

**BEFORE THE ZONING BOARD OF APPEALS
AURORA, ILLINOIS**

Kim Frachey, Nancy Maloney,)	
<i>et al.</i> , and Fox Valley Families)	
Against Planned Parenthood,)	
)	
Appellants,)	
)	
vs.)	07 ZBA 001
)	
City of Aurora,)	
A Municipal Corporation,)	
)	
Appellee.)	

**Motion to Dismiss And/Or Transfer Appeal to the Building Code Board
Of Appeals for Lack of Subject Matter Jurisdiction**

NOW COMES the City of Aurora, Appellee, by and through its attorney, Alayne M. Weingartz, Corporation Counsel, and for its Motion to Dismiss and/or Transfer Appeal, states and alleges as follows:

Appellants state “**by this letter the undersigned hereby appeal...the orders, requirements, decisions and determinations announced on Monday, October 1, 2007, culminating in the grant of an occupancy permit** for the Gemini/Planned Parenthood facility at 3051 E. New York Street, Aurora, Illinois.” Appellants go on to identify their appeal as inclusive of “(1) **the decisions, orders, and/or determinations to approve every relevant permit application**—particularly the zoning permit and the occupancy certificate applications—submitted by Gemini/Planned Parenthood, along with relevant decisions, orders, and/or determinations to approve plans, applications, or other intermediate actions predicate to obtaining permit application approval, and (2) **the decisions, orders, and/or determinations to issue every relevant permit**—particularly the zoning permit and the occupancy certificate—obtained for the subject property, along with relevant decisions, orders, and/or determinations to approve plans, applications, or other intermediate actions predicate to issuing the relevant permits.” (Emphasis added)

Appellants cite several sections of the Illinois Municipal Code and the Aurora Zoning Ordinance with respect to their appeal regarding this property, located at 3051 E. New York Street (hereinafter “the subject property”).

LACK OF SUBJECT MATTER JURISDICTION

The first statutory section cited by Appellants is 65 ILCS 5/11-13-12 of the Municipal Code, which provides that “an appeal to the board of appeals may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality. The appeal shall be taken within 45 days of the action complained of by filing, with the officer from whom the appeal is taken and with the board of appeals a notice of appeal, specifying the grounds thereof.”

The zoning for the subject property was approved and adopted by the City Council of the City of Aurora via Ordinance 093-124 on December 7, 1993. The Zoning Administrator approved the use to be made of the subject property as submitted in the final plan document as being in accordance with the previously adopted zoning for the subject property in a staff report dated October 27, 2006, which report was published to the Planning Commission at a public meeting on November 1, 2006, and to the Planning and Development Committee at a public meeting on November 16, 2006. Therefore and according to 65 ILCS 5/11-13-12 which Appellants cite as authority, it has been more than 45 days since any zoning determination by the Zoning Administrator was made for the subject property.

Further, the City of Aurora Zoning Ordinance provides, in Section 10.4-2 of that Ordinance, that “the zoning board of appeals is hereby vested with the following jurisdiction and authority: 10.4-2.1 To hear and decide appeals from any order, requirement, decision or determination made by the zoning administrator under this ordinance...” As well, the “Rules and Regulations For Aurora Zoning Board of Appeals” states, in the “Procedures on Appeals” section at page 3 of such Rules, that “an appeal for an interpretation of the Zoning Administrator’s decision may be taken by any person aggrieved, or officer, department or bureau head of the municipality affected by the Zoning Administrator’s decision. An appeal shall be filed with the Zoning Administrator

within twenty (20) days from the date that the decision appealed form (sic) is published. (a) a decision shall be deem (sic) published when the ruling is made known to the party requesting it...”

In this case, the Zoning Administrator did not issue any “order, requirement, decision or determination” on October 1, 2007. His determination of the appropriate zoning for the subject property was “published” in 2006, when the property was the subject of a public meeting before the Planning Commission and, at the latest, when the matter was heard, again at a public meeting, before the Planning and Development Committee on November 16, 2006. More than twenty days have passed since the Zoning Administrator published his determination of the appropriate zoning and use for the subject property.

Appellants may argue that the recent investigation into the review process involving the subject property somehow invites this appeal, but this argument would be without legal merit. The Zoning Administrator’s determination did not change as a result of the investigation, and all that resulted from said investigation was decisions by outside attorneys that the Zoning Administrator’s original determination in 2006 and the Ordinance adopted in 1993 were in fact correct interpretations of the City’s zoning requirements as applied to the subject property. This review does not then rise to the level of a new publication of the Zoning Administrator’s determination, and cannot be used for purposes of determining the time allowed for an appeal to be filed.

Therefore, under any legal authority cited by Appellants, whether it be the Municipal Code Section 11-13-12 or the City of Aurora Zoning Ordinance, or the Rules and Regulations of the Zoning Board of Appeals, the time has expired for an appeal to be brought before the Zoning Board of Appeals, and therefore, the Zoning Board of Appeals lacks subject matter jurisdiction of this issue, and the Appeal should therefore be dismissed.

Appellants also cite 65 ILCS 5/11-13-15, which provides property owners within 1200 feet in any direction of the property on which a building claimed to be in violation of a zoning ordinance the right to institute any appropriate action or proceeding to remedy the alleged unlawful condition. Appellants’ reliance on this Section of the Illinois Municipal Code is incorrect. Section 11-13-15 provides an owner or tenant of

real property situated within the requisite distance of the subject property the ability to bring an action in state court – this statute does not provide for an appeal of an alleged zoning violation to a municipal board of appeal.

Section 11-13-15 expressly provides both municipalities and private land owners the power to file a cause of action against an adjoining private land owner who is in violation of the zoning code. *Herrey v. Berke*, 179 Ill App 3d 927, 933-35 (1st Dist. 1989); *City of Aurora v. Navar*, 210 Ill App 3d, 126 (2nd Dist. 1991). Here, judicial action under Section 11-13-15 would be against Planned Parenthood as the owner of the property, not against the City. “Although the terms of the statute provide that either the city or an adjacent landowner may institute proceedings against private landowners who violate zoning ordinances, **the language of the statute does not provide a cause of action against the city by a landowner.**” (*Heerey* at page 1281-emphasis added). The extent of involvement by the City would be receipt of notice of the action from the plaintiffs “[W]hen any such action is instituted by an owner or tenant, notice of such action shall be served upon the municipality at the time suit is begun, by serving a copy of the complaint on the chief executive officer of the municipality, no such action may be maintained until such notice has been given.”

Therefore, any reliance on Section 11-13-15 of the Municipal Code is, likewise, not well taken before the Zoning Board of Appeals. The Board is lacking in subject matter jurisdiction, and the Appeal should therefore be dismissed.

TRANSFER OF THIS APPEAL TO THE BUILDING CODE BOARD OF APPEALS

The only action that can be timely appealed by Appellants is the October 2007 issuance of the certificate of occupancy for the subject property.

Section 104.1 of the City of Aurora Building Code adopted in Section 12-16 of Chapter 12 of the City of Aurora Code of Ordinances provides “the building official is hereby authorized and directed to enforce the provisions of this code.” Section 110 of the Building Code so adopted provides for certificates of occupancy, and specifically, at Section 110.1, “No building or structure shall be used or occupied, and no change in the

existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a certificate of occupancy therefore as provided herein.” Section 110.4 provides “the building official is authorized to issue a temporary certificate of occupancy before the completion of the entire work covered by the permit, provided that such portion or portions shall be occupied safely.” The issuance of the certificate of occupancy was therefore the responsibility solely of the City of Aurora Building Official, an official of the City of Aurora Building and Permits Division, in compliance with Chapter 12 of the City of Aurora Code of Ordinances and the Building Code as amended and adopted from time to time.

The City acknowledges that in prior years, the City of Aurora had one person performing the role of both Zoning Administrator and Director of Permits. However these two roles became separate divisions and distinct jobs in approximately March of 1999, when the separate divisions of “Land Use and Zoning” and “Building and Permits” were created. Since approximately April of 1999, only the Building Official has been responsible for, and authorized to, issue certificates of occupancy in accordance with the Building Code as adopted and amended by the City of Aurora from time to time. This practice has been continuous since 1999 without exception. The Building Official seeks input from the land use and zoning and engineering divisions of the City prior to his issuance of any permit; however, the determination to issue same is solely his own and in accordance with the Building Code. While there exists still certain provisions within the Zoning Ordinance that are cited by Appellants as authority in this matter, those code provisions are and have not been relied upon or utilized since 1999 when the function of issuing occupancy permits became distinct and separate from the land use and zoning division, and therefore, are of no legal consequence or authority for purposes of this appeal.

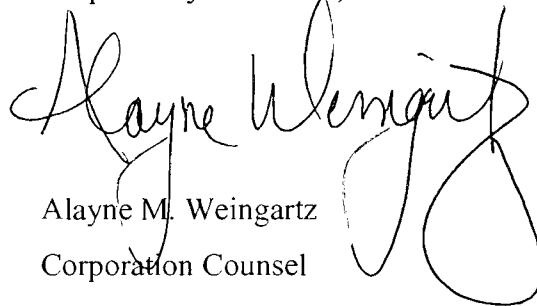
Therefore, because the issuance of the certificate of occupancy was solely within the authority of and acted upon by the Building Official, and not by the Zoning Administrator, Section 11-13-12 does not provide Appellants with a statutory basis for appealing a decision made by the Building Official to the Zoning Board of Appeals. Rather, according to the Building Code that authorizes certificates of occupancy, an appeal of the Building Official’s determination on this issue is well taken only to the

Building Code Board of Appeals. Moreover, Appellants state in their appeal as noted above, that they seek review of “determinations to approve every relevant permit application.” Again, the authority for issuance of permits lies with the Building Official, not with the Zoning Administrator, and thus the appeal is not well taken to the Zoning Board of Appeals.

WHEREFORE, the City of Aurora respectfully prays that the Zoning Board of Appeals enter an Order as follows:

- 1) That this Appeal as it might apply to this Zoning Board of Appeals is not timely filed and therefore, this Board lacks jurisdiction of this cause in its entirety; and
- 2) That this Appeal cannot be brought pursuant to Section 11-13-15 of the Municipal Code, and that portion of the Appeal brought pursuant thereto is hereby dismissed; and
- 3) That this Appeal shall be transferred to the Building Code Board of Appeals for further action consistent with its jurisdiction and its own rules and procedures.

Respectfully submitted,



Alayne M. Weingartz
Corporation Counsel