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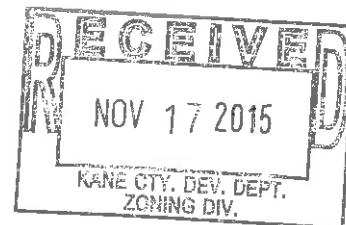
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Date: November 16, 2015

To: Mark VanKerkhoff, AIA, Zoning Enforcement Officer
Zoning Board of Appeals

From: Andrew E. Kolb

Re: Appeal dated October 30, 2015, in relation to Maxxam Partners, LLC – Special Use
Petition 4364



I. ZONING

1. Objector's Assertion: Enforcing Officer's decision not to follow the procedures of the Kane County Zoning Ordinance must be reversed. (Paragraph 27)

Applicant's Response: Applicant agrees with the assertions set forth in the memorandum dated November 12, 2015 issued by Mark VanKerkhoff. In further support of the County's Zoning Enforcement Officer interpretation of the zoning issues raised Applicant resubmits its Rider and related legal and expert opinions Applicant submitted with its Special Use application on August 31, 2015.

Analysis of Section 5.15

Applicant raised Section 5.15 of the Kane County Zoning Ordinance within its Application for Special Use solely to illustrate how similarity is handled in the Ordinance in a variety of situations. Section 5.15 (*is similar to all other sections within Section 5 which dictate how one must comply operationally and physically in order to keep their already issued permit active and compliant with all related regulations*) provides a process for an Applicant to petition the County to amend the Zoning Ordinance by adding non-enumerated land uses consistent and similar to existing enumerated uses to any section that such enumerated uses are listed for the purpose of providing Applicants with issued permits and special use permits the ability to use their already issued permits for previously non-listed uses without requiring Applicant to petition the County to issue a new permit. Such application for a new permit requires a legislative action for approval as opposed to Section 5.15 which allows Applicant to apply for an Administrative action that is a more expeditious process. Unfortunately, as per the attached Memorandum prepared by the Lannert Group dated November 17, 2015, in the case of this property, it is impossible for Applicant to utilize Section 5.15 because the currently issued special use is so specific to the current owners' unique use that any new owner would be compelled to submit an application for the issuance of a new permit.

II. SIMILARITY

2. Objector's Assertion: Applicant's Proposed Use is fundamentally different from a Hospital. (Paragraph 27)

Applicant's Response: Applicant incorporates herein each of Applicant's arguments regarding similarity as set forth within the Applicant's Rider to Application for Special Use (together with all materials incorporated herein collectively the "Rider").

3. Objector's Assertion: Applicant's proposed use, an Alcoholism and Substance Abuse Treatment Facility, differs from a hospital because unlike a hospital, Applicant's proposed facility is not "an institution *open to the public*". (Paragraph 27)

Applicant's Response: Objector's assertion is incorrect. Applicant asserts that the term "Hospital" encompasses all types of hospitals. Many hospitals have a limited scope of services. Further, Hospitals can be publicly or privately owned. As per the Emergency Medical and Treatment Labor Act (EMTLA), privately-owned hospitals may turn away patients in a non-emergency situation; Applicant's proposed facility is privately-owned and similar to a privately-owned hospital may deny certain members of the public *that do not meet the criteria required for admission*.

4. Objector's Assertion: Illinois law recognizes "hospitals, whether private or publicly owned, are institutions *operated largely for the benefit of the community* by the care and treatment of bed patients" and therefore Applicant's proposed use is not similar to a Hospital. (Paragraph 27)

Applicant's Response: The Objector's assertion supports the Applicant's position that an Alcoholism and Substance Abuse Treatment Facility is similar to a Hospital because Applicant's proposed facility will be operated largely for benefit of the community by the care and treatment of bed patients and will be privately owned.

5. Objector's Assertion: The definition of a Hospital does not consider the residential component of the proposed use. (Paragraph 28)

Applicant's Response: The Objector's assertion is incorrect. The definition of "Hospital" does consider the residential component of the proposed use because as per Applicant's detailed list of relevant hospitals in Illinois included in the Murer Consultants, Inc. expert opinion that corroborates the similarity between the proposed use and a Hospital (Tab #11 of the Rider), many Hospitals in Illinois provide inpatient residential alcoholism and substance abuse treatment within the hospital.

6. Objector's Assertion: The projected average duration of stay at the proposed facility is potentially 625% or 1,875% longer than the average hospital stay and thus, the proposed use differs from a Hospital. (Paragraph 28)

Applicant's Response: Objector asserts that "the average hospital stay is 4.8 days." Objector attempted to mislead the ZBA by not qualifying Objector's statistic. Objector left out from its assertion that such statistic is only related to "short-stay Hospitals."

The Objector's assertion is incorrect because it bases its assertion on inappropriate statistics, *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, related to the average length of stay in Hospitals. As per the American Hospital Association's most recently issued statistics related to Hospitals' utilization, *AHA Hospital Statistics (2015 Edition)*, "Nonfederal Long-Term General and Other Special Hospitals" average length of stay (LOS) is 71.7 days. (*AHA Hospital Statistics (2015 Edition)*, Page 8) According to the American Hospital Association, LOS is defined as:

"Length of Stay (LOS): LOS refers to the average number of days a patient stays at the facility. Short-term hospitals are those where the average LOS is less than 30-days. Long-term hospitals are those where the average LOS is 30-days or more. The figure is derived by dividing the number of inpatient days by the number of admissions." (*AHA Hospital Statistics (2015 Edition)*, Page 206)

Applicant asserts in its Application that the average length of stay for patients in its proposed facility will be 30-to-90 days. As such, these appropriate exemplify and support that similarity between a hospital and an Alcoholism and Substance Abuse Treatment Facility.

7. Objector's Assertion: Illinois law recognizes that alcoholism and substance abuse treatment facilities and hospitals are different. (Paragraph 29)

Applicant's Response: Applicant incorporates herein the opinions and assertions set forth on Page 3 (Paragraph 2) of the expert opinion authored by Murer Consultants, Inc. dated June 17, 2015. Moreover, Illinois law recognizes that a hospital and alcoholism and substance abuse treatment facility are so similar from a licensing standpoint, that in order not to unnecessarily burden Alcoholism and Substance Abuse Treatment Facilities, the legislature carves out such facilities from the burden of Hospitals' more intensive licensure process that is outlined in the Hospital Licensing Act. The Objector's assertion that hospitals are exempt from the licensure requirements because the services are covered within the scope of the Hospital Licensing Act actually supports Applicant's position regarding the similarity between alcoholism and substance abuse treatment facilities and hospitals because a Hospital does not need to apply for a separate license to provide inpatient residential alcoholism and substance treatment.

8. Objector's Assertion: The Applicant's proposed facility differs from a hospital because Applicant's proposed facility will not "set broken bones, perform minor or major surgeries, fight infection, take X-Rays, perform MRI's, deliver babies or provide other basic services commonly associated with a public hospital." (Paragraph 30)

Applicant's Response: As noted earlier in this document, the Objector's argument disregards and ignores the existence of many hospitals that do not provide, are not required to provide, and are not capable of providing all of the services listed above. For example, psychiatric hospitals do not deliver babies and typically do not have an orthopedic surgeon on staff.

9. Objector's Assertion: The Objector claims that the Illinois Supreme Court has conclusively determined that a "detoxification facility" is dissimilar to a Nursing Home. (Paragraph 32)

Applicant's Response: The Objector's reliance upon *Pallela* is unfounded for two primary reasons to wit:

- (a) ***Pallela* involved the Court's examination of the four corners of an existing special use ordinance. Conversely, Applicant's petition involves a "similarity" analysis under Section 25-8-1-DD.**

The Objectors essentially claim that the Illinois Supreme Court made findings that a nursing home is not similar to a "detoxification facility." To the contrary, the Illinois Supreme Court made no such finding. In reality, the Supreme Court was not asked to make a "similarity" determination and determined only that a detoxification facility is not permitted ***under the clear language of the special use ordinance at issue.*** In fact, even when the Supreme Court referenced the earlier findings of the lower Court, the Supreme Court examined the detoxification center use in the context of the "*natural import of the words within the statute.*" Importantly, the special use ordinance in *Pallela* expressly prohibited expansion and conversion of the nursing home use with the words "*said nursing and convalescent home shall not be converted to a hospital, nor to an institution for the care of the insane or feeble minded, but shall continue to operate under a special use permit...*" Had the DuPage County special use ordinance included the language found within Kane County's Section 25-8-1-DD (thereby allowing "similar" uses), the Illinois Supreme Court would have reached a completely different opinion in *Pallela*.

Pallela was not about a similarity analysis at all. Instead, it was about a strict reading and interpretation of a special use ordinance which on the face of that ordinance prohibited expansion of use beyond a nursing home. The Supreme Court reviewed each word on the special use ordinance in effect and found that the plain language of the ordinance itself prohibited the expansion of the nursing home use to include a detoxification facility.

Conversely, Applicant's petition is subject to completely different criteria and analysis. Applicant's petition and proposed use is not bound by the strict language of an existing special use ordinance limiting the use only to what is enumerated. In Applicant's case, Section 25-8-1-DD allows Kane County to find "similarity" and specifically permits expansion to similar uses. A close reading of *Pallela* demonstrates that the context is inapplicable.

Additionally, Applicant is asking the County to make a similarity determination of a prospective use while *Pallela* involves a determination of whether an existing use fits within the constraints of the ordinance.

- (b) **The primary reason the Supreme Court denied the detoxification facility was because the underlying special use permit had expired.** The Objectors are misled as to the primary reason why the Supreme Court affirmed the lower court order enjoining the expanded detoxification use in *Pallela*. The Objectors believe the reason was because the Supreme Court found that a nursing home was not "similar" to a detoxification unit. A closer reading reveals the true rationale of the Court was based upon the fact that the special use permit issued

in *Palella* was conditioned upon *the continued use of the property as a nursing home*. Because the nursing home use in *Palella* already was discontinued at the time of the lower court's ruling, the special use permit thereby expired in *Palella* making it impossible for the municipality to allow the proposed detoxification center use under any scenario. In the words of the Supreme Court, "*use as a nursing and convalescent home was terminated and, accordingly, the trial court was correct in entering the order enjoining a violation of the ordinance.*" Essentially, the special use permit in *Palella* had expired and thus, a new special use permit was needed.

10. Objector's Assertion: Licensure for a "nursing home" is different from the licensure of Applicant's proposed use and therefore the two uses are not similar. (Paragraph 33)

Applicant's Response: The Objector points out that the licensure of the proposed facility is not identical to the licensure of a nursing home. The facility need not have identical licensure to the listed use; the facility need only be similar to other identified uses in order for it to be determined to be a special use. Although Nursing Homes and Substance Abuse Treatment Facilities are not licensed by the same the governing bodies, the more intensive care and the larger, more qualified staff provided at such a facility clearly requires compliance with even more regulations. Furthermore, please refer to the "Rider" and related documents submitted in regard to the similarity as part of Applicant's petition that does exist between a Nursing Home and an Alcoholism and Substance Abuse Treatment Facility.

11. Objector's Assertion: Applicant's proposed use most closely resembles a *Clinic* and Group home. Further, since the Applicant's proposed use most closely resembles a methadone clinic it belongs in the RB zoning district. (Paragraph 35 & 36)

Applicant's Response: Objector's assertion is incorrect. Applicant incorporates herein the letter dated November 17, 2015 from the State of Illinois's Department of Human Services, Division of Alcoholism and Substance Abuse regarding the dissimilarity between Applicant's proposed use and that of a Methadone Clinic.

12. Objector's Assertion: "Applicant's proposed use will be a, 'set of group homes?'" (Paragraph 37)

Applicant's Response: Objector's assertion is incorrect. Applicant incorporates herein the letter dated November 17, 2015 from the State of Illinois's Department of Human Services, Division of Alcoholism and Substance Abuse regarding the dissimilarity between Applicant's proposed use and that of a Group Home.

Furthermore, Objector's assertion that "Applicant's proposed use will be a, 'set of group homes,'" is incorrect because Applicant's dwellings will house more than eight patients per lodge and Applicant's proposed use is not solely to house disabled residents but to provide such residents with a full continuum of care that a group home would not and could not provide.

13. Objector's Assertion: Non-Applicability of FHA; The FHA does not grant protected classes carte blanche in determining where they can live in total disregard of local zoning codes. (Paragraph 40)

Applicant's Response: Federal law is clear that the Federal Fair Housing Act applies to facilities engaged in the treatment of persons seeking treatment for alcoholism and substance abuse. The law establishes that local governments have an "affirmative duty" to provide "reasonable accommodation" or flexibility, when making decisions about zoning and land use regarding housing and related facilities for persons with disabilities. Under the Federal Fair Housing Act, specific populations are designated as "handicapped" or "disabled" and are therefore protected from housing discrimination. Included in this classification are substance abusers and the mentally ill. *See Federal Fair Housing Act*, 42 U.S.C. Section 3602(a). Thus, Applicant's proposed facility clearly falls within the purview of the act and Applicant has requested Kane County to make reasonable accommodation on behalf of its disabled residents that will seek treatment within Applicant's facility. Courts have repeatedly held that those suffering from alcoholism and drug addiction fall with the definition of "handicapped" thus to invoke the protections and accommodation of the FFHA. *See Oxford House v. City of Baton Rouge, Louisiana*, 932 F.Supp.2d 683 (2013).

The United States Department of Justice has the authority to enforce federal law when there is a violation of the Fair Housing Act in local governments' zoning or land use decisions. Upon a judicial finding in favor of a residential provider or its' potential residents, a local government may be assessed penalties or become liable for damages and attorney's fees.

Section 5.2(b) of the Kane County Zoning Ordinance states that "no section, clause or provision of this Ordinance is intended nor shall be construed as contrary to the Federal Fair Housing Act."

Sources: See United States v. Village of South Elgin (No. 05 C 5258, N.D. Ill., December 13, 2006) holding monetary damages and civil penalties were paid by the Village as part of a settlement agreement for the denial of a special use zoning permit.; See also Pathways Psychosocial v. Town of Leonardtown, 133 F. Supp. 3d 772 (D. Md., 2001) rejecting a claim of immunity for town officials, because of their "irrational prejudice" against persons with disabilities; Oxford House v. City of Baton Rouge, Louisiana, 932 F.Supp.2d 683 (2013).

14. Objector's Assertion: "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 Association*. (2001) (Paragraph 40)

Applicant's Response: Applicant's petition does not request or require that preferential treatment be extended to its handicap residents. The Kane County Zoning Code already provides that the current location is suitable under the "similarity" standard. Objector's reference to this case supports Applicant's request for reasonable accommodation because the past permitted special use of the Subject Property and the potential future permitted special uses allowed in the "F" Farming District include "monasteries, nunneries, religious retreats, nursing and convalescent homes, assisted living facilities, etc." which are all special uses that have a residential component. As such, any denial of Applicant's request for reasonable accommodation would demonstrate that these disabled residents are not being afforded the equal opportunity to use and enjoy a dwelling.

15. Objector's Assertion: Applicant is incorrect that the denial of the application will result automatically in a violation of the FHA because, "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 zoning code is necessary because plaintiff's disability is what causes his deprivation of the activities, services, or benefits desired;..." *Daveri Dev. Group, LLC v. VILL of Wheeling*, (2013). (Paragraph 41)

Applicant's Response: As per our assertion above, since so many different types of related residential uses are permitted in "F" Farming District, a denial of this application would seemingly be due to the disabilities of Applicant's residents and thus would cause a deprivation of the activities, services, or benefits desired.

16. Objector's Assertion: Applicant's proposed facility violates the 2040 Plan. (Section IV, Paragraphs 44-48)

Applicant's Response: The proposed use of the Subject Property promotes the goals of the Kane County 2040 Land Use Plan ("The 2040 Plan,") in the ways described below:

- a. The 2040 Plan's "Quality of Kane" model emphasizes healthy people, healthy living and healthy communities and the unique coverage of three principal planning processes: transportation, health, and land use.¹ The special use recognizes these concepts. In order to promote healthy communities, the special use will not only treat individuals who suffer from disease of alcoholism and drug addiction, but will also commit to participate in substantial community outreach to community schools, religious groups, and other agencies to improve alcoholism and substance abuse awareness within the community.
- b. The 2040 Plan recognizes that the following factors contribute to Health: Physical Environment (10%); Clinical Care (20%); Health Behaviors (30%); and Socio-Economic (40%).² The proposed special use fits in with these factors. The physical environment of the site will not change and will therefore not impact surrounding neighbors and at the same time are a critical component for the health and well-being of the facility's patients. The high-end clinical care provided by the proposed facility will improve the health of its patients, and its outreach will do the same for others in the community. Part of the treatment regimen of the proposed facility includes helping patients understand and make healthy behavioral and physical (diet and exercise) choices.
- c. The 2040 Plan recognizes the benefits of "Re-inhabitation," which is the adaptive re-use of existing structures for uses that provide for and contribute to society.³ The proposed adaptive re-use of the former Glenwood School will address a societal need for the effective treatment of alcoholism and drug addiction with no substantial changes to the existing facility.

¹ Kane County 2040 Plan, "Quality of Kane Model," Page 11.

² Kane County 2040 Plan, "Contributing Factors to Health," Page 41.

³ Kane County 2040 Plan, "Opportunities for Retrofitting Sprawling Land Use Patterns," Page 53.

- d. The 2040 Plan's focus on community health expressly recognizes that alcohol misuse is among the challenges that face the citizens of Kane County⁴ and encourages environments that prevent excessive consumption of alcohol. The Facility's treatment of individuals who have a dependency on alcohol and other substances combined with its community outreach programs address these important considerations.⁵ The Facility's treatment of individuals who are addicted to alcohol and/or other unlawful substances combined with community outreach programs organized by the facility address these important aspects of community health.
- e. The 2040 Plan contains a list of "Ten Essential Services of Public Health." They include: (1) Monitor health status and understand health issues facing the community; (2) Protect people from health problems and health hazards; (3) Give people the information they need to make healthy choices; (4) Engage the community to identify and solve health problems; (5) Develop public health polices and plans; (6) Enforce public health laws and regulations; (7) Help people receive health services; (8) Maintain a competent public health workforce; (9) Evaluate and improve programs an interventions; and (10) Contribute to and apply the evidence base of public health.⁶ The proposed special use contributes positively to these ten essential services outlined in The 2040 Plan.
- f. The 2040 Plan expressly recognizes the need for a policy of cross-sector collaboration to achieve community-wise wellness through partnerships with school districts, colleges, social service agencies, the faith-based community, non-profit organizations, hospitals, physicians, employers, park districts, municipal staff, elected officials, and other organization. The proposed facility is committed to significant community outreach and will assist in achieving the goal of cross-collaboration.
- g. The 2040 Plan expressly encourages the removal of barriers that unnecessarily discourage housing diversity.⁷ The proposed special use would allow for a residential treatment facility for disabled adults suffering from alcoholism and substance addictions.
- h. The 2040 Plan seeks to preserve and protect open space and green infrastructure as the cornerstone of natural resource protection and community well-being. A considerable portion of the 120 acre Subject Property is open space, and the Application is intended to commit permanently a portion of that open space by way of easement or other appropriate action.

17. Objector's Assertion: The 2014 decision of Kane County's Zoning Enforcing to prepare a text amendment to the County Zoning Ordinance in regards to the non-enumerated land use for a Medical Marijuana Dispensary implies that the County should prepare a text amendment for this matter. (Paragraph 46)

⁴ Kane County 2040 Plan "Community Health," Page 79.

⁵ Kane County 2040 Plan "Community Health," Page 98.

⁶ Kane County 2040 Plan, "Ten Essential Services of Public Health," Page 83.

⁷ Kane County 2040 Plan, "Housing Objectives," Page 99.

Applicant's Response: The Illinois Compassionate Use of Medical Cannabis Pilot Program Act (410 ILCS 130/1 et seq.) at Section 140 provides guidance for municipalities and local governmental units such as Kane County, through the following language: *“A unit of local government may enact reasonable zoning ordinances or resolutions, not in conflict with this Act or with the Department of Agriculture or Department of Financial and Professional Regulation rules, regulating the registered medical cannabis cultivation center or medical cannabis dispensing organizations.”*

In sum, Kane County was following the direction of the newly approved Illinois legislature and the overwhelming trend in the State when Kane County adopted reasonable zoning regulations governing Medical Cannabis. Such legislation should not be advanced by the Objectors to support the notion that Kane County somehow must adopt a text amendment each time with respect to *any* use that may be considered “similar” to an existing use. Such a misreading by the Objectors would obviate Section 25-8-1-2 DD of the zoning ordinance. To expect Kane County to adopt a text amendment each time an applicant advances a use “similar” to an existing use essentially nullifies Section 25-8-1 DD. As noted, Section 25-8-1- DD allows “Other uses similar to those permitted herein as special uses” without the necessity of a text amendment each and every time.



November 17, 2015

Memo – Special Use, Alcoholism and Substance Abuse Treatment Facility

The purpose of this memo is to clarify my understanding of the special use provisions of the Kane County Zoning Ordinance. Generally, when a special use is established it is linked to the application, location and the specificities of the use/plan. The documents are the enabling provisions of the approval. As long as the approval requirements are followed the use is permitted and can continue. In addition to the approval, the operations of the use must continue uninterrupted to remain in compliance. In the case of the special use application for the previous “Glenwood School for Boys,” located at 41W400 Silver Glen Road, the approval granted the requested use. Only that use could continue to operate on that site uninterrupted to remain compliant. Additionally, the approved special use for a not-for-profit facility to serve at risk children renders the site unusable for any future use.

The discontinued use and vacation of the property by the “Glenwood School” renders the special use null and void. The new special use request for an Alcoholism and Substance Abuse Treatment Facility is a new application. The specifics of the proposal must stand on its own merits and is not linked to any prior approvals. Also, as identified in the Kane County Zoning Ordinance, a special use that has been discontinued is subject to revocation by the County on their own motion.

The proposed request for an Alcoholism and Substance Abuse Treatment Facility special use under Section 8.1-2 Special Uses.dd. *“Other uses similar to those permitted herein as special uses,”* is appropriate. The application addresses all of the requirements for the issuance of a special use permit for the Applicant’s proposed use and follows the procedural requirements of the County Ordinance and the development staff. These comments supplement my previous report and are attached to and made part of those opinions.

A handwritten signature in black ink, reading "J. Christopher Lannert". The signature is fluid and cursive, with the first name "J." and last name "Lannert" clearly legible.

J. Christopher Lannert