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Memorandum

Date: August 19, 2015

To: Steven Marco, Maxxam Partners, LLC

From: Steven M. Elrod
Hart M. Passman

Re: Proposed Alcoholism and Substance Abuse Treatment Facility, Kane County, Illinois
Zoning Analysis

We have reviewed the Zoning Ordinance of Kane County, Illinois, and have determined that the property known as the Glenwood School for Boys, located at 41W400 Silver Glen Road in unincorporated Kane County, may be used for an alcoholism and substance abuse treatment facility, provided that a special use permit is approved by the County Board. We have also concluded that this use likely satisfies the standards for granting a special use at the specified location. Our analysis and findings are summarized below.

I. Permitted and Special Uses of the Subject Property.

There is no individual use in the County Zoning ordinance that explicitly references residential alcoholism and substance abuse treatment facilities. However, this use is included within several listed uses. The closest defined uses that encompass various portions of the proposed residential alcoholism and substance abuse treatment facility are:

- "*Assisted Living Facility*," defined as: "A building and premises where the proprietor furnishes lodging and varying degrees of custodial care to persons who are elderly or who require assistance in daily living, but are otherwise in good health."
- "*Convalescent or Nursing Home*," which is defined as: "A private home for the care of the aged or infirm, or a place of rest for those suffering bodily disorders."
- "*Hospital or Sanitarium*," defined as: "An institution open to the public in which patients or injured persons are given medical or surgical care; or for the care of contagious diseases."
- "*Nursing and Convalescent Home*" (a separate term in the Zoning Ordinance) is defined as: "A building and premises for the care of sick, infirm, aged, or injured

persons to be housed; or a place of rest for those who are bedfast or need considerable nursing care, but not including hospitals, assisted living facilities or group homes."

It is our opinion that the defined "hospital" use best describes the medically managed detoxification component of the proposed facility, and the defined "Nursing and Convalescent Home" use best describes the residential dwelling arrangements for the residents of the facility.

The Ordinance defines "Hospital or Sanitarium" as "an institution open to the public in which patients or injured persons are given medical or surgical care; or for the care of contagious diseases." The reference to "medical care" in the "hospital" definition comes closest to the proposed facility's treatment programs. We note that the proposed facility will have a licensed medical physician as its medical director, and that a licensed medical physician may see each facility patient daily, as needed. Also, the facility must have 24-hour staffing by either a registered or licensed nurse, or a certified emergency medical technician. This level of care and professional staff indicates that the facility will share many of the same characteristics as a hospital.

The Ordinance defines "Nursing and Convalescent Home" as "a building and premises for the care of sick, infirm, aged, or injured persons to be housed; or a place of rest for those who are bedfast or need considerable nursing care, but not including hospitals, assisted living facilities or group homes." We understand that the patients of the proposed residential alcoholism and substance abuse treatment facility are disabled and sick, and will be housed in seven separate resident lodges. Each lodge is a home or dwelling unit as it contains bedrooms with private bathrooms, a kitchen, and a dining/living room area. We further understand that the patients' medications will be administered to them in the lodges by the facility's professional staff, the same as in a Nursing Home.

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

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

II. Special Uses under Illinois Law.

The Illinois Supreme Court has explained that, under Illinois zoning law, "a 'special use' is a type of property use that is expressly permitted within a zoning district by the controlling zoning ordinance so long as the use meets certain criteria or conditions." *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 196 Ill. 2d 1, 16 (2001). The identification of a use as a "special use" constitutes "a local legislative determination that the use, as such, is neither inconsistent with the public's health, safety, morals or general welfare, nor out of harmony with the town's general zoning plan." *Id.* at 17 (internal citation omitted).

This means that the County has *already* determined, in its legislative discretion, that uses like the proposed facility are allowed and contemplated in the F Farming District, so long as the specific proposal satisfies the designated standards for the special use permits. It may be that there are parcels within the F Farming District that, for reasons unique to those parcels, are *unsuitable* for uses like the proposed facility. However, in this case, given the historic use of the subject property and existing buildings as an isolated residential-like setting for at-risk individuals, as well as the extensive natural and landscaped buffers, and we are certain that the proposal meets the County standards for special uses, particularly if the proposal will not include new construction.

We understand that opponents to the proposed facility have argued that the proposal is inconsistent with the County's comprehensive land use plan. Even if this is true, it is not dispositive. Under Illinois law, comprehensive plans are advisory only: Section 5-14004 of the Illinois Counties Code, 55 ILCS 5/5-14004 expressly states as much, and numerous court opinions, analyzing parallel provisions of the Illinois Municipal Code, confirm it. *See, e.g., City of Chicago Heights*, 196 Ill. 2d at 22 ("the City's zoning ordinance is law; the comprehensive plan is not."). Notably, in *Chicago Heights*, as here, the applicable special use permit standards do *not* include "conformance with the comprehensive plan." *Id.* Thus, this attack on the proposed facility would not be persuasive under Illinois or County law.

III. LaSalle Factors and Zoning Ordinance Standards.

At public hearings held by the Village of Campton Hills in 2012, concerning a similar treatment facility for this same property, the Campton Hills Village Attorney stated his opinion that such prior proposal satisfied the *LaSalle* factors by which courts frequently review zoning disputes. At the hearing and afterward, some opponents to that proposal voiced their disagreement with the Village Attorney's analysis. We have conducted our own analysis of the evidence presented at the public hearings and of the *LaSalle* factors, and believe that the Village Attorney was correct: a court should find that the prior treatment facility proposal satisfies those factors.

The specific task of the County is to weigh the evidence against the six standards for special uses set forth in Section 4.8-2 of the Zoning Ordinance. We believe that those standards

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can be met for this new proposed use, and therefore we conclude that the new proposal can qualify for the required special use permit.

IV. County Review under the Fair Housing Act.

Alongside its review of the proposed facility under the Zoning Ordinance and State zoning law, the County must also consider its obligations under the Federal Fair Housing Act ("*FHA*").

The FHA prohibits discrimination in housing, including discrimination against "persons with disabilities." This prohibition encompasses the enforcement of zoning or other local ordinances in a manner that treats disabled persons less favorably than non-disabled persons. Under the FHA, a "disability" generally means "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h)(1). Individuals recovering from alcoholism and substance abuse, such as those that would be residing at the proposed facility, are considered to be persons with disabilities within the coverage of the FHA.

As we have advised our local government clients throughout the region, the United States Attorney's Office for the Chicago metropolitan area has taken an aggressive posture when local governments deny zoning approvals for residential facilities for persons with disabilities. In a well-known case resolved by consent decree, *United States v. Village of South Elgin* (No. 05 C 5258, N.D. Ill., December 13, 2006), which, incidentally, is located in Kane County, monetary damages and a civil penalty were paid by the Village as part of the settlement agreement for the denial of a special zoning permit, based in part on improper comments made by residents appearing at the public hearings in opposition to the proposed use. The settlement agreement also required the Village Board and other relevant village employees to receive training on the Fair Housing Act and required the village to keep and maintain records for the next three years relating to other zoning and land use requests regarding persons with disabilities. The Village was also required to submit biannual Compliance Reports, which Reports included, among other things, "the identity of each zoning, land-use, or building application or request for reasonable accommodation related to housing for disabled persons (including those for building permits, special exceptions, variances, or other uses not provided for) for which the Village had made a determination, indicating: (1) the date of the application; (2) the applicant's name; (3) the applicant's current residential street address; (4) the street address of the proposed housing; (5) the disposition of the application, including any appeals, indicating reasons for that outcome; and (6) if a vote was taken, how each member of the responsible body voted and the date of the vote." The U.S. Attorney said at the time that "this settlement should send a message to other communities that no municipality, driven by neighborhood opposition, can prohibit persons recovering from addictions from enjoying the benefits of living in the safe and supportive environment" of these types of residential facilities. In another jurisdiction, a court went so far as to reject a claim of immunity for town officials, because of their "irrational prejudice" against

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persons with disabilities. *See Pathways Psychosocial v. Town of Leonardtown*, 133 F. Supp. 2d 772 (D. Md., 2001).

Accordingly, the County will be required to make a “reasonable accommodation” with respect to the facility, because the facility will provide residential services to persons with disabilities who are protected under the Act. Notably, Section 5.3(b) of the County’s Zoning Ordinance expressly recognizes that the FHA is applicable in Kane County, and implicitly acknowledges the County’s mandate to provide such accommodations to persons with disabilities. Particularly when, as here, the proposed facility satisfies all zoning criteria for approval, it would be difficult for the County to deny the requested zoning relief without violating the FHA.

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