


MEMORANDUM

To: Joseph White, Chairman Kane County Zoning Board of Appeal

From: Kevin M. Carrara 

Date: November 23, 2105

Re: *Andrzejewski Notice of Appeal In Re Maxxam Partners, LLC, Application for Special Use Petition No. 4364 (the "Appeal")*

Joline T. Andrzejewski, as Trustee of the Joline T. Andrzejewski Trust #2004 and Abram Andrzejewski (collectively the "Andrzejewskis") re-assert their objection presented at the Appeal hearing on November 17, 2015 to the Zoning Board of Appeals (the "ZBA") relating to the ZBA's receipt and consideration of the Meyers & Flowers Memorandum dated November 16, 2015 and the Holland & Knight Response Memorandum dated November 17, 2015 (collectively the "Revised Opinions").

Additionally, the Andrzejewskis re-assert their conflict of interest objection presented at the Appeal hearing. Attorney Patrick M. Kinnally represented to the ZBA that he was the attorney for the Kane County Board, yet he was actively involved in the hearing process by asserting objections, cross-examining the Andrzejewskis' expert witness and presenting the closing argument on behalf of the County to deny the Appeal—whether Mark VanKerkhoff's interpretation of the Kane County Zoning Ordinance ("Ordinance") was incorrect. As an attorney advocate involved in the representation to support Mark VanKerkhoff and his interpretation of the Ordinance, which is the basis of the Appeal, Mr. Kinnally had a conflict which prevented him from providing independent legal advice to the ZBA in executive session

relating to the ZBA's acceptance and consideration of the Revised Opinions. The contents of the Revised Opinions appear on their face to argue in support of the position Mr. Kinnally was advocating during the Appeal hearing and closing argument.

As stated at the Appeal hearing, Maxxam Partners, LLC ("Maxxam") did not have standing during the ZBA's quasi-judicial Appeal hearing. Maxxam did not seek permission to intervene in the Appeal—instead Maxxam waited until the evening of the Appeal hearing to offer new evidence and/or testimony via the Revised Opinions—without the Andrzejewskis having the ability to review the information contained within the Revised Opinions or cross-examine witnesses who provided opinions within the Revised Opinions.

The Appeal is based upon whether the Enforcing Officer, Mark VanKerkhoff (the "Enforcing Officer"), with the information contained within the Application for Special Use and supporting materials filed by Maxxam, correctly interpreted the Ordinance. The ZBA cannot consider Maxxam's self-serving efforts to attempt to re-characterize their earlier reliance upon Section 5.15 of the Ordinance in its Application, after the parties to the Appeal presented testimony, exhibits and had closed their cases. Such efforts raise serious due process concerns.

By statute and case law, "[t]he principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions." 55 ILCS 5/5-12012.1(b); *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d 586, 596 (2d Dist. 1983). "At the core of [procedural] due process is notice and a meaningful opportunity to be heard." *Chamberlain v. Civil Serv. Comm'n of Vill. of Gurnee*, 2014 IL App (2d) 121251, ¶ 46. In the context of quasi-judicial administrative proceedings, procedural due process requires, among other things, a party's opportunity to cross-examine witnesses. *See People ex rel. Klaeren v. Vill. of Lisle*, 202 Ill. 2d 164, 186-87 (2002) *superseded by statute on other grounds, see Condo. Ass'n of Commw. Plaza v.*

City of Chicago, 399 Ill. App. 3d 32, 48 (1st Dist. 2010); *see also Bartlow v. Shannon*, 399 Ill. App. 3d 560, 570 (5th Dist. 2010) (“Due process of law is served where there is a right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence which is offered.” (quotation omitted)) (addressing administrative proceeding by Illinois Department of Labor under Employee Classification Act).

In this matter, the ZBA accepted and considered the Revised Opinions after the Appeal hearing was closed. This violated Andrzejewskis’ substantive and procedural due process rights to a fair and impartial Appeal hearing.

In the alternative, and without waiving any of their objections, should the ZBA continue to overrule Andrzejewskis’ objections, the expert testimony of Mr. Abel sets forth that there is no rational basis in the professional land planning arena, or the Ordinance for the assertion by the Enforcing Officer or Maxxam that Section 5.15 only applies in the instance of a permit request under Section 4.3 of the Ordinance.

To the contrary, Mr. Abel testified that as a part of the drafting of the Ordinance the intent of the County is clear by the plain language that Section 5.13 is applicable to all parts of the Ordinance. Section 5.13 cannot be forgotten or set aside merely because the Enforcing Officer is liberally interpreting the Ordinance, so Maxxam can control the entitlement requests for its Application. It is not the Applicant who decides the zoning and land uses for the County—it’s the County that makes those decisions. Mr. Abel testified that simply because the County incorrectly handled a few prior applications, without considering Section 5.13, does not require the County to continue to allow the Enforcing Officer to make incorrect decisions while interpreting the Ordinance. The process can be easily stopped and corrected, and following the

procedures set forth by the County in Section 5.13, as Mr. Abel testified, is the norm in the land planning process for a non-listed use as unique as Maxxam's.

Section 5.15 of the Ordinance states, "the Enforcing 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. However such non-listed uses shall not be approved until the applicant for such use has been reviewed by the County Development Department staff and a favorable report has been received by the Enforcing Officer. The non-listed uses which are approved shall be added to the appropriate use list at the time of periodic updating and revision."

Lastly, Mr. Abel testified that the application of Section 5.13 to the Maxxam non-listed land use is proper and makes sense from the plain language of the Ordinance and a professional land planning perspective as the ZBA will still be able to perform its function under the Ordinance: (1) if the County staff and/or Enforcing Officer determine an unlisted land use such as Maxxam's use is not similar and clearly compatible with the listed permitted or special uses for the F District, then Maxxam's non-listed land use should not proceed as a special use but should instead be considered by the ZBA during the public hearing process as a text amendment and/or rezoning under the Ordinance; or (2) if Maxxam's unlisted land use is similar and clearly compatible with the listed permitted or special uses in the F District, then the ZBA will proceed with the public hearing process for a special use.