

October 2, 2007

Zoning Board of Appeals
City of Aurora
1 South Broadway
Aurora, Illinois 60507



**RE: Notice of Appeal in the matter of Gemini/Planned Parenthood facility at 3051
E New York St**

Ladies and Gentlemen:

By this letter the undersigned hereby appeal to the Zoning Board of Appeals ("the Board") on behalf of the parties listed below ("Appellants"), who are aggrieved by 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. Said orders, requirements, decisions and determinations were made, or should have been made, by Aurora's Zoning Administrator, but apparently others too may have participated in the flawed process that led to issuance of said occupancy permit, and 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"). Respectfully, as is more fully set forth herein, Appellants urge that the Zoning Board of Appeals review and reverse the orders, requirements, decisions and determinations reached below, and in the proper exercise of the powers reposed in said body by the laws of the State of Illinois and the ordinances of the City of Aurora, restore and uphold the rule of law in the City of Aurora. At stake is nothing less than whether the provisions of the AZO apply equally to all Aurora's citizens, or whether the AZO's requirements may be dispensed with at the behest of special interests.

I. Preliminaries

A. Items for Appeal

In particular, Appellants appeal: (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.

B. Ultimate Relief -- Request for Remedies

The Appellants seek by way of ultimate relief: (1) rejection of every relevant permit application, particularly the zoning permit and the occupancy certificate applications, submitted by Gemini/Planned Parenthood and every relevant plan, application, or other intermediate action predicate to obtaining permit application approval, (2) revocation of and declaration of “null and void” as to every relevant permit, particularly the zoning permit and the occupancy certificate, obtained for the subject property and as to every relevant plan, application, or other intermediate action predicate to issuing the relevant permits, (3) issuance of an order to the Zoning Administrator to require an immediate cessation of illegal use and occupation of the subject property and removal of the illegal improvement thereon, restoring and returning the property to its status prior to construction, and (4) such other remedies as are required, appropriate and equitable in accordance with law.

C. Immediate Relief -- Automatic Stay of Occupancy and Use *Pendente Lite*

In accord with 65 ILCS 5/11-13-12, the filing of this appeal automatically triggers a stay of "all proceedings in furtherance of the action appealed from." The Appellants respectfully request that the Board enforce this statutory requirement and immediately stay the effectiveness, the enforcement and any and all further actions or proceedings on the part of any and all persons in the City of Aurora, which are being taken or may be taken in pursuance of the orders, requirements, decisions and determinations appealed from. This stay should encompass and therefore prohibit any further illegal use and occupancy by Gemini/Planned Parenthood or any other persons of the subject property.

D. Jurisdiction

The Zoning Board of Appeals is vested with jurisdiction over this appeal, pursuant to the applicable provisions of Illinois law, including 65 ILCS 5/11-13-15, and the applicable provisions of the Aurora Zoning Ordinance (“AZO”), including §14.1-2. From the inception of its planned development and use of the subject property and continuing to the present date, Gemini/Planned Parenthood has acted in violation of – indeed, in defiance of – the explicit requirements of the applicable Illinois state law and Aurora municipal law. Specifically, it has never served notice on the Appellants or other members of the public of its intended “special use” of the subject property, as Illinois and Aurora law alike require. Appellants have taken action as promptly as the circumstances permitted to seek relief from the Zoning Administrator and other Aurora officials, attempting to secure an order or direction that Gemini/Planned Parenthood cease and desist from their continued violation of law. The Appellants have suffered, and continue to suffer, an ongoing violation of their legal rights as Aurora citizens and property owners situated in close proximity to the subject property and its illegal development, use and occupancy.

II. Discovery of the Special Use Permit Requirement

On or after Tuesday, September 25, the Appellants ascertained that Gemini/Planned Parenthood was required to have obtained a special use permit prior to the construction of the facility. At a City Council meeting that night, several Aurora residents shared that discovery with the Council and the public. The revelation of this requirement spotlighted the motivation that must have prompted Gemini/Planned Parenthood officials to misrepresent the intended tenant and planned use of the subject property to Aurora building department, zoning and other officials, including one of more members of Aurora’s city council. But whatever the motivation for those

misrepresentations and material omissions of fact in communications to Aurora and to members of the public, the law is crystal clear: a special use should have been applied for but was not applied for. Appellants had the right to be notified about that proposed special use, to voice their objections, and to have a public hearing held. None of these requirements were met. These are not technical flaws, but fatal ones. The certificate of occupancy must be quashed and held for naught, and all those purporting to act under it must be held to act at their peril.

III. Zoning of the Subject Property

In this matter, the zoning for the property has been represented by various government officials as allowing the permitted uses of a B-2 District. Under current zoning law, in B-2 use district, a for-profit medical clinic falls under Sub Use Category One 6300 "Health Services," which is under Major Use Category 6000 "Education, public admin., health care, and other inst."

A. Nonprofit Organizations and Charitable Organizations/Health Related Facilities

A nonprofit health care organization, however, falls under Sub Use Category One 6600 "Associations, nonprofit organizations, etc.," which is also under Major Use Category 6000. Further, in the specific matter of Gemini/Planned Parenthood—an Illinois Not-for-Profit Corporation registered with the IRS as a 501(c)(3) charitable organization—a further Sub Use Category applies: Sub Use Category Two 6630 "Social Service Agencies, Charitable Organizations, Health Related Facilities, and similar uses when not operated for pecuniary profit".

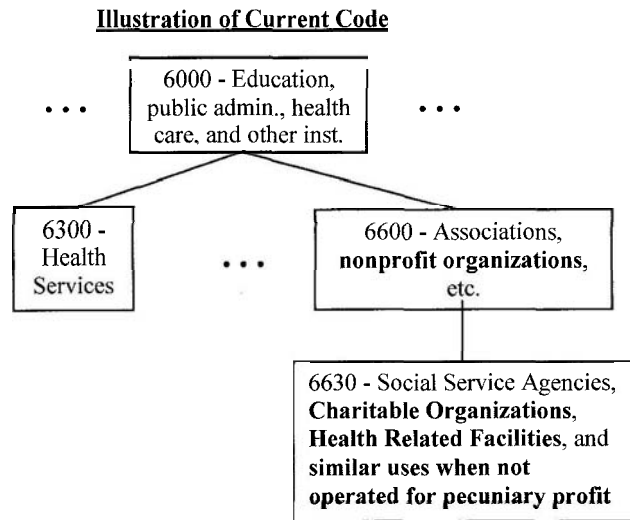
Gemini/Planned Parenthood falls squarely within the 6630 classification in at least three different respects: (1) It is registered as a charitable organization under federal law; (2) it is seeking to operate a health related facility; and (3) the catch-all "similar uses" provision applies because, by law, Planned Parenthood cannot operate for pecuniary profit.

B. Current vs. Former Code

The City Council modified several zoning classifications in the last year. One action of note is that the former category, "Offices, business and professional, including medical clinics" was split into two categories. "Offices, business and professional" now fall under Sub Use Category One 2400 "Business and professional, office," which is under Major Use Category 2000 "General sales, services or office". "Medical clinics" now fall within Sub Use Category One 6300, which is under Major Use Category 6000, as noted above.

Under the former code, one of the permitted uses under B-2 was "Offices, business and professional, including medical clinics," and one of the special uses was "Social service agencies, charitable organizations, health related facilities, meeting halls and similar uses when not operated for pecuniary profit in any use district". The current code keeps the exact language from the old code for the applicable special use (except for moving meeting halls to a different section).

Thus, the Aurora City Council did not change the status of a charitable organization or nonprofit health related facility, which was previously—and remains now—a **special use** in the B-2 district.



C. Special Use vs. Permitted Use

As a final note, any suggestion that an applicant might freely pick and choose the use it wishes to apply for—e.g., a permitted use provision instead of a special use provision—is legally baseless. If this were true, there would be no point to the Zoning Code’s prescription of a hierarchy of permissible uses: Major Use Category, Sub Use Category One, Sub Use Category Two, and Sub Use Category Three. Moreover, the Code itself provides that: "In interpreting and applying the provisions of this ordinance, they shall be held to be the **minimum requirements** for the promotion of safety, health, convenience, comfort, prosperity, and general welfare.... except that **where this ordinance imposes a greater restriction** upon the use of land, buildings or premises or upon the height of buildings, or requires larger open spaces than are imposed or required by such other ordinances or such other easements, covenants or agreements, **the provisions of this ordinance shall control.**" To hold that a more permissive use trumps a less permissive use would rewrite the Code. It would require that the use provisions of the ordinance to be interpreted as **maximum requirements, instead of minimum requirements.**¹

Here, a clear special use applies and the use classification was unchanged throughout the duration of the entire permitting process for Gemini/Planned Parenthood. Indeed, the relevant use classifications and special use requirement applicable here have been intact and unchanged

¹ At the City press conference yesterday, the City’s Corporation Counsel stated that the law holds that "the more specific prevails when viewing zoning ordinances." For some reason, the City Corporation Counsel then misapplied that principle to hold that the more general and permissive for-profit use, "Offices, business and professional, including medical clinics" applies to the current project instead of the more specific and less permissive nonprofit health use, "Social service agencies, charitable organizations, health related facilities, meeting halls and similar uses when not operated for pecuniary profit in any use district."

for many years. There can be no question or confusion here. There isn't a shred of ambiguity about the words set forth. The Code is clear and explicit in its command: this charitable, nonprofit health-related facility required a special use permit, which it never sought nor obtained.

IV. Several Ordinances and Statutes of Interest

A. Some Violated Ordinances and Statutes

A wide variety of city ordinances and state statutes have been violated – indeed, flouted and disregarded – by Gemini/Planned Parenthood. The Appellants set forth a few of them here.

AZO 3.2-5.1. No buildings or structures shall be erected, converted, enlarged, reconstructed or structurally altered, nor shall any building or land be used for any purpose other than is permitted in the district in which the building or land is located.

AZO 3.2-6.1. 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 10.2-1. 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.... 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 10.6-6.1. The plan commission may recommend and the city council may authorize that there be in part of the area of a planned development, and for the duration of such development, specified uses not permitted by the use regulations of the district in which said development is located, provided that the plan commission shall find that:

- A. The uses permitted by such exceptions are necessary or desirable** and are appropriate with respect to the primary purpose of the development;
- B. The uses permitted by such exception are not of such a nature or so located as to exercise an undue detrimental influence on the surrounding neighborhood;**
- C. Not more than twenty (20) percent of the ground area or of the gross floor area of such development shall be devoted to the uses permitted by said exception;**
- D. In an industrial planned development, such additional uses allowed by exceptions shall conform with the performance standards of the district in which the development is located;**
- E. The use exceptions so allowed are reflected by the appropriate zoning district symbols and so recorded on the zoning district map.**

AZO 10.6-6.2. D. The application filed with the city clerk on the City of Aurora's application for establishment of a planned development as set forth above shall be forwarded to the planning commission, and the planning council. Notice shall be given and the planning commission shall hold a public hearing as required herein for a special use. Pursuant to the public

hearings, and upon testimony from the planning commission, and the testimony of the planning council, the planning commission shall submit a written report to the city council. The report shall set forth the planning commission's findings and recommendations with a record of the vote of each member.

§ 65 ILCS 5/11-13-1.1

Sec. 11-13-1.1. The corporate authorities of any municipality may in its ordinances passed under the authority of this Division 13 provide for the classification of special uses. Such uses may include but are not limited to public and quasi-public uses affected with the public interest, uses which may have a unique, special or unusual impact upon the use or enjoyment of neighboring property, and planned developments. A use may be a permitted use in one or more zoning districts, and a special use in one or more other zoning districts. **A special use shall be permitted only after a public hearing** before some commission or committee designated by the corporate authorities, with prior notice thereof given in the manner as provided in Section 11-13-6 and 11-13-7 [65 ILCS 5/11-13-6 and 65 ILCS 5/11-13-7]. **A special use shall be permitted only upon evidence that such use meets standards established for such classification in the ordinances, and the granting of permission therefor may be subject to conditions reasonably necessary to meet such standards.** In addition, any proposed special use which fails to receive the approval of the commission or committee designated by the corporate authorities to hold the public hearing shall not be approved by the corporate authorities except by a favorable majority vote of all aldermen, commissioners or trustees of the municipality then holding office; however, the corporate authorities may by ordinance increase the vote requirement to two-thirds of all aldermen, commissioners or trustees of the municipality then holding office.

B. Ordinances and Statute Supporting Jurisdiction and Recovery

Parties set forth here ordinances and a statute that support jurisdiction and recovery in this matter.

AZO 14.1-2. 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. **The zoning administrator, immediately upon any such violation having been called to his attention, [shall] institute injunction, abatement or any other appropriate action to prevent, enjoin, abate or remove such violation. Such action may also be instituted by any property owner who may be especially damaged by any violation of this ordinance.**

AZO 11.5-3.1. For all petitions, public notice shall be mailed by the petitioner. Said notices shall be mailed after a public hearing date has been scheduled by the planning division to be held before the planning commission. **The notices shall be mailed to all owners of record within two hundred fifty (250) feet in each direction of the location in which the property is located, and to owners or occupants of other properties that may be affected as determined by the planning commission.** The owners of record within the two-hundred-fifty-foot requirement shall be determined by consulting the tax assessor's rolls of the township or the county in which the property is located, provided the number of feet occupied by all public roads, streets,

alleys and other public ways shall be excluded in computing the two-hundred-fiftyfoot requirement. The notice shall be in writing and shall contain the following information:

- A. Common description of property.
- B. Requested action.
- C. Date, time and place of hearing.
- D. Reference to planning division of City of Aurora for further information.
- E. Telephone number of planning division.

§ 65 ILCS 5/11-13-15

Sec. 11-13-15. In case any building or structure, including fixtures, is constructed, reconstructed, altered, repaired, converted, or maintained, or any building or structure, including fixtures, or land, is used in violation of an ordinance or ordinances adopted under Division 13, 31 or 31.1 of the Illinois Municipal Code, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or **any owner or tenant of real property, within 1200 feet in any direction of the property on which the building or structure in question is located who shows that his property or person will be substantially affected by the alleged violation**, in addition to other remedies, **may institute any appropriate action or proceeding** (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. When 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.

In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue a restraining order, or a preliminary injunction, as well as a permanent injunction, upon such terms and under such conditions as will do justice and enforce the purposes set forth above.

An owner or tenant need not prove any specific, special or unique damages to himself or his property or any adverse effect upon his property from the alleged violation in order to maintain a suit under the foregoing provisions.

V. Why Justice has been Delayed

The special use permit requirement was presented to the Zoning Administrator this past Tuesday, and yet no action was taken by the City. In fact, within a mere 24 hours the City Corporation Counsel had publicly expressed a negative opinion with respect to the special use requirement, without having contacted or consulted the affected parties or their legal counsel, and without any reasoned explanation for her reading the special use requirement out of the Aurora Zoning Code. Next, Aurora's Mayor and Chief Executive Officer, the Hon. Thomas Weisner, held a press conference to proclaim that Aurora would take action in defiance of the crystal clear, explicit commands of Aurora's own Zoning Code. Without explaining the rationale for reading the special use requirement out of the Code, the Mayor merely decreed in conclusory fashion that "the City of Aurora has no legal basis to deny Planned Parenthood an occupancy certificate and thus the Building and Permits Division will move forward with issuing Planned Parenthood an

occupancy certificate." The media now report that Planned Parenthood has been granted an occupancy certificate and is scheduled to open today for business – presumably, for “nonprofit” business without having sought or secured the necessary special use zoning.

The City of Aurora isn’t governed by mayoral decree or executive *fiat*. The rule of law obtains in Aurora as elsewhere. An occupancy permit issued in violation of the applicable law is null and void and of no legal force or effect.

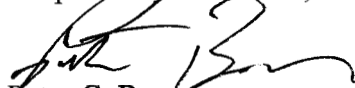
By law, the Zoning Administrator is the sole official designated and authorized to pass judgment on Zoning Permits and Certificates of Occupancy. The Zoning Board of Appeals is the official body and governmental unit authorized and empowered to review his judgment. These Appellants urge the Zoning Board of Appeals to defend and restore the rule of law in Aurora.

Appellants are informed and believe that after their legal counsel ascertained and publicized the special use requirement a week ago, the Zoning Administrator was silenced, having had a gag order imposed on him by other City officials. Reportedly, he was no longer allowed to consult or speak with other Aurora citizens about the Gemini/Planned Parenthood situation. Since an occupancy certificate appears to have issued, parties must assume that the Zoning Administrator signed that certificate although they were deprived of any opportunity to participate in the decisional process, let alone to enjoy and exercise their legal rights to notice and hearing. This constituted a serious violation of Appellants’ rights not only under Illinois law and Aurora’s municipal law, but it also deprived Appellants of their constitutional rights to due process of law.

VI. Conclusion

Again, the rule of law obtains in the City of Aurora, as elsewhere. Laws must be followed. They cannot be thrust aside when inconvenient or at odds with political expediency. Here, the Appellants were clearly deprived of their rights to notice and hearing on the special use that Planned Parenthood and Gemini needed to build and operate their planned facility. The Zoning Administrator and other Aurora officials who were involved in this flawed process must be held to enforce the law. Respectfully, the Appellants urge that the Zoning Board of Appeals review and reverse the grant of a certificate of occupancy to Gemini/Planned Parenthood in violation of the applicable law. An immediate stay should be enforced in defense of the people’s rights to have notice and **a public hearing** before any special use is permitted here. Appellants urge the Zoning Board of Appeals to respect and enforce their rights.

Respectfully submitted,



Peter C. Breen

Thomas Brejcha

Thomas More Society,

A public interest law firm

29 S LaSalle St, Ste 440

Chicago, IL 60603

On behalf of

Kim Frachey
Autumn Lake Drive
Aurora, Illinois 60504

Nancy Maloney
3036 Waters Edge Cir
Aurora, IL 60504-3297

Socorro Nieto
3139 Autumn Lake Drive
Aurora, Illinois 60504

Fox Valley Families Against Planned Parenthood
c/o Eric Scheidler
Volunteer Coordinator
c/o eric@prolifeaction.org
Aurora, Illinois