Z.O. – unlike the definition of "group home" – does not contemplate the residential nature of the Facility. According to data compiled by the federal Center For Disease Control and Prevention, the average hospital stay is 4.8 days. Centers for Disease Control and Prevention, FastStats: Hospital Inpatient Care, *National Hospital Discharge Survey: 2010 Table, Number and Rate of Hospital Discharges*, http://www.cdc.gov/nchs/data/nhds/1general/2010gen1_agesexalos.pdf. Data supplied by the Petitioner in their Application indicates that "The average stay will be between 30 to 90 days." The residential nature of the proposed Facility with stays potentially 625% or 1,875% longer than the average hospital stay makes it clearly distinct and dissimilar from a hospital.

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

While hospitals and substance abuse treatment facilities may have some overlap in services, the luxury and largely nonpublic nature of the proposed Facility, its provision of services such as meditation, yoga, massages, personal trainers and Zumba classes to a residential clientele, and the clearly disparate treatment of such a Facility under Illinois law and our state's regulatory framework do not permit it to be considered "similar in nature and clearly compatible."

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

The K.C.Z.O. defines a "nursing and convalescent home" as "a building and premises for the case of sick, infirm, aged, or injured persons to be housed; or a place of rest for those who are bedfast or need considerable nursing care, but not including hospitals, assisted living facilities or group homes." K.C.Z.O. § 3.1. Illinois law is clear that a substance abuse treatment facility is also fundamentally different than a nursing home.

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

Second, Illinois' regulatory structure also reflects the reality that substance abuse treatment facilities and nursing home facilities are fundamentally different. The two types of facilities are subject to distinct sets of regulations administered by different state agencies. Nursing homes are licensed and regulated by the Illinois Department of Public Health in accordance with the Nursing Home Care Act. *See* 210 ILCS 45/1-101 *et seq*. In contrast, as explained above, substance abuse treatment facilities are licensed and regulated by the Illinois Department of Alcoholism and Substance Abuse pursuant to the Alcoholism and Other Drug Abuse and Dependency Act. *See* 20 ILCS 301/1-1 *et seq*.

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

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

Two uses conspicuously absent from the analyses in the Opinions are "clinic" and "group home because they are not permitted uses in the underlying F district." K.C.Z.O. § 3.1. However, those are the two defined uses that the Facility most closely resembles.

A "clinic" is "an individual or organization offering medical, psychological and/or dental services." K.C.Z.O. § 3.1. Clinics are a permitted use in the RB Zoning District. K.C.Z.O. § 10.1(c). Further, the RB Zoning District permits "mixed use" properties – *i.e.*, "[a] building under one ownership which contains dwellings either located above the ground floor or to the rear of the building and permitted restricted business uses, per this ordinance, located on the ground floor or to the front of the building." K.C.Z.O. § 10.1(h). In fact, Illinois case law already holds that a methadone clinic falls within an ordinance permitting use of land for "[o]ffices of professional persons such as physicians, dentists, health practitioners (but not including veterinarians), attorneys, architects and engineers, and including out-patient medical and dental clinics, but not hospitals." *Vill. of Maywood v. Health, Inc.*, 104 Ill. App. 3d 948, 953 (1st Dist. 1982). It is easy to see how a mixed use property in an RB Zoning District could accommodate a residential substance abuse treatment facility.

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

A second issue for the Facility, and for the County, is that the K.C.Z.O. does not identify in which zoning districts group homes may be established or whether such homes are permitted uses or special uses. Instead, it states that "[n]o section, clause or provision of this Ordinance is intended, nor shall be construed, to be contrary to the Federal Fair Housing Act as amended. (42 USC 3601 *et seq.*), including but not limited to those provisions contained in the Federal Fair Housing Act which may apply to 'group homes' as defined herein." K.C.Z.O. § 5.3(b). Thus, implying that group homes are allowed uses to the extent necessary for compliance with the federal Fair Housing Act ("FHA"). The lack of clarity concerning the appropriate locations for group homes in Kane County could lead to a patchwork of inconsistent (and incompatible) uses that defeats the County's thorough master planning efforts.

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

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

> The "equal opportunity" element limits the accommodation duty so that not every rule that creates a general inconvenience or expense to the disabled needs to be modified. Instead, the statute requires only accommodations necessary to ameliorate the effect of the plaintiff's disability so that she may compete equally with the non-disabled in the housing market. We have enforced this limitation by asking whether the rule in question, if left unmodified, hurts handicapped people *by reason of their handicap,* rather than by virtue of what they have in common with other people, such as a limited amount of money to spend on housing.

Wis. Cmty. Serv., Inc. v. City of Milwaukee, 465 F.3d 737, 749 (7th Cir. 2006) (emphasis in original; quotations and citations omitted); 42 U.S.C. § 3604(f)(3)(B).

The "mere fact" that a substance abuse treatment facility does not fit within the definitions of allowable uses in a zoning district "does not automatically require a reasonable accommodation. The accommodation sought must be related to the disability: the FHA does not grant protected classes carte blanche in determining where they can live in total disregard of local zoning codes." ***Advocacy & Res. Ctr. v. Town of Chazy*****, 62 F. Supp. 2d 686, 689 (N.D.N.Y. 1999)**(emphasis added). Accordingly, for example, "an accommodation should not extend a preference to handicapped residents relative to other residents, as opposed to affording them equal opportunity and accommodations that go beyond affording a handicapped tenant an equal opportunity to use and enjoy a dwelling are not required by the [FHA]." *Sporn v. Ocean Colony Condo. Ass'n*, 173 F. Supp. 2d 244, 250 (D.N.J. 2001) (quotations omitted; alteration adopted).

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

Importantly, there is no requirement that when the County must make a "reasonable accommodation," it is limited to consideration of the accommodation requested by the Applicant. Under the FHA, the County may not "refus[e] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). The County may choose what accommodation to make, as long as such accommodation is "reasonable." *See Corp. of Episcopal Church in Utah v. W. Valley City*, 119 F. Supp. 2d 1215, 1222 (D. Utah 2000). As such, if an accommodation to ameliorate the handicap suffered by the intended clients of the Facility is necessary, the County does have options as to such accommodation. For example, depending on the exact circumstances, the County to fulfill its obligation of providing a reasonable accommodation could consider a permit for a mixed use clinic property in an RB Zoning District. Alternatively, the County could fulfill its requirements by considering a permit for a group home or homes in any zoning district. A third entirely appropriate and reasonable accommodation by the County might be the consideration of a text amendment to the K.C.Z.O. that specially addresses residential substance abuse treatment facilities within the County's zoning plan. It is important to recognize that there is no obligation of the County under the FHA or ADA to grant this *particular* application for a special use, and that there are multiple viable options that are more orderly and consistent with the County's existing zoning ordinance and long history of deliberative and consistent land use planning.

IV. The Kane County 2040 Plan

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

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

CONCLUSION

In conclusion, the Facility is not a permitted or special use in the F Zoning District. A review of case law, standing legislation and regulatory treatment, and the facts of the Petitioner's own Application show that a special use permit cannot be processed under the hospital or nursing home exceptions. Under the current K.C.Z.O., the proposed use would most accurately be defined as a mixed use clinic, but this use is not permitted on an F District parcel and would require a rezoning of the Parcel to a Restricted Business Zoning District. Because the K.C.Z.O. does not contemplate residential substance abuse treatment facilities in any defined use, the County should consider initiating a text amendment to the zoning regulations to address such facilities. The amendment should identify: (1) in what zoning districts such facilities may be established; (2) whether such facilities will be allowed as a permitted or special use; and (3) what conditions should be applied to such facilities to protect the public health, safety and welfare. A comprehensive analysis of the external impacts generated by such facilities should be conducted to ensure the County accounts for the impacts of not just this Facility, but for the many other similar proposals that will likely be forthcoming based on decisions made on the current Application.

Very truly yours,

RATHJE & WOODWARD, LLC

Kevin M. Carrara

KMC/lb

cc: Mr. J. Lulves, Assistant Kane State's Attorney
Client