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1 STATE OF ILLINOIS)
 2) SS:
 3 COUNTY OF L A K E)
 4 IN THE CIRCUIT COURT OF THE NINETEENTH
 5 JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS
 6 HOUSING AUTHORITY OF THE)
 7 COUNTY OF LAKE,)
 8 Plaintiff,) No. 15 MR 1133
 9 -vs-)
 10 LAKE COUNTY ZONING BOARD)
 11 OF APPEALS, et al.,)
 12 Defendants.)
 13
 14 TRANSCRIPT OF PROCEEDINGS had in the
 15 above-entitled cause in Courtroom No. C-303 of the
 16 Lake County Courthouse, on the 8th day of November,
 17 A.D. 2016, commencing at 1:46 p.m.
 18
 19 BEFORE: HONORABLE THOMAS M. SCHIPPERS.
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 22
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Page 2

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 13 MR. ROBERT J. MASINI,
 14 rmasini@divergrach.com,
 15 appeared on behalf of the Plaintiff;
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 21 MR. JAMES J. BABOWICE,
 22 appeared on behalf of Defendant Lake
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 18 objectors.
 19
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 21
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1 THE COURT: Hey, hey, folks. Come on up.
 2 MR. MASINI: Good afternoon.
 3 THE COURT: Good afternoon.
 4 MS. DiGRINO: Good afternoon.
 5 THE COURT: Good afternoon, everybody. I was
 6 telling Vivian I'm glad --
 7 MR. BABOWICE: Good afternoon, Judge.
 8 THE COURT: Hello, Mr. Babowice.
 9 MR. SHAPIRO: Good afternoon, your Honor.
 10 Mr. Shapiro. How are you folks?
 11 Miss Fox, welcome.
 12 MS. FOX: Good afternoon, your Honor. I'm
 13 standing in for Ms. Dawson.
 14 THE COURT: I noticed that was not her.
 15 I was telling Vivian I'm glad I didn't
 16 continue this out for two weeks because I would
 17 have spent two more weeks looking at everything.
 18 And I see you have a court reporter.
 19 Hello there. How are you?
 20 THE COURT REPORTER: Good, how are you?
 21 THE COURT: Just also for the record I think
 22 it is important to note that at our last argument
 23 we have had two oral arguments in this case and Mr.
 24 Babowice brought up the density argument, and the

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1 State's Attorney's Office along with the
2 petitioners which includes the Housing Authority
3 and PADS all cited the Court to Section 12 of the
4 zoning ordinance -- Article 12, excuse me, and so
5 there is no argument that they waived any argument
6 as it pertains to Article 12. And the Court did
7 consider Article 12 in its ruling.
8 Anything else, anybody, other than that
9 that we need to supplement the record with that we
10 talked about in oral argument that wasn't in the
11 briefs? I don't think so.
12 Okay. So here is the Court's ruling:
13 The uncontested facts are that the Midlothian Manor
14 consists of a building on an acre built in 1997
15 which contains 14 individual efficiency apartments
16 with toilet and kitchen facilities in each
17 respective unit. The building also contains common
18 areas which consists of a kitchen, a lobby, living
19 and dining rooms, and a rec room. It has always
20 been zoned R-1. In 2014 PADS and the Authority
21 entered into a private public partnership to use
22 the building as a residence for chronically
23 homeless persons. It was also -- although this was
24 contested during the arguments, the Court finds

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1 that it was uncontested as to what these common
2 areas would be used for. It is uncontested that
3 these common areas would not be open to the public
4 and they would only be used by the residents.
5 Essentially the gist of the testimony is that the
6 common areas would be available to the residents to
7 watch TV, eat, read, chat, and the like. PADS
8 would also staff the building with a social worker,
9 nurse, and other staff.
10 Director Waggoner after some wrangling
11 amongst other county employees regarding the zoning
12 designation determined that the building as
13 proposed by PADS was government use R-1 with no
14 assembly space. The Zoning Board of Appeals
15 reversed that decision.
16 And I know there was much discussion in
17 the briefs and oral argument, also much, much
18 discussion during the actual protracted hearings
19 regarding the process that was used by Waggoner and
20 the County before Waggoner got involved. Also, how
21 the Midlothian Manor should probably be designated,
22 whether it is group living, et cetera. But I
23 believe that the issue presented to this Court is
24 much more narrow than all of those issues. And

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1 PADS kind of framed it this way, and I agree with
2 it.
3 The first issue is does the Authority's
4 lease to Midlothian Manor constitute government use
5 as it is defined in the UDO and, two, if it does,
6 does Midlothian Manor contain assembly space as it
7 is defined in the UDO. And the first task which I
8 spent much time looking at was the proper standard
9 of review. And PADS has claimed that this is a
10 very easy decision for the Court because it is
11 obvious that it is a de novo standard of review.
12 As we know, questions of law are reviewed de novo
13 and a construction of a statute is a question of
14 law that must be reviewed de novo. And it seems to
15 me that I'm tasked right now with interpreting a
16 specific state -- or specific state statutes in
17 conjunction with interpreting how a county zoning
18 ordinance comports with that state's statute or how
19 it interrelates with it. And to do that, of
20 course, I must apply a set of facts to the law to
21 make a determination as to whether or not the set
22 of facts meets the statutory requirements.
23 Despite the urging of PADS, despite my
24 musings on the previous date that it is difficult

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1 to envision a case where the Court would be tasked
2 with interpreting a statute without applying a
3 given set of facts to that statute, thus,
4 justifying the de novo standard of review and
5 despite a Second District case which states clearly
6 when material facts are not in dispute and only a
7 legal conclusion drawn therefrom it is a de novo
8 standard of review, the Supreme Court tells me that
9 this is a clearly erroneous standard.
10 In City of Belvidere versus Illinois
11 State Labor Relations Board, 181 Ill.2nd 191 at
12 205, the Court said, Because this case involves an
13 examination of the legal effect of a given set of
14 facts, it involves a mixed question of law and fact
15 and the clearly erroneous standard of review
16 applies.
17 Several years later, 10 years after that
18 in the Cincus versus the Village of Stickney, 228
19 Ill.2nd 200 at 211 and 212, the Court -- the
20 Supreme Court said this: Mixed questions of fact
21 and law are questions in which the historical facts
22 are admitted or established, i.e., they are not in
23 dispute. The rule of law -- and that's my
24 parenthetical there. Back to the quote, The rule

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1 of law is undisputed, and the issue of whether the
 2 facts satisfy the statutory standard or, put
 3 another way, whether the rule of law has applied to
 4 the established facts is or is not violated. And
 5 the Court noted prior to the City of Belvidere case
 6 which I just cited, This Court has held where facts
 7 are undisputed, the legal result of those facts is
 8 a question of law which is reviewed de novo.
 9 However, in the City of Belvidere, this Court held
 10 for the first time that an examination and a legal
 11 effect of a given set of facts involves a mixed
 12 question of law and fact with a standard of review
 13 clearly erroneous.
 14 And so the Court acknowledging that this
 15 has been a very difficult area including by the
 16 Supreme Court, that is the holding of that case and
 17 it is still good law.
 18 A year after that in Excel Disposal
 19 Corp., Excel Disposal argued exactly what PADS
 20 argued, that it is a de novo standard of review
 21 because the facts aren't in dispute and it is just
 22 applying the facts to the statute, and the Court
 23 said we disagree, it is a clearly erroneous
 24 standard.

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1 The First District in 2016 in Cook
 2 County Sheriff's Office versus Cook County
 3 something on Human Rights -- Commission on Human
 4 Rights it must be -- cited that exact language in
 5 the Supreme Court, as did the Second District in
 6 the City of Sandwich case, 406 Ill.App.3d 1006.
 7 So I believe it is a clearly erroneous
 8 standard that I am confronted with right now. An
 9 administrative decision is clearly erroneous only
 10 when the reviewing Court based upon the entire
 11 record is left with a definite and firm conviction
 12 that a mistake has been made.
 13 An administrative agency's decision is
 14 generally not required to make findings on every
 15 evidentiary fact or claim. Instead the agency's
 16 findings must be specific enough to permit an
 17 intelligent review of its decision. And that's the
 18 Lucie B. case, 212 Ill.App.2d 101284 which this
 19 Court has found to be quite challenging based upon
 20 the record.
 21 In this case it has been as I mentioned
 22 during oral argument with you guys extremely
 23 difficult for me to discern the exact basis of the
 24 Board's decision in part because there are six

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1 board members but also in part because the
 2 individuals did not articulate with any specificity
 3 or particularity the basis of their opinions. As I
 4 mentioned earlier, the hearings took many twists
 5 and turns and much time was spent on the process
 6 leading up to the hearing and whether the
 7 Midlothian Manor fell within various use
 8 definitions under the UDO like group living and the
 9 like. But the key issue for this Court is to
 10 decide whether the Board's ultimate decision to
 11 reverse the director's opinion that Midlothian
 12 Manor constituted government use with no assembly
 13 space was clearly erroneous.
 14 We know from 2.7.1.2 -- let me know if I
 15 go too fast --
 16 THE COURT REPORTER: Thank you.
 17 THE COURT: -- the director is allowed to make
 18 interpretations of the provisions of this
 19 ordinance. When somebody believes that the
 20 director's erred, 3.14 allows an appeal to the
 21 Zoning Board of Appeals.
 22 2.7.1.2 also states that the
 23 responsibility for interpreting it is with the
 24 director, and 3.14.7 states that this

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1 interpretation by the director enjoys, quote, "a
 2 presumption of correctness," closed quote, before
 3 the Zoning Board of Appeals, which I think is
 4 pertinent in my analysis or was somewhat pertinent
 5 in my analysis.
 6 Government use as you guys, as we all
 7 know and just for the record is defined under
 8 14.2(191), quote, A building or structure owned or
 9 leased by a unit of government and used by the unit
 10 of government in exercising its statutory
 11 authority.
 12 In my analysis the first issue is
 13 determining whether the Authority is, quote,
 14 exercising its statutory authority by leasing
 15 Midlothian Manor to PADS which would be required by
 16 the UDO. As PADS cited in their briefs, Chapter
 17 310, Section 10, talks about the authority that is
 18 conferred upon the local housing authorities, and
 19 Section 2 states that the local authority has,
 20 quote, "all the powers necessary or appropriate in
 21 order that they may engage in low-rent housing to
 22 relieve the shortage of decent, safe, affordable
 23 and sanitary dwellings.
 24 Section 8.2 is really what I would term

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1 as like the necessary and proper clause, but it
2 states that to further these objectives set forth
3 in Section 2 the Authority has power to assist
4 through the exercise of the powers herein conferred
5 any individual, association, corporation, or
6 organization which presents a plan for development
7 or redevelopment of any property to provide
8 affordable housing.

9 And then Section 10 as was noted by the
10 Respondents states that all projects that are
11 brought forth pursuant to Chapter 310, Section 10/2
12 must comport with local zoning laws. But I think
13 Section 10 merely begs the question. The question
14 is did the director comport with the zoning laws in
15 making his decision or did the Zoning Board of
16 Appeals comport with the zoning laws in reversing
17 that decision?

18 The agreement by the Authority to lease
19 the facility to PADS to enable PADS to provide
20 housing for the chronically homeless is clearly
21 within the scope of the directives set forth in the
22 statute. No board member, and me reading the
23 record, no board member concluded that this was not
24 the case. The Zoning Board of Appeals represented

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1 by Mr. Babowice who was not part of this case until
2 it came before this Court insists that the case law
3 reveals that despite the clear directives of the
4 statute the Authority would not be acting in its
5 governmental capacity in leasing the facility to
6 PADS. He cites the Chicago Housing Authority
7 case -- and I don't need to do that cite because it
8 is in the record -- for the proposition that
9 whenever a unit of government is acting as a
10 landlord it is, quote, "acting in its proprietary
11 capacity rather than its governmental one." In the
12 Chicago Housing Authority, that concerned a public
13 housing tenant who had a month-to-month lease with
14 the Chicago Housing Authority. The Chicago Housing
15 Authority sought to terminate the lease pursuant to
16 the terms of the contract. The tenant argued that
17 the Housing Authority gave no reason for the
18 Authority terminating the lease and, therefore, it
19 violated his due process rights. And the Court
20 rejected that argument, and that's when they cited
21 the quote that Mr. Babowice cited.

22 The Court went on though to cite various
23 other cases where the government as a landlord
24 brought eviction proceedings against individuals or

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1 corporations, and the tenants argued that absent a
2 valid basis for the eviction the government
3 decision was arbitrary and a violation of due
4 process.

5 In the United States versus Blumenthal,
6 315 F.2d 351, which was actually cited as authority
7 by the Chicago Housing Authority case for the
8 pertinent quote, that case concerned, again, a
9 month-to-month lease by the government to a
10 clothing manufacturer, and the government sought to
11 terminate the lease pursuant to the terms of the
12 lease and the corporation argued that this was a
13 violation of their due process rights. And the
14 Court said, The fact that the plaintiff gave no
15 reason for its notice to quit and sought to evict
16 the defendant while renting other similar business
17 properties to other tenants on a similar
18 month-to-month basis is said to amount to
19 discrimination against the defendant which was so
20 arbitrary as to deny him due process of the law.

21 And then here is the pertinent quote --
22 and this is how it arose in juris prudence and
23 ultimately in the Chicago Housing Authority case --
24 But the plaintiff which is here acting in a

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1 proprietary rather than in a governmental capacity
2 has the same absolute right as any other landlord
3 to terminate a monthly lease by giving appropriate
4 notice and to recover possession of the demised
5 property without being given any reason for its
6 action. In this line of cases and it all concerns
7 the government being a party to a contract, the
8 Court found it necessary to distinguish the
9 government's role. In these cases it seems to me
10 the tenants were pushing to test the limits of
11 substantive due process and equal protection
12 rights. Essentially the language cited is founded
13 upon the simple principle that the government has a
14 right to enforce its contracts the same as anyone
15 else.

16 In fact, Brand versus Chicago Housing
17 Authority, 120 F.2d 786, gave this quote which is
18 really the genesis of it all and that's a 1941
19 case. When the government enters into contract
20 relations, its right and duties therein are
21 governed generally by the law applicable to
22 contracts between private individuals. So the need
23 for the Court to make this distinction between a
24 government actor and a party to a contract in those

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1 cases I find has no applicability whatsoever to the
2 present circumstances.

3 These cases do not form a basis to
4 ignore the statutory directives set forth by the
5 Illinois Legislature that clearly states that a
6 local housing authority is acting in furtherance of
7 its governmental authority when partnering with a
8 private enterprise to provide affordable houses,
9 nor do these cases justify reading into the UDO's
10 definition the same conclusion.

11 If one might conclude -- and I'm going
12 to say this a couple of times -- but if one might
13 conclude that the Zoning Board of Appeals
14 implicitly found that the Authority was not, quote,
15 "exercising its statutory authority," closed quote,
16 in partnering with PADS for the project, I find
17 that this conclusion was clearly erroneous.

18 The gravamen of this case though really,
19 I think, turns on the next issue, and that's
20 whether the proposed use of Midlothian Manor
21 constitutes government use. In determining whether
22 the Board was clearly erroneous on this score, it
23 is important I think to note that only two board
24 members showed any deference whatsoever to the

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1 director's determination. That was Chairman
2 Koeppen who voted to reverse Waggoner and Member
3 Stimpson who voted to affirm Waggoner. Much of
4 Koeppen's concern, however, was focused on the
5 process rather than on the interpretation itself.
6 But nobody in any way stated that Director
7 Waggoner's interpretation was presumed correct and
8 gave any basis with any specificity as to why that
9 conclusion was not correct as the UDO requires, and
10 I believe that's a problem for the Zoning Board of
11 Appeals.

12 It is uncontested that the building is
13 owned by a unit of government, the Authority. The
14 County Board selected the term "use." And as we
15 talked about in argument, that is a very, very
16 broad term. Merriam-Webster's online dictionary
17 defines "use" as the act or practice of employing
18 something or a method or manner of employing or
19 applying something.

20 As acknowledged earlier, if it were the
21 Authority actually operating Midlothian Manor to
22 provide housing for the chronically homeless, it
23 would certainly constitute government use as it is
24 defined in the UDO. But does the term, quote,

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1 "use" exclude leasing the property to a private
2 entity to fulfill a government purpose? The County
3 Board did not select the term "occupy." In
4 reversing the director, the Zoning Board of Appeals
5 members had to read into the ordinance that a unit
6 of government who owns a building must actually
7 occupy that building to constitute government use.
8 That the County Board likely did not contemplate
9 the exact scenario before us when enacting the UDO
10 does not justify straying from and adding meaning
11 to the plain language of this provision. Here the
12 Authority is using or employing its building via
13 the lease to PADS in furtherance of its statutory
14 directive. It is leasing the property to a private
15 corporation to fulfill its statutory authority
16 which according to Director Waggoner and from the
17 Court's interpretation clearly falls within the
18 definition as set forth in the UDO.

19 The Respondents argue that the Court
20 should look at Appendix F. And when the Court
21 reads Appendix F in conjunction with the government
22 use definition, it makes it clear that the County
23 Board intended to exclude residential use as a
24 valid government use when enacting the UDO. Again,

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1 this argument is not convincing to the Court. The
2 Court agrees with the State's Attorney's office and
3 Director Waggoner for that matter and defers to
4 Director Waggoner in his expertise that Appendix F
5 is simply a reference guide for categorizing uses
6 set forth in Section 6 and was not intended to be a
7 regulation.

8 Further, to accept such a conclusion
9 than the hypothetical of the Authority owning and
10 operating a housing project could never constitute
11 government use. Appendix F then would essentially
12 trump the government use definition. Such a
13 conclusion I don't believe is reasonable. Appendix
14 F is not a basis to insert exceptions into the
15 government use definition.

16 As I mentioned, additionally, the
17 director has opined that Appendix F is not
18 regulatory. On the Respondent's best day, Appendix
19 F may create some ambiguity. Under those
20 circumstances the Court should defer to the
21 director's expertise.

22 The Respondents also argue that the
23 Court should consider the density requirements and
24 that the Midlothian Manor cannot meet the density

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1 requirements for R-1. And they ask the Court to
 2 just look to affirm on any basis which is very
 3 difficult for the Court to do having no expertise
 4 and not being able to look at the record to see any
 5 arguments that were made or opinions given
 6 especially from the director or the Zoning Board of
 7 Appeals in regard to this. So this was in no way
 8 considered below. The Zoning Board of Appeals only
 9 dealt with whether or not to reverse the director's
 10 decision on government use.

11 And to review this abuse of discretion
 12 standard, the Court finds that very difficult also
 13 because what am I looking at to determine whether
 14 or not they abused their discretion? Because the
 15 Zoning Board members never even entertained the
 16 argument. But even assuming the density
 17 requirements are properly before the Court, I find
 18 them to be inapplicable. The SA and PADS both
 19 argued that the density requirements only apply to
 20 new construction and not to existing structures and
 21 that Midlothian Manor essentially is grandfathered
 22 in. Section 12.1.1 states that the regulations of
 23 Article 12 govern use, structures and other
 24 situations that came into existence legally but do

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1 not comply with one or more requirements of the
 2 ordinance.

3 12.3.1 defines nonconforming structures
 4 as any building which is a legally established but
 5 no longer complies with density standards.

6 13.3.2 states that a nonconforming
 7 structure may be used for any use allowed in the
 8 underlying zoning district.

9 12.2.9 states that a multidwelling
 10 structure that was legally established shall not be
 11 deemed nonconforming solely to the fact that it
 12 does not comply with maximum density standards.

13 So the Court even though I don't believe
 14 it is properly before me right now because there is
 15 nothing for me to review and so, therefore, I would
 16 be reviewing this de novo, I guess, which is kind
 17 of crazy to me. But based upon -- assuming that it
 18 was properly before me based upon Section 12, the
 19 density standards do not apply to Midlothian Manor.

20 So based upon the foregoing, I am
 21 finding that the Zoning Board of Appeals was
 22 clearly erroneous in reversing the director's
 23 decision on the definition of government use which
 24 leads me to the issue of assembly space.

Page 23

1 The next issue is for me to determine
 2 whether the Zoning Board of Appeals was clearly
 3 erroneous in reversing the director's finding that
 4 Libertyville Manor as presented contained no
 5 assembly space as defined by the UDO. Again, this
 6 is really hard for the Court to do because the
 7 issue is never really addressed by the board
 8 members in rendering their decision. The only time
 9 that it was mentioned in concluding remarks was
 10 when the Chairman simply said, "And I struggle with
 11 that assembly space, too. It's a big thing for
 12 me." That's all he said about it. And Member
 13 Zerba said, In my brain, three ellipses, assembly
 14 is just a gathering, and I would have to just say
 15 by the size of the so-called entry, I would
 16 consider that to be assembly space.

17 That in no way is any analysis
 18 pertaining to the definition of assembly space.
 19 But be that as it may, I go and I look at assembly
 20 space and the definition as you folks provided to
 21 me and as we know, it is intended to accommodate a
 22 group of people gathered together for a particular
 23 purpose whether religious, social, educational or
 24 social, and it gives some examples. The un rebutted

Page 24

1 testimony is that the common areas of Midlothian
 2 Manor would be used by the residents at the
 3 pleasure of the individual residents. There is no
 4 evidence that the areas would be used for planned
 5 or organized events. Rather, residents could use
 6 those areas to sit, read, eat, watch TV, et cetera.
 7 There is no evidence that the common areas would be
 8 used, quote, "to accommodate a group of people
 9 gathered together for a particular purpose," closed
 10 quote, as required by the UDO. The fact that one
 11 tenant might suggest meeting another tenant in a
 12 living room to watch a ball game does not transform
 13 the room into assembly space.

14 The fire department analogy I believe
 15 illustrates this point very aptly. Any fire
 16 protection facility with full-time firefighters
 17 would have an assembly space according to the
 18 reading urged by the Respondents. The county board
 19 cannot have intended such a result. Furthermore,
 20 when one cross-references 6.3.24, it is evident
 21 that the county board consider assembly to be more
 22 of a public type of gathering. That provision
 23 states that an assembly shall be between 8:00 a.m.
 24 and 8:00 p.m. unless you get a permit to hold the

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1 assembly outside of those hours and that you must
2 have a maximum of 15 assemblies per year. Applying
3 that provision to the instant facts would create
4 absurd results. Two tenants who want to meet after
5 work, say, at 9:00 p.m. to share a pizza and watch
6 the election results would be required to obtain a
7 permit to do that. Any two tenants or any
8 combination of two tenants if they were to watch TV
9 together they could do so only for a total of 15
10 times per year. It is clear to the Court that this
11 provision was not enacted nor the plain reading of
12 the provision was not enacted for a situation to be
13 used by PADS at Midlothian Manor.
14 So inasmuch as the Court can conclude
15 from the record that the Zoning Board of Appeals
16 found that there was assembly space at Midlothian
17 Manor which, again, is difficult for me to do,
18 indeed, I'm finding that that was also clearly
19 erroneous and for the foregoing reasons I am
20 reversing the Zoning Board of Appeals' decision.
21 MR. MASINI: Thank you.
22 THE COURT: All right. Anything else we need
23 to do?
24 No?

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1 MR. SHAPIRO: Thank you, Judge.
2 THE COURT: We are all good?
3 All right. Thank you, everybody.
4 Thank you.
5 MS. FOX: Thank you, your Honor.
6 (WHICH WERE ALL THE PROCEEDINGS HAD
7 IN THE ABOVE-ENTITLED CAUSE ON THIS
8 DATE.)
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Page 27

1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF L A K E)
4 I, BARBARA A. DeMICCO, C.S.R. No.
5 84-2946, a Certified Shorthand Reporter of the
6 State of Illinois, do hereby certify that I
7 reported in shorthand the proceedings had at the
8 hearing aforesaid, and that the foregoing is a
9 true, complete and correct transcript of the
10 proceedings of said hearing as appears from my
11 stenographic notes so taken and transcribed under
12 my personal direction.
13 IN WITNESS WHEREOF, I do hereunto set my
14 hand at Chicago, Illinois, this 18th day of
15 November, 2016.
16
17 *Barbara A. DeMico*
18 BARBARA A. DeMICCO, C.S.R. No. 84-2946
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22 appeared on behalf of Defendant Lake
23 County Zoning Board of Appeals;
24

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1 APPEARANCES (CONT'D):
2 OFFICE OF THE STATE'S ATTORNEY,
3 LAKE COUNTY, ILLINOIS,
4 (18 North County Street, 3rd Floor,
5 Waukegan, Illinois 60085,
6 847-377-3000), by:
7 MS. KAREN FOX,
8 Assistant State's Attorney,
9 appeared on behalf of Director Waggoner;
10
11 DAN SHAPIRO LAW, LLC,
12 (3661 Woodhead Drive,
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14 312-763-9640), by:
15 MR. DAN SHAPIRO,
16 dshapiro@danshapirolaw.com,
17 appeared on behalf of the individual
18 objectors.
19
20
21
22 REPORTED BY: BARBARA A. DeMICCO,
23 C.S.R. Certificate No. 84-2946.
24

0004

1 THE COURT: Hey, hey, folks. Come on up.
2 MR. MASINI: Good afternoon.
3 THE COURT: Good afternoon.
4 MS. DiGRINO: Good afternoon.
5 THE COURT: Good afternoon, everybody. I was
6 telling Vivian I'm glad --
7 MR. BABOWICE: Good afternoon, Judge.
8 THE COURT: Hello, Mr. Babowice.
9 MR. SHAPIRO: Good afternoon, your Honor.
10 Mr. Shapiro. How are you folks?
11 Miss Fox, welcome.
12 MS. FOX: Good afternoon, your Honor. I'm
13 standing in for Ms. Dawson.
14 THE COURT: I noticed that was not her.
15 I was telling Vivian I'm glad I didn't
16 continue this out for two weeks because I would
17 have spent two more weeks looking at everything.
18 And I see you have a court reporter.
19 Hello there. How are you?
20 THE COURT REPORTER: Good, how are you?
21 THE COURT: Just also for the record I think
22 it is important to note that at our last argument
23 we have had two oral arguments in this case and Mr.
24 Babowice brought up the density argument, and the

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1 State's Attorney's Office along with the
2 petitioners which includes the Housing Authority
3 and PADS all cited the Court to Section 12 of the
4 zoning ordinance -- Article 12, excuse me, and so
5 there is no argument that they waived any argument
6 as it pertains to Article 12. And the Court did
7 consider Article 12 in its ruling.

8 Anything else, anybody, other than that
9 that we need to supplement the record with that we
10 talked about in oral argument that wasn't in the
11 briefs? I don't think so.

12 Okay. So here is the Court's ruling:
13 The uncontested facts are that the Midlothian Manor
14 consists of a building on an acre built in 1997
15 which contains 14 individual efficiency apartments
16 with toilet and kitchen facilities in each
17 respective unit. The building also contains common
18 areas which consists of a kitchen, a lobby, living
19 and dining rooms, and a rec room. It has always
20 been zoned R-1. In 2014 PADS and the Authority
21 entered into a private public partnership to use
22 the building as a residence for chronically
23 homeless persons. It was also -- although this was
24 contested during the arguments, the Court finds

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1 that it was uncontested as to what these common
2 areas would be used for. It is uncontested that
3 these common areas would not be open to the public
4 and they would only be used by the residents.
5 Essentially the gist of the testimony is that the
6 common areas would be available to the residents to
7 watch TV, eat, read, chat, and the like. PADS
8 would also staff the building with a social worker,
9 nurse, and other staff.

10 Director Waggoner after some wrangling
11 amongst other county employees regarding the zoning
12 designation determined that the building as
13 proposed by PADS was government use R-1 with no
14 assembly space. The Zoning Board of Appeals
15 reversed that decision.

16 And I know there was much discussion in
17 the briefs and oral argument, also much, much
18 discussion during the actual protracted hearings
19 regarding the process that was used by Waggoner and
20 the County before Waggoner got involved. Also, how
21 the Midlothian Manor should probably be designated,
22 whether it is group living, et cetera. But I
23 believe that the issue presented to this Court is
24 much more narrow than all of those issues. And

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1 PADS kind of framed it this way, and I agree with
2 it.

3 The first issue is does the Authority's
4 lease to Midlothian Manor constitute government use
5 as it is defined in the UDO and, two, if it does,
6 does Midlothian Manor contain assembly space as it
7 is defined in the UDO. And the first task which I
8 spent much time looking at was the proper standard
9 of review. And PADS has claimed that this is a
10 very easy decision for the Court because it is
11 obvious that it is a de novo standard of review.
12 As we know, questions of law are reviewed de novo
13 and a construction of a statute is a question of
14 law that must be reviewed de novo. And it seems to
15 me that I'm tasked right now with interpreting a
16 specific state -- or specific state statutes in
17 conjunction with interpreting how a county zoning
18 ordinance comports with that state's statute or how
19 it interrelates with it. And to do that, of
20 course, I must apply a set of facts to the law to
21 make a determination as to whether or not the set
22 of facts meets the statutory requirements.

23 Despite the urging of PADS, despite my
24 musings on the previous date that it is difficult

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1 to envision a case where the Court would be tasked
2 with interpreting a statute without applying a
3 given set of facts to that statute, thus,
4 justifying the de novo standard of review and
5 despite a Second District case which states clearly
6 when material facts are not in dispute and only a
7 legal conclusion drawn therefrom it is a de novo
8 standard of review, the Supreme Court tells me that
9 this is a clearly erroneous standard.

10 In *City of Belvidere versus Illinois*
11 *State Labor Relations Board*, 181 Ill.2nd 191 at
12 205, the Court said, Because this case involves an
13 examination of the legal effect of a given set of
14 facts, it involves a mixed question of law and fact
15 and the clearly erroneous standard of review
16 applies.

17 Several years later, 10 years after that
18 in *Cincus versus the Village of Stickney*, 228
19 Ill.2nd 200 at 211 and 212, the Court -- the
20 Supreme Court said this: Mixed questions of fact
21 and law are questions in which the historical facts
22 are admitted or established, i.e., they are not in
23 dispute. The rule of law -- and that's my
24 parenthetical there. Back to the quote, The rule

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1 of law is undisputed, and the issue of whether the
2 facts satisfy the statutory standard or, put
3 another way, whether the rule of law has applied to
4 the established facts is or is not violated. And
5 the Court noted prior to the City of Belvidere case
6 which I just cited, This Court has held where facts
7 are undisputed, the legal result of those facts is
8 a question of law which is reviewed de novo.
9 However, in the City of Belvidere, this Court held
10 for the first time that an examination and a legal
11 effect of a given set of facts involves a mixed
12 question of law and fact with a standard of review
13 clearly erroneous.

14 And so the Court acknowledging that this
15 has been a very difficult area including by the
16 Supreme Court, that is the holding of that case and
17 it is still good law.

18 A year after that in Excel Disposal
19 Corp., Excel Disposal argued exactly what PADS
20 argued, that it is a de novo standard of review
21 because the facts aren't in dispute and it is just
22 applying the facts to the statute, and the Court
23 said we disagree, it is a clearly erroneous
24 standard.

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1 The First District in 2016 in Cook
2 County Sheriff's Office versus Cook County
3 something on Human Rights -- Commission on Human
4 Rights it must be -- cited that exact language in
5 the Supreme Court, as did the Second District in
6 the City of Sandwich case, 406 Ill.App.3d 1006.

7 So I believe it is a clearly erroneous
8 standard that I am confronted with right now. An
9 administrative decision is clearly erroneous only
10 when the reviewing Court based upon the entire
11 record is left with a definite and firm conviction
12 that a mistake has been made.

13 An administrative agency's decision is
14 generally not required to make findings on every
15 evidentiary fact or claim. Instead the agency's
16 findings must be specific enough to permit an
17 intelligent review of its decision. And that's the
18 Lucie B. case, 212 Ill.App.2d 101284 which this
19 Court has found to be quite challenging based upon
20 the record.

21 In this case it has been as I mentioned
22 during oral argument with you guys extremely
23 difficult for me to discern the exact basis of the
24 Board's decision in part because there are six

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1 board members but also in part because the
2 individuals did not articulate with any specificity
3 or particularity the basis of their opinions. As I
4 mentioned earlier, the hearings took many twists
5 and turns and much time was spent on the process
6 leading up to the hearing and whether the
7 Midlothian Manor fell within various use
8 definitions under the UDO like group living and the
9 like. But the key issue for this Court is to
10 decide whether the Board's ultimate decision to
11 reverse the director's opinion that Midlothian
12 Manor constituted government use with no assembly
13 space was clearly erroneous.

14 We know from 2.7.1.2 -- let me know if I
15 go too fast --

16 THE COURT REPORTER: Thank you.

17 THE COURT: -- the director is allowed to make
18 interpretations of the provisions of this
19 ordinance. When somebody believes that the
20 director's erred, 3.14 allows an appeal to the
21 Zoning Board of Appeals.

22 2.7.1.2 also states that the
23 responsibility for interpreting it is with the
24 director, and 3.14.7 states that this

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1 interpretation by the director enjoys, quote, "a
2 presumption of correctness," closed quote, before
3 the Zoning Board of Appeals, which I think is
4 pertinent in my analysis or was somewhat pertinent
5 in my analysis.

6 Government use as you guys, as we all
7 know and just for the record is defined under
8 14.2(191), quote, A building or structure owned or
9 leased by a unit of government and used by the unit
10 of government in exercising its statutory
11 authority.

12 In my analysis the first issue is
13 determining whether the Authority is, quote,
14 exercising its statutory authority by leasing
15 Midlothian Manor to PADS which would be required by
16 the UDO. As PADS cited in their briefs, Chapter
17 310, Section 10, talks about the authority that is
18 conferred upon the local housing authorities, and
19 Section 2 states that the local authority has,
20 quote, "all the powers necessary or appropriate in
21 order that they may engage in low-rent housing to
22 relieve the shortage of decent, safe, affordable
23 and sanitary dwellings.

24 Section 8.2 is really what I would term

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1 as like the necessary and proper clause, but it
2 states that to further these objectives set forth
3 in Section 2 the Authority has power to assist
4 through the exercise of the powers herein conferred
5 any individual, association, corporation, or
6 organization which presents a plan for development
7 or redevelopment of any property to provide
8 affordable housing.

9 And then Section 10 as was noted by the
10 Respondents states that all projects that are
11 brought forth pursuant to Chapter 310, Section 10/2
12 must comport with local zoning laws. But I think
13 Section 10 merely begs the question. The question
14 is did the director comport with the zoning laws in
15 making his decision or did the Zoning Board of
16 Appeals comport with the zoning laws in reversing
17 that decision?

18 The agreement by the Authority to lease
19 the facility to PADS to enable PADS to provide
20 housing for the chronically homeless is clearly
21 within the scope of the directives set forth in the
22 statute. No board member, and me reading the
23 record, no board member concluded that this was not
24 the case. The Zoning Board of Appeals represented

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1 by Mr. Babowice who was not part of this case until
2 it came before this Court insists that the case law
3 reveals that despite the clear directives of the
4 statute the Authority would not be acting in its
5 governmental capacity in leasing the facility to
6 PADS. He cites the Chicago Housing Authority
7 case -- and I don't need to do that cite because it
8 is in the record -- for the proposition that
9 whenever a unit of government is acting as a
10 landlord it is, quote, "acting in its proprietary
11 capacity rather than its governmental one." In the
12 Chicago Housing Authority, that concerned a public
13 housing tenant who had a month-to-month lease with
14 the Chicago Housing Authority. The Chicago Housing
15 Authority sought to terminate the lease pursuant to
16 the terms of the contract. The tenant argued that
17 the Housing Authority gave no reason for the
18 Authority terminating the lease and, therefore, it
19 violated his due process rights. And the Court
20 rejected that argument, and that's when they cited
21 the quote that Mr. Babowice cited.

22 The Court went on though to cite various
23 other cases where the government as a landlord
24 brought eviction proceedings against individuals or

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1 corporations, and the tenants argued that absent a
2 valid basis for the eviction the government
3 decision was arbitrary and a violation of due
4 process.

5 In the United States versus Blumenthal,
6 315 F.2d 351, which was actually cited as authority
7 by the Chicago Housing Authority case for the
8 pertinent quote, that case concerned, again, a
9 month-to-month lease by the government to a
10 clothing manufacturer, and the government sought to
11 terminate the lease pursuant to the terms of the
12 lease and the corporation argued that this was a
13 violation of their due process rights. And the
14 Court said, The fact that the plaintiff gave no
15 reason for its notice to quit and sought to evict
16 the defendant while renting other similar business
17 properties to other tenants on a similar
18 month-to-month basis is said to amount to
19 discrimination against the defendant which was so
20 arbitrary as to deny him due process of the law.

21 And then here is the pertinent quote --
22 and this is how it arose in juris prudence and
23 ultimately in the Chicago Housing Authority case --
24 But the plaintiff which is here acting in a

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1 proprietary rather than in a governmental capacity
2 has the same absolute right as any other landlord
3 to terminate a monthly lease by giving appropriate
4 notice and to recover possession of the demised
5 property without being given any reason for its
6 action. In this line of cases and it all concerns
7 the government being a party to a contract, the
8 Court found it necessary to distinguish the
9 government's role. In these cases it seems to me
10 the tenants were pushing to test the limits of
11 substantive due process and equal protection
12 rights. Essentially the language cited is founded
13 upon the simple principle that the government has a
14 right to enforce its contracts the same as anyone
15 else.

16 In fact, Brand versus Chicago Housing
17 Authority, 120 F.2d 786, gave this quote which is
18 really the genesis of it all and that's a 1941
19 case. When the government enters into contract
20 relations, its right and duties therein are
21 governed generally by the law applicable to
22 contracts between private individuals. So the need
23 for the Court to make this distinction between a
24 government actor and a party to a contract in those

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1 cases I find has no applicability whatsoever to the
2 present circumstances.

3 These cases do not form a basis to
4 ignore the statutory directives set forth by the
5 Illinois Legislature that clearly states that a
6 local housing authority is acting in furtherance of
7 its governmental authority when partnering with a
8 private enterprise to provide affordable houses,
9 nor do these cases justify reading into the UDO's
10 definition the same conclusion.

11 If one might conclude -- and I'm going
12 to say this a couple of times -- but if one might
13 conclude that the Zoning Board of Appeals
14 implicitly found that the Authority was not, quote,
15 "exercising its statutory authority," closed quote,
16 in partnering with PADS for the project, I find
17 that this conclusion was clearly erroneous.

18 The gravamen of this case though really,
19 I think, turns on the next issue, and that's
20 whether the proposed use of Midlothian Manor
21 constitutes government use. In determining whether
22 the Board was clearly erroneous on this score, it
23 is important I think to note that only two board
24 members showed any deference whatsoever to the

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1 director's determination. That was Chairman
2 Koeppen who voted to reverse Waggoner and Member
3 Stimpson who voted to affirm Waggoner. Much of
4 Koeppen's concern, however, was focused on the
5 process rather than on the interpretation itself.
6 But nobody in any way stated that Director
7 Waggoner's interpretation was presumed correct and
8 gave any basis with any specificity as to why that
9 conclusion was not correct as the UDO requires, and
10 I believe that's a problem for the Zoning Board of
11 Appeals.

12 It is uncontested that the building is
13 owned by a unit of government, the Authority. The
14 County Board selected the term "use." And as we
15 talked about in argument, that is a very, very
16 broad term. Merriam-Webster's online dictionary
17 defines "use" as the act or practice of employing
18 something or a method or manner of employing or
19 applying something.

20 As acknowledged earlier, if it were the
21 Authority actually operating Midlothian Manor to
22 provide housing for the chronically homeless, it
23 would certainly constitute government use as it is
24 defined in the UDO. But does the term, quote,

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1 "use" exclude leasing the property to a private
2 entity to fulfill a government purpose? The County
3 Board did not select the term "occupy." In
4 reversing the director, the Zoning Board of Appeals
5 members had to read into the ordinance that a unit
6 of government who owns a building must actually
7 occupy that building to constitute government use.
8 That the County Board likely did not contemplate
9 the exact scenario before us when enacting the UDO
10 does not justify straying from and adding meaning
11 to the plain language of this provision. Here the
12 Authority is using or employing its building via
13 the lease to PADS in furtherance of its statutory
14 directive. It is leasing the property to a private
15 corporation to fulfill its statutory authority
16 which according to Director Waggoner and from the
17 Court's interpretation clearly falls within the
18 definition as set forth in the UDO.

19 The Respondents argue that the Court
20 should look at Appendix F. And when the Court
21 reads Appendix F in conjunction with the government
22 use definition, it makes it clear that the County
23 Board intended to exclude residential use as a
24 valid government use when enacting the UDO. Again,

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1 this argument is not convincing to the Court. The
2 Court agrees with the State's Attorney's office and
3 Director Waggoner for that matter and defers to
4 Director Waggoner in his expertise that Appendix F
5 is simply a reference guide for categorizing uses
6 set forth in Section 6 and was not intended to be a
7 regulation.

8 Further, to accept such a conclusion
9 than the hypothetical of the Authority owning and
10 operating a housing project could never constitute
11 government use. Appendix F then would essentially
12 trump the government use definition. Such a
13 conclusion I don't believe is reasonable. Appendix
14 F is not a basis to insert exceptions into the
15 government use definition.

16 As I mentioned, additionally, the
17 director has opined that Appendix F is not
18 regulatory. On the Respondent's best day, Appendix
19 F may create some ambiguity. Under those
20 circumstances the Court should defer to the
21 director's expertise.

22 The Respondents also argue that the
23 Court should consider the density requirements and
24 that the Midlothian Manor cannot meet the density

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1 requirements for R-1. And they ask the Court to
2 just look to affirm on any basis which is very
3 difficult for the Court to do having no expertise
4 and not being able to look at the record to see any
5 arguments that were made or opinions given
6 especially from the director or the Zoning Board of
7 Appeals in regard to this. So this was in no way
8 considered below. The Zoning Board of Appeals only
9 dealt with whether or not to reverse the director's
10 decision on government use.

11 And to review this abuse of discretion
12 standard, the Court finds that very difficult also
13 because what am I looking at to determine whether
14 or not they abused their discretion? Because the
15 Zoning Board members never even entertained the
16 argument. But even assuming the density
17 requirements are properly before the Court, I find
18 them to be inapplicable. The SA and PADS both
19 argued that the density requirements only apply to
20 new construction and not to existing structures and
21 that Midlothian Manor essentially is grandfathered
22 in. Section 12.1.1 states that the regulations of
23 Article 12 govern use, structures and other
24 situations that came into existence legally but do

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1 not comply with one or more requirements of the
2 ordinance.

3 12.3.1 defines nonconforming structures
4 as any building which is a legally established but
5 no longer complies with density standards.

6 13.3.2 states that a nonconforming
7 structure may be used for any use allowed in the
8 underlying zoning district.

9 12.2.9 states that a multidwelling
10 structure that was legally established shall not be
11 deemed nonconforming solely to the fact that it
12 does not comply with maximum density standards.

13 So the Court even though I don't believe
14 it is properly before me right now because there is
15 nothing for me to review and so, therefore, I would
16 be reviewing this de novo, I guess, which is kind
17 of crazy to me. But based upon -- assuming that it
18 was properly before me based upon Section 12, the
19 density standards do not apply to Midlothian Manor.

20 So based upon the foregoing, I am
21 finding that the Zoning Board of Appeals was
22 clearly erroneous in reversing the director's
23 decision on the definition of government use which
24 leads me to the issue of assembly space.

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1 The next issue is for me to determine
2 whether the Zoning Board of Appeals was clearly
3 erroneous in reversing the director's finding that
4 Libertyville Manor as presented contained no
5 assembly space as defined by the UDO. Again, this
6 is really hard for the Court to do because the
7 issue is never really addressed by the board
8 members in rendering their decision. The only time
9 that it was mentioned in concluding remarks was
10 when the Chairman simply said, "And I struggle with
11 that assembly space, too. It's a big thing for
12 me." That's all he said about it. And Member
13 Zerba said, In my brain, three ellipses, assembly
14 is just a gathering, and I would have to just say
15 by the size of the so-called entry, I would
16 consider that to be assembly space.

17 That in no way is any analysis
18 pertaining to the definition of assembly space.
19 But be that as it may, I go and I look at assembly
20 space and the definition as you folks provided to
21 me and as we know, it is intended to accommodate a
22 group of people gathered together for a particular
23 purpose whether religious, social, educational or
24 social, and it gives some examples. The unrebutted

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1 testimony is that the common areas of Midlothian
2 Manor would be used by the residents at the
3 pleasure of the individual residents. There is no
4 evidence that the areas would be used for planned
5 or organized events. Rather, residents could use
6 those areas to sit, read, eat, watch TV, et cetera.
7 There is no evidence that the common areas would be
8 used, quote, "to accommodate a group of people
9 gathered together for a particular purpose," closed
10 quote, as required by the UDO. The fact that one
11 tenant might suggest meeting another tenant in a
12 living room to watch a ball game does not transform
13 the room into assembly space.

14 The fire department analogy I believe
15 illustrates this point very aptly. Any fire
16 protection facility with full-time firefighters
17 would have an assembly space according to the
18 reading urged by the Respondents. The county board
19 cannot have intended such a result. Furthermore,
20 when one cross-references 6.3.24, it is evident
21 that the county board consider assembly to be more
22 of a public type of gathering. That provision
23 states that an assembly shall be between 8:00 a.m.
24 and 8:00 p.m. unless you get a permit to hold the

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1 assembly outside of those hours and that you must
2 have a maximum of 15 assemblies per year. Applying
3 that provision to the instant facts would create
4 absurd results. Two tenants who want to meet after
5 work, say, at 9:00 p.m. to share a pizza and watch
6 the election results would be required to obtain a
7 permit to do that. Any two tenants or any
8 combination of two tenants if they were to watch TV
9 together they could do so only for a total of 15
10 times per year. It is clear to the Court that this
11 provision was not enacted nor the plain reading of
12 the provision was not enacted for a situation to be
13 used by PADS at Midlothian Manor.

14 So inasmuch as the Court can conclude
15 from the record that the Zoning Board of Appeals
16 found that there was assembly space at Midlothian
17 Manor which, again, is difficult for me to do,
18 indeed, I'm finding that that was also clearly
19 erroneous and for the foregoing reasons I am
20 reversing the Zoning Board of Appeals' decision.

21 MR. MASINI: Thank you.

22 THE COURT: All right. Anything else we need
23 to do?

24 No?

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1 MR. SHAPIRO: Thank you, Judge.

2 THE COURT: We are all good?

3 All right. Thank you, everybody.

4 Thank you.

5 MS. FOX: Thank you, your Honor.

6 (WHICH WERE ALL THE PROCEEDINGS HAD
7 IN THE ABOVE-ENTITLED CAUSE ON THIS
8 DATE.)

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1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF L A K E)

4 I, BARBARA A. DeMICCO, C.S.R. No.
5 84-2946, a Certified Shorthand Reporter of the
6 State of Illinois, do hereby certify that I
7 reported in shorthand the proceedings had at the
8 hearing aforesaid, and that the foregoing is a
9 true, complete and correct transcript of the
10 proceedings of said hearing as appears from my
11 stenographic notes so taken and transcribed under
12 my personal direction.

13 IN WITNESS WHEREOF, I do hereunto set my
14 hand at Chicago, Illinois, this 18th day of
15 November, 2016.

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BARBARA A. DeMICCO, C.S.R. No. 84-2946
Certified Shorthand Reporter