



DIAMOND BUSH
DiCIANNI
& KRAFTHEFER

A Professional Corporation
140 South Dearborn Street, Suite 600
Chicago, IL 60603
www.ancelglink.com

Julie A. Tappendorf
jtappendorf@ancelglink.com
(P) 312.604.9182
(F) 312.782.0943

MEMORANDUM

To: President Blecker & Board of Trustees
Village of Campton Hills

CC: Jennifer Johnsen, Village Administrator

From: Julie A. Tappendorf

Subject: Maxxam Petition – Fair Housing Act

Date: December 29, 2015

Maxxam Partners, LLC (“*Maxxam*”) filed an application with Kane County for a special use permit to operate a residential substance abuse treatment facility (“*Facility*”) on property located at 41W400 Silver Glen Road in unincorporated Kane County (“*Property*”). The application is currently pending before the Kane County Zoning Board of Appeals (“*ZBA*”), which is conducting a public hearing prior to making a recommendation to the County Board on Maxxam’s application. One issue that came up at the ZBA hearings is the Fair Housing Act (“*FHA*”), and whether that federal law “requires” the County to approve Maxxam’s application for a special use permit. You asked me to prepare a memorandum advising you on this issue. It is my opinion that although the FHA is implicated, it does not mandate that the County approve Maxxam’s application for a special use permit for the Facility.

Other Legal Opinions

In its application, Maxxam includes opinion letters from two law firms representing Maxxam. A third opinion was submitted by a law firm representing a neighboring property owner. All three law firm opinions discuss the impact of the FHA, summarized below:

1. Meyer & Flowers Opinion (Hired by Maxxam)

Meyers & Flowers prepared a memorandum dated July 18, 2015 that discussed, among other things, the impact of the FHA on the County’s consideration of Maxxam’s application. In M&F’s opinion, the County must consider its obligations under the FHA in making a determination as to whether or not to grant a special use to Maxxam. Specifically, M&F noted that the County would be required to make a “reasonable accommodation” with respect to the facility because the facility provides residential treatment to persons with disabilities.

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M&F submitted a second opinion dated November 16, 2015, in which it expanded on this analysis. M&F argued that local governments have an “affirmative duty” to provide reasonable accommodation when making zoning decisions regarding housing for persons with disabilities. M&F further asserted that denial of Maxxam’s application for reasonable accommodation would demonstrate that the disabled residents were not afforded “equal opportunity” to use and enjoy a dwelling. Finally, M&F asserted that a denial of Maxxam’s application would “seemingly be due to the disabilities” of residents of the proposed Facility.

2. Holland & Knight Opinion (Hired by Maxxam)

Holland & Knight LLP prepared a memorandum dated August 19, 2015 that also discussed the FHA. H&K advises that the FHA prohibits discrimination in housing against persons with disabilities, including those recovering from alcoholism and substance abuse. H&K notes that the U.S. Attorney’s Office in this region has taken an aggressive posture when local governments deny zoning approvals for residential facilities for persons with disabilities. Like M&F, H&K also notes that the County is required to make a “reasonable accommodation” with respect to the Facility. H&K concludes that it would be difficult for the County to deny Maxxam’s application where, in H&K’s opinion, the proposed Facility “satisfies all zoning criteria for approval.”

3. Rathje Woodward Opinion (Hired by Neighboring Property Owner)

Rathje Woodward, a law firm representing a nearby property owner, submitted a third legal opinion dated October 2, 2015. RW opined that H&K and M&F were incorrect in arguing that the County was required to approve the Maxxam application in order to make a reasonable accommodation under the FHA. Instead, RW argued that the County could choose what accommodation to make, so long as it was reasonable.

Analysis of FHA and Maxxam’s Application

After reading through the various legal opinions and reviewing the FHA and relevant cases, it is my opinion that Kane County is not obligated under the FHA to approve Maxxam’s application for a special use permit to operate the Facility on the Property. The FHA does not mandate a zoning approval as a reasonable accommodation, and it certainly does not mandate approval of a particular application for zoning relief. It also does not preempt local zoning procedures or standards. In short, there is no obligation of the County under the FHA or any other federal law to approve Maxxam’s special use application.

As an initial matter, it is accurate to say that the FHA applies to residential facilities engaged in the treatment of persons seeking treatment for alcoholism and substance abuse such as Maxxam’s proposed Facility. That does not mean, however, that Maxxam can operate its proposed Facility wherever it chooses. The FHA does not require a “total disregard of local zoning codes.” *Advocacy & Res. Ctr. v. Town of Chazy*, 62 F. Supp. 2d 686, 689 (N.D.N.Y.

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1999). In other words, Maxxam must still comply with Kane County's zoning and land use regulations before it can open up its Facility on the Property.

Although the Village disagrees with the County and Maxxam regarding the proper zoning process (as discussed in previous correspondence and by Village resolution), there appears to be no dispute that Maxxam requires some form of zoning relief to operate its Facility on the Property. The County has advised that Maxxam must apply for and obtain a special use permit for the Facility.

The FHA does not mandate that the County issue a special use permit to Maxxam, nor does the FHA require the County to ignore the zoning process (notice, hearing, etc) or the standards for granting a special use permit. It is within the required special use permit process that the FHA must be interpreted and applied. If the zoning process is not properly followed, then the special use permit should be denied. If Maxxam fails to establish that its proposed Facility meets each and every one of the standards for a special use permit contained in the County zoning regulations, then the special use permit should be denied. The FHA does not preempt the County's zoning authority over uses proposed to be located within the County's jurisdiction.

With respect to Maxxam's argument that the denial of Maxxam's application for reasonable accommodation would demonstrate that the disabled residents were not afforded "equal opportunity" to use and enjoy a dwelling, that is simply not the case. The County can and, in fact, must review and consider Maxxam's special use application in connection with the special use permit standards contained in Section 25-4-8-2 of the County Zoning Ordinance just as it does for all special use permit applications. Should Maxxam's application fail to meet any one of these standards, the special use permit should be denied. The denial would not, as M&F stated, be "due to the disabilities" of residents of the proposed Facility; instead it would be due to the failure of Maxxam to demonstrate that its proposed Facility meets each and every one of the special use standards.

Just because a reasonable accommodation may be necessary under the FHA, that does *not* mean that the County must approve the exact relief or accommodation requested by the applicant. Instead, the County may choose what accommodation to make, as long as the accommodation is "reasonable." *See Corp. of Episcopal Church in Utah v. W. Valley City*, 119 F. Supp. 2d 1215, 1222 (D. Utah 2000). In this case, the County has a number of options available to accommodate the housing needs of disabled persons. The County could, as noted by RW in its legal memorandum, take any of the following actions, among many others:

- consider a permit for a mixed use clinic property in an RB Zoning District.
- consider a permit for a group home or homes in any zoning district.
- consider a text amendment to its zoning regulations to specifically address residential substance abuse treatment facilities within the County's zoning plan.

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Conclusion

In sum, the County has no obligation under the FHA or other law to grant Maxxam's *specific* application for a special use for *this* Facility on *this* Property. Denial of Maxxam's application for a special use permit is not an automatic violation of the FHA if the County's decision is made based on the zoning standards contained in the County Zoning Ordinance and not based on the disabilities of the residents of the proposed Facility. Even H&K's opinion acknowledges the importance of Maxxam satisfying all of the zoning criteria.

It is important that the County review and consider Maxxam's application for a special use permit by following the proper zoning process and applying each of the special use permit standards in its Zoning Ordinance. Nothing in the FHA preempts the local zoning process or zoning standards. It is within this context that the County should make its decision, and not based on incorrect allegations made by law firms hired by Maxxam that the County "must" approve zoning relief for Maxxam or be in violation of the FHA.