

**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' MOTION FOR ISSUANCE OF SUBPOENAS *DUCES TECUM*  
FOR EXPEDITED DEPOSITIONS OF MR. ED SIEBEN, MR. HERMAN  
BENEKE, MR. PHILLIP LEUTKEHANS, AND MR. RICHARD MARTENS**

Now come Kim Frachey, Nancy Maloney, Socorro Nieto, Chad and Natalie Fiolo, neighboring landowners, and Fox Valley Families Against Planned Parenthood (hereinafter “Appellants”), by their undersigned counsel, and move that the Zoning Board of Appeals issue subpoenas *duces tecum* for Appellants to conduct expedited depositions of Mr. Ed Sieben, Aurora Zoning Administrator; Mr. Herman Beneke, Building Official; Mr. Phillip Leutkehans, Zoning Expert for Aurora; and Mr. Richard Martens, Zoning Expert for Aurora. In support whereof, Appellants state the following:

**After Almost Two Years in Process, the City Has Acknowledged It Applied the  
Wrong Zoning to the Subject Property.**

1. In its Motions to Dismiss of November 15, 2007, and December 5, 2007, the City of Aurora acknowledged that

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. (Exhibit A1, Motion to Dismiss, pg 2, Bates 6; Exhibit A2, Amended Motion to Dismiss, pg 2)

Under Ordinance 093-124, the uses for the property are B-B Business Boulevard permitted uses. (Exhibit B1, 093-124, pg 5, Bates 357) The standards for the property are B-B Business Boulevard zoning standards. (Exhibit B2, 093-124, pg 8, Bates 360)

2. This new determination clearly contradicts the zoning determinations made by the City in its permitting process and by Attorneys Leutkehans and Martens in their respective investigations. Attorney Leutkehans held that the property was either

subject to a combined B-1, B-2, B-3, O district under 1973 Ordinance 4330 or subject to a B-2 district “underlying zoning.” (Exhibit C, Leutkehans Report, 10/1/07, pg 2) Attorney Martens cited a Summary of Land Use History, issued by City Planner Stephanie Phifer, which held that the property was subject to a B-1 use district imposed by Preliminary Plat Resolution R97-203 from 1997. (Exhibits D1 & D2, Martens Report, 9/13/07, pg 7 & Tab 16)

3. Based on their respective reports, it appears the City did not provide the correct zoning ordinance, O93-124, to Attorneys Leutkehans and Martens. If the City did not provide the ordinance, Attorneys Leutkehans and Martens should give sworn testimony on the effect of the ordinance on their zoning determinations. If the City provided the ordinance, Attorneys Leutkehans and Martens should give sworn testimony as to why they did not apply the ordinance to the subject property.

**Appellants Notified the Zoning Administrator of the Correct Zoning Ordinance on October 19, 2007, and He Has Not Acted to Remedy the Numerous Evident Violations Indicated Under that Ordinance, O93-124.**

4. The Appellants brought the correct zoning to public light in their Notice of Amendment of Appeal on October 19, 2007, which was delivered in person to the Zoning Administrator, Mr. Ed Sieben, on that day. Applying the correct zoning ordinance, Appellants clearly indicated the numerous zoning violations that have been committed throughout this permitting process—violations that outlaw the ongoing use of the property to the present day. In derogation of his mandatory duty under AZO 14.1-2, Mr. Sieben has not "immediately" moved to abate the zoning violations on the property. Based on the admission that O93-124 applies, the Zoning Administrator, Mr. Ed Sieben, should clarify, with sworn testimony, the zoning violations committed in breach of Ordinance O93-124 during the permitting process and why he has failed to remedy and abate this illegal land use.

**The Ongoing Use of the Subject Property in a B-B Business Boulevard District is Prohibited, and Under Ordinance O93-124, City Council Approval Was Required and Not Obtained Prior to Final Plan Submission, Rendering the Permits Void *Ab Initio*.**

5. Applicant’s not-for-pecuniary-profit health-related facility is a **prohibited use** in a B-B Business Boulevard district **under all circumstances**. (AZO 8.6-4.4) The facility could have been allowed under special use circumstances in the B-1, B-2, B-3, or O districts, but **never** in a B-B district. Thus Aurora's zoning law prohibited use of this land for the facility that Planned Parenthood built and now is operating in defiance of law. The zoning code would have required amendment in order to permit this use at this location. That would have necessitated a free, open and robust debate in the City Council where the people's voice would have been heard.
6. Moreover, the plans for the property show that they were approved in clear violation of a variety of B-B zoning requirements. (Exhibits E1-E3; Final Plan, Landscape

Plan, Site Plan; "2006.390 – Updated Record Submission" from City; pp 100, 101, 105) Even if Planned Parenthood's land use was otherwise permitted in a B-B district, any one of these significant departures from the B-B zoning standards would have required variances. Each of these variances would have required notice to nearby landowners and a public hearing, culminating in either approval or disapproval:

- A. The building is too large for the parking spaces provided. (AZO 8.6-5.2.E)
- B. The parking spaces are too small. (AZO 8.6-5.1.G.ii)
- C. The backup space in the parking lot is not sufficient. (AZO 8.6-5.1.G.ii)
- D. The paved parking lot extends at least five feet into the required front yard setback, in violation of both setback and landscape requirements. (AZO 8.6-5.1.B.i & 5.4-4.1.A.iii)

7. At the time of issuance of the certificate of occupancy—and to the present—these violations have persisted on the property, along with obstructions in the required visibility clearance zone (AZO 8.6-5.1.G.ii) and illegal fencing in violation of numerous AZO requirements. (AZO 4.2-4.1, *et seq.*)
8. According to Ordinance O93-124 and the AZO, submission of Final Plans for this property required City Council approval, since the deadline for filing Final Plans had passed. (Exhibit B3, O93-124, pg 15, Bates 367; AZO 10.7-8, 10.7-11, 10.7-12.1) In this case, such approval was neither sought nor received. In fact, Gemini did not even submit required Preliminary Plans—or plans that purported to serve as Preliminary Plans—without which Final Plans cannot be approved (AZO 10.7-6 *et seq.*). These clear violations of zoning law render any purported approval of Final Plans void and without legal effect. Thus, no legal authority existed to issue permits and certificates of occupancy, rendering all of them null and void *ab initio* (AZO 10.7-15, 10.2-1, 3.2-6.1). In light of the December 17, 2007, expiration of the final Temporary Certificate of Occupancy issued on October 1, 2007, expedited sworn testimony is needed for the public and ZBA to quickly evaluate these clear violations of law. (Exhibit F, Temporary Certificate of Occupancy, Expiring 12/17/07)

**Planned Parenthood and Gemini Knew or Should Have Known That the Property Was Subject to Ordinance O93-124 and Had to Be Tested Against B-B Business Boulevard District Zoning Requirements.**

9. Gemini Office Development ("GOD") received the property via a Warranty Deed ("the Gemini Deed") executed on March 23, 2006. (Exhibit G, Warranty Deed recorded 4/10/06 as Document No. R2006-064928, Bates No. 61-64) "GOD" took the property "SUBJECT TO: Covenants, conditions and restrictions of record as described on Exhibit A attache[d] heret[o] ". (Exhibit G, Warranty Deed, pg 1, Bates No. 61) Exhibit A lists the "PERMITTED EXCEPTIONS", including

9. TERMS AND CONDITIONS CONTAINED IN TRUSTEE'S DEED  
RECORDED AUGUST 9, 2001 AS DOCUMENT NO. R2001-166187  
AND WARRANTY DEED RECORDED AUGUST 9, 2001 AS

DOCUMENT NO. R2001-166188. (Exhibit G, Warranty Deed, pg 4, Bates No. 64)

10. An "A.L.T.A./A.C.S.M. Land Title Survey" for the property was completed December 9, 2005, and submitted by "GOD" to the City on or about July 27, 2006. Appellants are unable to attach this document to this Motion, since this public document has been inexplicably withheld by the City of Aurora. The survey gives "Notes" on the subject property, telling the reader that

3. Building lines are shown only where they are recorded on the maps. **Refer to your deed or abstract for additional zoning restrictions....**

5e. Property subject to terms & conditions contained in Trustee's Deed recorded as Doc. R2001-166187 & R2001-166188.

11. Trustee's Deed R2001-166187 has a "Rider" referenced and attached as "Exhibit B" that lays out various terms for the property. The Rider states that "The provisions of this Rider shall run with the real estate granted, sold and conveyed hereby for thirty-five (35) years from the date hereof." (Exhibit H, Trustee's Deed recorded August 9, 2001, as Document No. R2001-166187, pg 4, #8) The Rider notifies—and restricts—the property holder to the extent that

The real estate granted, sold and conveyed hereby is zoned as part of a Planned Development District, sometimes called the Fox Valley East, established pursuant to Section 14.7 of the City's zoning ordinance. Such real estate cannot be developed and no buildings or structures constructed thereon until such time as a Final Plan – as defined and described in the zoning ordinance – has been submitted to and approved by the City. (Exhibit H, Trustee's Deed, pg 4, #3)

The Rider continues, notifying—and restricting—the property holder to the extent that

The real estate granted, sold and conveyed hereby shall be developed only as a 'Business Area' which under the **Plan Description Modification** which is Exhibit A to the Annexation Agreement, may only be used for the **uses permitted in a B-B Business Boulevard District on 12/7/93** or which become permitted uses thereafter. (Exhibit H, Trustee's Deed, pg 4, #4)

Finally, the Rider notifies—and restricts—the property holder to the extent that

The Party of the Second Part, shall at its sole cost and expense, **prepare and obtain the City's approval for a Preliminary Plan and thereafter a Final Plan** for the real estate granted, sold and conveyed hereby **which shall designate such real estate as a 'Business Area'**. (Exhibit H, Trustee's Deed, pg 4, #5)

12. Warranty Deed R2001-166188 has a "Rider" referenced and attached as "Exhibit A" that lays out similar pertinent terms to those of Trustee's Deed R2001-166187. (Exhibit I, Warranty Deed recorded August 9, 2001, as Document No. R2001-166188, pp 3-4)

13. Planned Parenthood cannot claim that it acted in "good faith" in reliance on any mistake by the City when its own deeds spelled out the laws that bound it, as they bind every other citizen of Aurora. Any liability for the myriad zoning violations in this matter fall squarely on the shoulders of Planned Parenthood. The City should immediately enforce the applicable zoning ordinance, O93-124, against the subject property.

**The City Told a Federal District Court That Its October 2007 "Zoning Review" Would Cover "the Whole Process of Application" and Would Result in a "Decision," But Now It Tells Aurora's Zoning Board of Appeals That No Zoning Decision or Determination Has Occurred Since October 2006.**

14. Just last Friday, December 7, Appellants received transcripts of proceedings before Federal Judge Charles Norgle in the case Planned Parenthood Chicago Area v. City of Aurora, 07 C 5181 (N.D. Ill). (Exhibit J, 9/17/07 transcript; Exhibit K, 9/20/07 transcript) In that case, Planned Parenthood made a motion that it be allowed to open its facility before the City completed its review. That motion for preliminary injunction comprises the main thrust of the argument in these transcripts. The City defeated Planned Parenthood's motion. During the argument, the City told Judge Norgle that the October 1 review would be a full and complete **zoning** review. What the City told Judge Norgle directly contradicts what it is telling the Zoning Board of Appeals here—that no zoning decision was made in the review concluded October 1, 2007. The City must not be permitted to contradict itself here, taking a position opposite to the one it took—successfully!—in Federal Court.

15. In order to win its defense, the City represented to Judge Norgle that it was performing a "**zoning review**." (Exhibit J, 9/17/07 transcript, pg 10, ln 17) The City defended its review because "from the City's perspective there is a **zoning** interest in the property." (Exhibit J, 9/17/07 transcript, pg 17, lns 1-2)

16. Counsel for the City told Judge Norgle that the review included

**...investigating the whole process of application**, down through the present of this application, to make sure **everything** was done according to Code, and **complies completely** with Code. (Exhibit J, 9/17/07 transcript, pg 24, lns 15-18)

17. Counsel told Judge Norgle that "The City of Aurora decided to do an independent review of the process to **determine** whether its own codes were followed properly." (Exhibit J, 9/17/07 transcript, pg 25, lns 2-5, emphasis added)

18. In order to convince Judge Norgle to allow the zoning review to conclude before allowing the facility to open, Counsel for the City stated that "Our position is we haven't decided yet and we'd like to be able to **decide**." (Exhibit J, 9/17/07 transcript, pg 27, lns 14-15) Counsel for the City and the Court itself repeatedly refer to a "decision" as the final result of the investigation. (Exhibit J, 9/17/07 transcript, pg 11, ln 1: "The City has not reached a **decision**." pg 28, lns 14-15: "The City completes its review, and then it gives a **decision**." pg 32, lns 10-12: "The City...is going to make a **decision** regarding the certificate of occupancy very quickly." pg 45, lns 23-24)
19. In one instance, Counsel for the City told the Federal Court that "My response is that the City is investigating the process, and whether there was any issue that's related to the **zoning**, the classification, and the right to open, and we're going -- **and the City will act upon that investigation**." (Exhibit J, 9/17/07 transcript, pg 37, lns 17-20)
20. This zoning review concluded with zoning decisions, determinations, orders and/or requirements. These zoning decisions, determinations, orders and/or requirements include some of the following: 1) a press conference was held, announcing that the legal requirements for permits and certificates were met for the property and facility, 2) three Temporary Certificates of Occupancy were issued, and 3) a requirement was imposed that Planned Parenthood sign a statement of restriction of use. The public and the ZBA need the sworn testimony of the key individuals—Mr. Ed Sieben, Mr. Herman Beneke, Mr. Phillip Leutkehans, and Mr. Richard Martens—to better understand the conclusions reached in this zoning review, and how the City's new admission impacts that zoning review.

### **City Continues to Deny Access to Pertinent Records**

21. When Counsel for the Appellants visited City offices to inspect documents provided pursuant to a Freedom Of Information Act (FOIA) request, he was denied copies of certain drawings and plans, status reports, and numerous other official correspondence between the City and Gemini/Planned Parenthood. Mr. Vincent Tessitore, Esq., a property owner in Aurora and an expert witness for the Appellants, requested documents pertinent to this appeal from the City under FOIA, and substantial parts of his request were denied, as shown in the attached letter and correction from Corporate Counsel, sent on Monday, December 10, 2007, and Wednesday, December 12, 2007. (Exhibit L, FOIA Response to Vincent Tessitore, 12/10/07 & 12/12/07)
22. The City continues to refuse to provide these public documents to the Appellants and citizens of Aurora. These documents will never see the light of day—unless the ZBA orders the City to produce them. Appellants believe some of these documents may be in the possession or under the control of Messrs. Sieben, Beneke, Leutkehans, and Martens and available through them via depositions pursuant to subpoenas *duces tecum*. If these zoning experts performed a "thorough" investigation of "the whole process of application," they should explain, under oath, how they arrived at their

conclusions—now admitted to be incorrect by the City. Counsel for the Appellants have been instructed by Corporate Counsel not to speak to the City officials who have pertinent information on this matter. Moreover, these officials have been placed under a gag order by the Corporate Counsel, such that Appellants and members of the public cannot consult with these involved officials, even informally, about this matter. Without the ZBA ordering sworn testimony, the public and the ZBA cannot adequately evaluate the zoning decisions and determinations made in this matter.

WHEREFORE, the Appellant Objectors respectfully request that this Board grant them the requested relief and issue the subpoenas *duces tecum* for expedited depositions of Mr. Ed Sieben, Aurora Zoning Administrator; Mr. Herman Beneke, Aurora Building Official; Mr. Phillip Leutkehans, Zoning Expert for Aurora; and Mr. Richard Martens, Zoning Expert for Aurora and for all other relief warranted on the premises in accordance with the law.

On behalf of the Appellants,

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/s/Peter Breen/s/

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