

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

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

**APPELLANTS' REPLY TO APPELLEE'S RESPONSE TO MOTION TO  
COMPLETE THE RECORD AS REQUIRED BY 65 ILCS 5/11-13-12 AND THE  
RULES AND REGULATIONS OF THE AURORA ZONING BOARD OF  
APPEALS**

Now come Kim Frachey, Nancy Maloney, Socorro Nieto, Chad and Natalie Fiolo, and Fox Valley Families Against Planned Parenthood (hereinafter “Appellants”), by their undersigned counsel, and move that the City of Aurora be required, pursuant to law as set forth in their Motion to Complete the Record and as set forth below, to complete the record herein. In support whereof, Appellants state the following:

**I. SCOPE OF APPEAL**

The City of Aurora states that Appellants appeal from:

(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. (Motion to Dismiss, pg 1, citing Notice of Appeal, pg 1)

Appellants also note that, in addition to appealing from the orders, requirements, decisions and determinations of the Zoning Administrator,

this appeal is taken as well from the orders, requirements, decisions and determinations of such other persons working under the authority of the Zoning Administrator or purporting to exercise in his stead the authority and responsibility for enforcing the Aurora Zoning Ordinance ("AZO"). (Notice of Appeal, pg 1)

## **II. STATUS OF MOTION**

Yesterday morning, the City delivered a Response to the Appellants' Motion, along with a CD-ROM containing images of certain additional documents, and an Amended Motion to Dismiss. The City based its determination of relevant documents as those the Zoning Administrator "relied upon in making the Zoning recommendation to the Plan Commission of the City of Aurora for their meeting on November 1, 2006 and that was ultimately approved by the Planning and Development Committee of the Aurora City Council at their meeting of November 16, 2006 relative to the Subject Property." (Notice of Certification of Record on Appeal, pg 1)

Appellants do not intend to argue the City's Motion to Dismiss prematurely and without the benefit of a full zoning record. However, for the sake of arguing this motion, Appellants will address the scope of the present appeal, the role of the Zoning Administrator and the Zoning Board of Appeals under the law, and a sampling of zoning orders, requirements, decisions and determinations made or required to be made in this matter.

The City claims that, throughout the approval and permitting process for the subject property, only one decision or determination was made by or under the authority of the Zoning Administrator: a "recommendation" made via a Staff Report to the Plan Commission in November 2006. (City's Response, pg 1) The City also claims that "the Zoning Board of Appeals does not have jurisdiction over permits applied for, granted or denied by the Building and Permits division of the City," even when these permits are required to be issued by authority of the Zoning Administrator. (City's Response, pg 1) The City is incorrect on both counts.

This action extends to orders, requirements, decisions and determinations beyond the lone decision made by the Zoning Administrator in October 2006. The requirement of the law is clear—"forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken." (65 ILCS 5/11-13-12) The law does not allow the City to pick and choose which action appealed from to respond to. The law requires "all the papers."

**III. IN THE CITY OF AURORA, THE ZONING ADMINISTRATOR ENFORCES  
THE ZONING ORDINANCE AND ZONING DETERMINATIONS FLOW FROM  
HIS AUTHORITY**

First, according to AZO 10.1-1:

The zoning administrator of the City of Aurora shall be responsible for the enforcing of this zoning ordinance. Said zoning administrator shall have the power and shall see that the provisions of this ordinance are properly enforced.

A city official must be given authority by some ordinance or statute to perform a particular duty, and in Aurora, the Zoning Administrator is the only official specifically charged by law with enforcement of the AZO.

Therefore, while the City contends that sections of the AZO are "of no legal consequence or authority," the clear fact remains that any zoning determination or decision made in the City of Aurora is an exercise of the Zoning Administrator's clear legal authority. (Amended Motion to Dismiss, pg 7) The Zoning Ordinance links the jurisdiction of the Zoning Board of Appeals to the Zoning Administrator's orders, requirements, decisions or determinations, because the AZO declares the Zoning Administrator enforcer of that ordinance. The AZO does not contemplate anyone else making a zoning determination or decision without doing so under the authority of the Zoning Administrator.

The City argues essentially that the Building Official may make zoning determinations without invoking the authority of the Zoning Administrator. (Amended Motion to Dismiss, pp 6-7) Appellants note that, when the City Council amended large sections of Chapter 12 of the Municipal Code, entitled "Buildings and Building Regulation," the Council stripped all provisions but one from "Article I. In General." The one provision left standing was Municipal Code Section 12-1: "There is created the position of zoning administrator. The zoning administrator shall enforce the city's zoning ordinance." That provision comprises the entirety of Article I of Chapter 12, while the City Building Code comprises Article II of Chapter 12. The same Chapter 12 that recognizes the authority of the Building Official over the Building Code, recognizes the authority of the Zoning Administrator over the Zoning Ordinance. (Municipal Code 12-1, 12-16; Building Code 104.1; cf. Building Code 101.1)

Moreover, while one should attempt to give effect to all provisions of the Code, if there is a direct conflict between the provisions of the Building Code and the Zoning Ordinance, those of the Zoning Ordinance prevail. The Municipal Code of Ordinances of the City of Aurora, Illinois, Sec. 12-16, adopted the 2000 International Building Code on June 5, 2001. However, according to the same Municipal Code of Ordinances, the Aurora Zoning Ordinance was amended "in its entirety" on April 25, 2006. (App. A) Thus, in determining the applicability of any directly conflicting requirements of the law, the later amended Zoning Ordinance takes precedence over the Building Code.

Indeed, the Building Code itself states that:

The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law. (Building Code 102.2)

Therefore, there is no merit in the City's argument that "Since approximately April of 1999, only the Building Official has been responsible for, and authorized to, issue certificates of occupancy..." (Amended Motion to Dismiss, pg 6)

If in fact the policy was as the City is now arguing it, given the requirements of the AZO, every time the Building Official or his staff—or any administrative official of the City besides the Zoning Administrator—made zoning determinations or issued zoning permits or occupancy certificates, all of those determinations would have to be declared illegal as against the AZO. Instead of discarding clear provisions of Aurora law and creating a code crisis, the simple answer is that the Building Official and his staff exercise the delegated authority of the Zoning Administrator when making determinations under the AZO.

Appellants' interpretation allows the whole of Aurora law to be respected and affirmed. It also preserves the rights of all applicants and neighbors aggrieved under the Zoning Ordinance and Illinois state law to appeal zoning determinations and decisions to the Zoning Board of Appeals.

#### **IV. THERE ARE MANY ZONING ORDERS, REQUIREMENTS, DECISIONS AND DETERMINATIONS THAT PROVIDE GROUNDS FOR THIS APPEAL**

The City claimed in its Motion to Dismiss that a "staff report" of October 26, 2006, was the last—and apparently only—zoning determination made by the Zoning Administrator that could be appealed by Aurora citizens. In its Amended Motion to Dismiss, the City apparently now contends that there were **no decisions** that could be appealed anywhere in this process. In the Amended Motion, the City states that "with regard to the recommendation of the Zoning Administrator to the Plan Commission, this recommendation is not appealable to the Zoning Board of Appeals as it is not a final decision." (Amended Motion to Dismiss, pp 4-5) A review of the Zoning Ordinance, the ZBA Rules and Regulations, the incomplete record, and other documents indicate that there are many zoning determinations and decisions that provide support for Appellants' timely filing with the ZBA.

##### **A. Zoning Determinations and Decisions Are Involved In the Issuance of Every Permit In the City of Aurora.**

The October 27, 2006, staff report was not the last zoning "order, requirement, decision or determination" to be made in this matter or from which the Appellants may appeal. As stated in the introduction, the Appellants appeal from all of the relevant orders, determinations, decisions and permits pertaining to the zoning and permitting of the subject property. (AZO 10.4-2.1; 65 ILCS 5/11-13-12)

While the City contends that the Zoning Administrator was not involved in the process after October 2006, its Amended Motion To Dismiss belies this contention. There, the City acknowledges that "The Building Official seeks input from the land use and zoning and engineering divisions of the City prior to his issuance of **any** permit..." (Amended Motion to Dismiss, pg 7, emphasis added)

The procedure actually followed in this case demonstrates the ongoing involvement of the Zoning Administrator in this process. "Any permit," under the City's acknowledgement, includes the Certificates of Occupancy the City issued on or about October 1, 2007. The Temporary Certificate of Occupancy (TCO) issued on August 16, 2007, to Gemini/Planned Parenthood notes, under Special Conditions, "ZONING; OK FOR TCO UNTIL SITE IMPROVEMENTS INSPECTED AND APPROVED." (Exhibit A1, Bates 000017) These conditions indicate that there were still zoning determinations to be made after the issuance of the August 16, 2007, TCO. Clearly, a zoning determination was made here, as even the incomplete record reflects, since the two TCO's issued October 1, 2007, do not include the previous conditional zoning requirement from August 16, 2007. (Exhibits A2 & A3, Bates 000018 & 000019) The earliest the Appellants had notice of this zoning determination was October 1, 2007, and thus, their appeal on October 2, 2007, would be timely filed.

Moreover, the clear language of Aurora law holds that "A certificate of occupancy to be issued by the **zoning administrator** shall be required for ... Occupancy and use of a building thereafter erected or enlarged." (AZO 10.3-1.1) And, "a temporary certificate of occupancy may be issued by the **zoning administrator**." (AZO 10.3-2) These clear requirements of law may not be ignored. Again, while for convenience, these certificates may have issued from the Buildings and Permits Division, their issuance remains an exercise of the authority of the Zoning Administrator. Otherwise, the certificates of occupancy issued in the present matter are null and void, since they would contravene AZO 10.3-2.

Finally, the Zoning Ordinance specifically requires that:

No building or structure shall be erected, reconstructed, enlarged, or moved until a zoning permit shall have been applied for in writing and issued by the zoning administrator. Said permit shall be posted in a prominent place on the premises prior to and during the period of erection, reconstruction, enlargement or moving. (AZO 10.2-1)

Surely, the City cannot be arguing that the issuance of a **zoning** permit is not a **zoning** determination proper to the **Zoning** Administrator. However, evidence of a zoning permit has not been provided in the record for this matter, and no evidence has been provided that a zoning permit was posted in a prominent place during the construction of the facility on the subject property.

**B. The Review of the Development Process and the Conclusions Generated By the Review, Along with the Zoning Decision on "Major Surgery," Were All Clear Zoning Orders, Requirements, Decisions and Determinations of the Zoning Administrator.**

Further evidence of subsequent zoning determinations after 2006 is shown by the recently released *Aurora borealis* newsletter distributed by the City to the people of Aurora. There, the Hon. Thomas Weisner, Mayor of Aurora, wrote about the City's most recent review of the development process involving the Gemini/Planned Parenthood project. The Mayor stated:

Once it became apparent that Gemini Office Development, a sub-agent of Planned Parenthood, had been less than forthcoming during the City's approval process, I felt I had a responsibility to **determine** if there was any wrongdoing before Planned Parenthood opened for business." (Exhibit B, *Aurora borealis*, Autumn 2007, pg 2, emphasis added)

The Mayor continued:

The City hired two outside **zoning** attorneys to review the process, plus asked the State's Attorney to review the issue. The City's Corporation Counsel, our contracted legal firm, and our planning and development staff **thoroughly researched and reviewed the process**, as well. In the end, none of the parties found sufficient legal grounds for refusing an occupancy certificate. (Exhibit B, *Aurora borealis*, pg 2, emphasis added)

The City has failed to mention in its Amended Motion and its Response that "The City's Corporation Counsel, our contracted legal firm, and our planning and development staff thoroughly researched and reviewed the process, as well." (Exhibit B, *Aurora borealis*, pg 2) Nor are there any documents in the zoning record to allow the Appellants, the ZBA, or the public to test the City's claim that:

**...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 zoning interpretations of the City Zoning requirements as applied to the subject property." (Amended Motion To Dismiss, p. 3, emphasis added)

Moreover, from the Mayor's comments about the "planning and development staff," it is also clear that the Zoning Administrator and his staff played a direct role in this review. Some questions that must have arisen and been answered during the review include the following: What are the permitted zoning uses of the property? What was the intended use at the time of permitting? What is the intended use now? Does the intended use fall within one of the permitted use categories, a special use category, or a prohibited use category? What types of abortions constitute "major surgery"? Was the process followed proper or improper? Were the issued permits legal or illegal? Did

Gemini lie or didn't they? Were the lies "material" or not? Were the zoning standards followed? (Exhibit C, Leutkehans Report; Exhibit D, Martens Report)

As this "thorough" review focused mainly on zoning matters, it was properly an exercise of the authority of the Zoning Administrator, no matter which City official actually initiated the review. (cf., AZO 10.1-1; Mun. Code, Chapter 12, Sec. 12-1.)

At the conclusion of the City's review process, a press conference was held on October 1, 2007, to explain the decisions and determinations of the City, the large majority of which related to questions about Gemini/Planned Parenthood's violations of the Aurora Zoning Ordinance. At the press conference, Mayor Weisner and Ms. Alayne Weingartz, Corporate Counsel of Aurora, conveyed the City's conclusions and the decision that Planned Parenthood would not be granted a Certificate of Occupancy until it signed an agreement to restrict its use of "major surgery," as defined by Attorney Leutkehans, on the property to comport with the permitted uses purportedly allowed under the Aurora Zoning Ordinance. (Leutkehans Report, pg 6) While it was not noted at the press conference which administrative official was making the zoning determination announced on October 1, 2007, this is evidence of a clear zoning order, requirement, decision and determination by the City. (AZO 10.4-2.4) The City has admitted that the outside attorneys "determined" and made "decisions"—by adopting their reports with regard to this zoning matter, the Zoning Administrator under the AZO has made a further determination or decision.

Finally, the *Aurora borealis* also presented "5 common questions about planned parenthood," in addition to the Mayor's personal remarks on the topic. Question 3 reads, "Why didn't the City Council debate and vote on opening of the facility?" Answer, "As a matter of law and practice, **the issuance of occupancy permits is done through an objective, administrative zoning process.** It would be unlawful for the city to suddenly change its practice..." (Exhibit B, *Aurora borealis*, Autumn 2007, pg 3, emphasis added) While the City contends to the Zoning Board of Appeals that no zoning determinations or decisions were made after October 2006, the City appears to be telling the residents of Aurora otherwise. Whether actually administered through the Buildings and Permits Division or the Land Use and Planning Division, according to the City, issuance of certificates of occupancy is "an objective, administrative **zoning process**," subject to the Aurora Zoning Ordinance.

#### **V. DECIDED INACTION IN THE FACE OF A ZONING VIOLATION IS A DECISION THAT CONTINUES UNTIL REMEDIED**

According to AZO 14.1-2, the Zoning Administrator:

...immediately upon any such violation [of the Aurora Zoning Ordinance] having been called to his attention, [shall] institute injunction, abatement or any other appropriate action to prevent, enjoin, abate or remove such violation.

The “shall” and the "immediately" in this provision indicate mandatory commands. The numerous zoning violations in this matter have been called to the attention of the Zoning Administrator by the Appellants in this case. Each day that the Zoning Administrator decides to do nothing to remedy these zoning violations is a continuing decision that may be, and is being, appealed in this action.

Moreover, according to state law, the ZBA has the same powers as the officer from whom the appeal is taken with regard to orders to be made in the premises. (65 ILCS 5/11-13-12) At this very moment, the Zoning Administrator is commanded by law to remedy the zoning violations on this property, and he has full powers to do so. Appellants urge the ZBA to exercise those proper powers and uphold the laws of the City of Aurora.

**VI. EVEN IF ANOTHER CITY OFFICIAL ENFORCES THE AURORA ZONING ORDINANCE, ILLINOIS STATUTE VESTS JURISDICTION IN THE ZONING BOARD OF APPEALS TO HEAR AN APPEAL FROM THAT OFFICIAL**

The City has contended that the Zoning Board of Appeals "...has been empowered to review only the decisions of the Zoning Administrator." (City's Response, pg 2) According to AZO 10.4-2:

The zoning board of appeals is hereby vested with the following jurisdiction and authority: ...10.4-2.3. To hear and decide all matters referred to it or upon which it is required to pass under this zoning ordinance **as prescribed by statute.** (emphasis added)

In this instance, 65 ILCS 5/11-13-3(f) provides:

In all municipalities the board of appeals shall hear and decide appeals from and review any order, requirement, decision, or determination made by an **administrative official** charged with the enforcement of any ordinance adopted under this Division 13. (emphasis added)

Therefore, if the City contends that another administrative official, such as the Building Official or the Mayor is lawfully charged with enforcement of the AZO, and makes an order, requirement, decision, or determination under that lawful enforcement authority, such order, requirement, decision, or determination is appealable to the ZBA.

Moreover, the AZO specifically prevents other City officials from issuing permits outside the approval of the Zoning Administrator. These AZO restrictions place such actions under the enforcement authority of the Zoning Administrator and, thus, within the scope of authority of the ZBA. First:

No application for a building permit or other permit or license, or for a certificate of occupancy, shall be approved by the zoning administrator, and **no permit or license shall be issued by any other city department,**

which would authorize the use or change in use of any land or building contrary to the provisions of this ordinance, or the erection, moving, alteration, enlargement or occupancy of any building designed or intended to be used for a purpose or in a manner contrary to the provisions of this ordinance. (AZO 3.2-6.1)

This provision shows that the Zoning Administrator—and the ZBA—have the authority to enforce the AZO against all permits, whether or not issued by the Zoning Administrator or under his authority, as defined in the AZO.

Next, the AZO provides:

Before a permit is issued for the erection, moving, alteration, enlargement or occupancy of any building, or structure or use of premises, the plans and intended use shall indicate conformity in all respects to the provisions of this ordinance. (AZO 10.2-1, paragraph 3)

Again, this provision is a general requirement, not restricted to permits issued solely by the Zoning Administrator. The Zoning Administrator's authority and duty is to enforce the AZO against these illegal permits.

Further, the AZO declares that:

The erection, construction, enlargement, conversion, moving or maintenance of any building or structure and the use of any land or building which is continued, operated or maintained, contrary to any of the provisions of this ordinance is hereby declared to be a violation of this ordinance and unlawful. (AZO 14.1-2)

This provision applies no matter what entity issued a permit, certificate, or approval for a particular property or structure. This provision extends the power of the Zoning Administrator and the ZBA to the erection of the building on the premises at 3051 E. New York St., which continues contrary to the provisions of the AZO.

In sum, Appellants' interpretation and application of the Building Code and Zoning Ordinance, as applied to the authority of the Zoning Administrator and the ZBA, allow the whole of Aurora law to be respected and affirmed. Appellants respectfully request that the ZBA uphold the spirit and letter of the Zoning Ordinance and Illinois state law and allow the aggrieved Appellants relief in this matter.

### **Request for Relief**

1. In particular, Appellants request that the following records be made part of the official record in this matter and, then, that the City affirm that it has produced a complete and total response to these requested records in compliance with 65 ILCS 5/11-13-12 and Section (e) of the Rules and Regulations of the Aurora Zoning Board of Appeals:

- A. All related notes, plans, surveys, applications, and all other records as the basis by which the Staff Report dated October 27, 2006, was prepared, the Planning Commission recommended approval of the Final Plan, and the Planning & Development Committee approved the Final Plan, as cited in the City's Motion to Dismiss.
  
- B. All records related to the property located at 3051 E. New York St., Aurora, IL (“the property”) in connection to the submission and approval of plans, submission and approval of permits, and improvement of the property—including but not limited to petition and permit applications with all attachments, permits issued, petitions, plans, drawings, surveys, corrections reports, correspondence issued by the City, notes made by inspectors and staff, along with any record submitted to the City by N.Y. Oakhurst, LLC; Thomas Lehman; David Dastur; Kristos Tsogas; Theresa Huyck; Gemini Office Development, LLC; Gemini Office Management, LLC; Planned Parenthood/Chicago Area; or anyone acting on any behalf of any of these individuals and entities.

In particular, none of the issued construction-related permits—the actual documents which purportedly authorized the improvement of the property—have been made of record. Moreover, while three temporary certificates of occupancy were provided in the record, a fourth—the certificate under whose authority Planned Parenthood is currently operating—was inexplicably withheld. Also, the A.T.L.A. Survey-Petition Submittal, the Floor/Site Plan-Petition Submittal, and other plans by which the decision to permit the property was made, are not of record. Some of these plans are listed on the "File Contents for Casefile Number" document submitted by the City, but the plans themselves are missing. (Appellants have been disallowed from copying any plans by the City.) The resubmittal/corrections reports and other intermediate or final reports sent to the applicants by the City are also not of record.

- C. All records relating to the approval by the City of the Preliminary Plan for the property. No records have been provided related to this necessary approval.
  
- D. All records relating to the determination of the appropriate zoning for the property—including but not limited to reports, all correspondence between the City and the applicant or anyone acting for the applicant, meeting details and notes, phone logs, and emails.

In particular, Mr. Lehman and Mr. Dastur apparently filed a Development Services Team application, No. 06-0012, for the property on January 5, 2006, but no record of this transaction or any follow-up has been released by the City. Including the Staff Report dated October 27, 2006, at least three different reports appear to have been prepared by the Planning Division regarding the zoning of the property—none are of record. Part of the alarm permit application is of record, but the required emergency contact submission—apparently the first

public document acknowledging Planned Parenthood's ownership of the property—received August 20, 2007, is not of record.

- E. The reports of the outside counsels hired by the City to review the process, along with all records cited or reviewed by the outside counsels—whether provided by the City, the applicant, or any other person or entity—in their reviews, as the final zoning decision announced by Mayor Weisner at his press conference on October 1, 2007, imposing a new condition on Planned Parenthood's right to occupy the property, was premised on those reports. The Leutkehans report concludes that Planned Parenthood was the intended user of the property from February 2007 onward based on "a review of the emails I received from Planned Parenthood's attorney," but these emails are not of record. The Leutkehans and Martens reports both cite proceedings before the Illinois Finance Authority featuring Theresa Huyck, who serves as both President of Gemini Office Development and Chief Operating Officer of Planned Parenthood / Chicago Area, but these proceedings are not of record. Leutkehans further cites the emails and "opinion letters from attorneys for Planned Parenthood" to support his conclusion that "the intended use for the development was always Planned Parenthood." These and all other records reviewed by the attorneys should be made part of the record.
  - F. All statements released or made by City officials in reference to the property, as these statements indicate the mindset of the City throughout the permitting process, in ordering the outside attorney review, and in imposing the new condition on Planned Parenthood's right to occupy, including but not limited to the City press release issued October 1, 2007, at the conclusion of the attorney review; the prepared statement of Ms. Alayne Weingartz read at the City Council meeting on October 9, 2007; the statements made by the City in the Autumn 2007 *Aurora borealis*; and any statements from City Spokeswoman, Ms. Carie Ergo, to the media or public on this matter.
  - G. And any other documents pertinent or related to the claims made by the Appellants in this appeal proceeding.
2. Without these items in the official record, the Board will be unable to make a fully informed decision in this matter, as mandated by 65 ILCS 5/11-13-12. That the administrative record be as complete as possible is especially important where, as here, it is both clear and conceded that the zoning and permit process was tainted by misrepresentation.

WHEREFORE, the Appellant Objectors respectfully request that this Board grant them the requested relief and order the City to complete the record and for all other relief warranted on the premises in accordance with the law.

On behalf of the Appellants,

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