

**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' RESPONSE TO CITY'S FIRST AMENDED MOTION TO DISMISS
AND/OR TRANSFER APPEAL TO THE BUILDING CODE BOARD OF APPEALS
FOR LACK OF SUBJECT MATTER JURISDICTION**

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 for their Response to the City's First Amended Motion to Dismiss and/or Transfer Appeal, they state the following:

INTRODUCTION

In its Amended Motion to Dismiss, the City makes three manifestly baseless claims:

1. No appealable zoning determinations, decisions, orders, or requirements are made during the Aurora development process.
2. The City may disregard ordinances as it sees fit, without demonstrating legal authority to do so.
3. The most visible and closely watched zoning review in the history of the City of Aurora, spanning over a month, including three attorney reviews, and a federal lawsuit, resulted in nothing that could be construed as a zoning decision, determination, requirement, or order...even in the face of the City's requirement that the Applicant sign a statement restricting its land use as one of the conclusions of the review.

This Response will show that numerous zoning decisions, determinations, orders, and requirements have been made during this development process—decisions, determinations, orders, and requirements that are timely appealed by the Appellants in this matter. These zoning decisions, determinations, orders, and requirements provide ample grounds for this Zoning Board of Appeals to rule on the substance of this appeal and remedy the illegal land use persisting on the subject property.

I. THE CITY'S POSITION WOULD STRIP THE ZONING BOARD OF APPEALS OF ALL JURISDICTION TO REVIEW ZONING VIOLATIONS.

In its original Motion to Dismiss, the City claimed that the only decision in this development process that could be appealed was a decision that the zoning was proper, conveyed by a staff report issued October 27, 2006. (Motion to Dismiss, pg 3, Bates 7) In its Amended Motion to Dismiss, the City has altered its position, now claiming that even the decision of October 27, 2006, could not have been appealed to the ZBA because it was not a "final decision." (Amended Motion to Dismiss, pg 5, Bates 825) Moreover, in its Amended Motion to Dismiss, the City has contended that the Zoning Administrator makes no decisions in connection with the issuance of Certificates of Occupancy. (Amended Motion to Dismiss, pp 6-7, Bates 826-827)

Therefore, the City effectively claims that Zoning Administrator makes no appealable zoning decisions, determinations, orders, or requirements at any time in the development process—whether before the building permit is issued, during construction, or through the issuance of the certificate of occupancy for the building. In addition to offending common sense, this claim contradicts the City's statements to the Federal District Court in Chicago, to the Aurora City Council, to the press, and to the citizens of Aurora. It also flouts the very ordinances by which the City purports to govern itself as a home rule municipality.

In every other venue—*except before this Zoning Board of Appeals*—the City has stated loudly and clearly that it makes numerous zoning decisions, determinations, orders, and requirements throughout the development process, up to and through the issuance of a certificate of occupancy for a property.

The City's claim also leads to the absurd result that, when an applicant is required by the AZO to obtain a variance or zoning amendment for construction of its property, that applicant has a simple way to flout the law and avoid oversight by this ZBA: ***just don't apply for the variance or amendment!*** The City's position would encourage applicants to skirt the law, secure in the knowledge that, if they could only get by the Building Official, they would 1) never have to give notice and hearing to neighboring landowners and the community; 2) never have to undergo the scrutiny of the members of the ZBA; and 3) never have to meet the requirements imposed by law to obtain a variance or amendment.

Finally, several of the zoning violations on the property undermine the legal authority for the City to approve Final Plans and issue permits for the property, making these plan approvals and permits null and void—***as if they had never happened.*** The City is telling this Board, in defiance of the Board's legal mandate, that it may not remedy blatantly improper zoning, even for a property that sits without plans approved and without permits issued for its construction.

In the face of the City's outrageous claim that this Zoning Board of Appeals has no power or authority to address and remedy major zoning violations in its own City, the ZBA should strongly and clearly declare and affirm its jurisdiction and proceed to address and adjudicate the merits of this appeal.

II. THE APPEAL IN THIS CASE IS TIMELY TAKEN FOR DETERMINATIONS, DECISIONS, ORDERS, AND REQUIREMENTS MADE BEFORE, ON AND AFTER OCTOBER 1, 2007.

A. For All Decisions, Determinations, Orders, and Requirements Made On or After October 1, 2007, This Appeal Is Timely.

Shortly after receiving allegations of material misrepresentation from the public, the City decided in late August to perform a full review of the permitting and development process for the property. Until the City completed its full zoning review and decided on a course of action, the neighbors had every expectation that the City would uncover and remedy the numerous zoning violations on the property. The Planned Parenthood facility was kept closed during the pendency of the zoning review, and the City appeared in Federal District Court to defend its right to perform this complete zoning review without interference.

Appellants relied upon the City to provide a full and accurate investigation of the zoning of the property and to take appropriate remedial action. Instead of appropriate remedial action, the City announced the opening of Planned Parenthood at a surprise press conference. No explanation was provided by the Zoning Administrator—who had been placed under a "gag order" by the City one week earlier.

Faced with the failure of the City to protect their interests and surprised by the speed of the City's action, Appellants drafted and filed a Notice of Appeal approximately 19 hours after the City's determinations, decisions, orders, and requirements were announced on October 1. Appellants took the City's "thorough" and "complete" investigative review at face value, and promptly appealed at the culmination of the zoning review.

Further, if the City had decided differently on October 1, 2007, Planned Parenthood would have been the party required to appeal to the ZBA. For instance, if the City decided that the Planned Parenthood use should be considered a "charitable organization not operated for pecuniary profit," a "health-related facility not operated for pecuniary profit," or a "hospital," the appropriate legal recourse for Planned Parenthood would have been an appeal to the ZBA. Instead, the City decided that the Planned Parenthood use should be considered a "medical clinic," as if its non-profit and charitable character and planned land use were somehow irrelevant or could be ignored. As a result, the neighboring landowners have brought this appeal.

B. For All Decisions, Determinations, Orders, and Requirements Made That Violate Provisions of the AZO for Which Appellants Had No Notice, This Appeal Is Timely.

Under law, Appellants cannot be bound by time limits for appeal from decisions, determinations, orders, and requirements not known to them. (cf., Motion to Declare Back-Dated Certificates of Occupancy Invalid, Doyle v Crystal Lake, 183 Ill. App. 3d 405, 409.) Moreover, the Illinois Municipal Code requires that, "The principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions." (65 ILCS 5/11-13-25(b)) Due process under the Illinois Municipal Code, the Illinois Constitution, and the

United States Constitution requires meaningful notice at a meaningful time before any person may be deprived of life, liberty, or property.

First, the violations of setback, parking, fencing, visibility clearance zone, and landscaping requirements each required the Zoning Board of Appeals to issue a variation, after giving Appellants and other landowners within 250 feet notice and an opportunity to be heard. Without this notice, Appellants and the general public had no reason to suspect that the development had not obtained the required variations for its violations or to suspect that the violations even existed.

Appellants also had no reason to suspect that Planned Parenthood had not obtained the required City Council permission to submit plans for the property. As soon as these violations became known, they were appealed.

Moreover, there is no prejudice to Planned Parenthood by the timing of this appeal. Based on its own deed of purchase and the survey for the property it submitted to the City, Planned Parenthood knew that its property was governed by B-B Business Boulevard zoning. (cf., Motion for Subpoenas Duces Tecum, pp 3-5) Planned Parenthood knew or should have known that its plans and development violated the AZO, but it took no action to remedy the violations.

Because of its deception, Planned Parenthood knew from the beginning that it was in a risky position. Weighing its options, Planned Parenthood decided to chance legal challenges to zoning after building its facility in exchange for avoiding notice to neighboring landowners and a public hearing on zoning issues and challenges to its zoning prior to laying the first brick. Planned Parenthood gained its desired short-term benefit. Now, Planned Parenthood must be held fully accountable for the numerous fatal zoning violations on its property—zoning violations that are generally applicable to *all* of Aurora's citizens and with which *they* would be held to comply.

C. An Appeal of the October 27, 2006, Staff Report of the Zoning Administrator Is Timely.

The City claims in its Amended Motion to Dismiss that:

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, 2007, which report was published to the Planning Commission at a public meeting on November 1, 2006, and to the Planning and Development Committee on November 16, 2006. Therefore...it has been more than 45 days since any zoning determination by the Zoning Administrator was made for the subject property. (Amended Motion to Dismiss, pg 2, Bates 822)

The City continues, noting that:

The Planning and Development Committee makes its' [sic] findings and the final approval based upon the recommendation of the Aurora Plan Commission, which body would have received a recommendation from the Zoning Administrator. (Amended Motion to Dismiss, pg 4, Bates 824)

Because "[n]o building permit relating to any part of a planned development district shall be issued prior to the approval of a final plan," one result of the Final Plan approval process is the issuance of a building permit. (AZO 10.7-15)

According to the ZBA Rules and Regulations, pg 3, part (b):

no decision which in whole or in part results in the issuance of a building permit shall be deemed published until the building permit so issued shall have been posted by the recipient thereof in a conspicuous location on the premises involved, at a location where it is obviously visible to persons residing in the neighborhood and to persons lawfully using the nearest right-of-way to said property, and in accordance with the Aurora Zoning Ordinance of City of Aurora [sic].

Any zoning decisions made during the Final Plan approval process would "in whole or in part result[] in the issuance of a building permit." However, apparently, there was no publication of the building permit here, as required by ZBA Rules and Regulations.

Moreover, even if publication of the building permit were shown, that building permit was issued for "Tenant ... Gemini Office." (Exhibit G, Building Permit) At the conclusion of the thorough review of the zoning process concluded by the City on October 1, 2007, outside counsel Leutkehans concluded that "there can be no doubt that the intended user for the development was always Planned Parenthood." (Leutkehans Report, pg 2, Bates 707). Appellants point out that "the name of the tenant is important because it indicates the true use of a property." (Amendment to Appeal, pg 4, Bates 51) Yet, the building permit was never reissued to correct this clearly incorrect information—to this day, the neighbors have not been properly notified under ZBA Rules and Regulations.

The City cannot rely on a non-published facially-inaccurate building permit as providing adequate notice to the neighborhood. Therefore, Appellants remain unencumbered by the harsh time limitations the City attempts to impose.

III. THE ZBA HAS JURISDICTION TO HEAR APPEALS FROM THE ZONING DETERMINATIONS, DECISIONS, ORDERS, AND REQUIREMENTS MADE IN THIS MATTER.

A. In the City of Aurora, the Zoning Administrator Enforces the Zoning Ordinance and Zoning Determinations Implicate 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 AZO clearly indicates that any zoning orders, requirements, decisions, or determinations made in the City of Aurora are an exercise of the legal authority vested in the Zoning Administrator. (Amended Motion to Dismiss, pg 7, Bates 827) 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 to be the official enforcer of that ordinance.

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, Bates 826-827) 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." (Municipal Code 12-1, Bates 621) 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 12-16, Bates 622; cf., Building Code 101.1 & 104.1, Bates 649 & 650)

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. (Exhibit D, Municipal Code, 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, Bates 50)

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, Bates 826) If the City's argument is true, every time the Building Official or his staff 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 to appeal zoning determinations and decisions to the Zoning Board of Appeals.

B. The AZO Explicitly Requires Zoning Administrator Involvement in Issuance of Certificates of Occupancy.

The clear wording of the relevant Aurora ordinance provides 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 as a matter of convenience, these certificates may have issued out of the Buildings and Permits Division, their issuance remains an exercise of the authority of the Zoning Administrator. Otherwise, the certificates of occupancy issued for the subject property would have to be deemed null and void, since they would contravene AZO 10.3-1 & 10.3-2.

C. 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 to Motion to Complete the Record, pg 2, Bates 682) However, 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, the pertinent statute, 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.

In its Amended Motion to Dismiss, the City invoked an unpublished DuPage County trial court decision, Village of Hinsdale v. Foxford, LLC et al., 2007 CH 1334, as holding that an administrative zoning decision of the Mayor may not be appealed to the ZBA. (Amended Motion to Dismiss, pg 5, Bates 825; Response to Motion to Complete the Record, pg 2, Bates 682) However, the zoning determination in Foxford appears to have been a **legislative** decision made by passing an ordinance, not an **administrative** decision subject to administrative remedies, as in this case. When an administrative official—such as the Mayor—acts in his or her administrative role vis a vis the Zoning Ordinance, any zoning order, requirement, decision, or determination he or she makes is appealable to the ZBA under state law and Aurora ordinance.

Moreover, on page 25 of the decision, the Court in Foxford specifically distinguished the facts in that case from the matter under appeal here, holding that:

The residents are not appealing from an action of any administrative official or officer. Neither the **village manager** nor the **village president** approved The Hinsdale Club planned development. (Hinsdale v. Foxford, pg 25, lns 18-22, Bates 853)

In this passage, the Court specifically references the "village manager" and "village president"—the chief officials in a village—as two administrative officials whose decisions can be appealed. Thus, the decisions of all officials, up to and including the Mayor of Aurora—the chief executive officer of this municipality—may be appealed to the ZBA.

Finally, in its quotation from Foxford, the City cited an instructive point made by the Court:

Nowhere does Section 11-13-12 authorize the ZBA to reverse, affirm or modify an ordinance passed by this elected Village Board. (Hinsdale v. Foxford, pg 26, lns 13-15, Bates 854; Amended Motion to Dismiss, pg 5, Bates 825)

The Aurora Zoning Ordinance is an ordinance passed by the elected City Council of the City of Aurora. While the City argues otherwise, telling this body that it should ignore certain provisions of the AZO, the ZBA cannot "reverse, affirm or modify" the clear terms of the zoning ordinance in judging this appeal. As argued above, the Appellant Objectors ask this ZBA to uphold the Aurora Zoning Ordinance against the illegal use of the subject property.

D. The Zoning Board of Appeals Has the Explicit Authority and Duty to Review Permits Issued By Other City Departments That Violate the Aurora Zoning Ordinance.

Moreover, the AZO specifically addresses the situation of other City officials issuing permits that violate the Zoning Ordinance. 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 gives the Zoning Administrator—and the ZBA—the authority to enforce the AZO against all permits, whether or not issued by the Zoning Administrator.

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)

This provision is not restricted to permits issued only by the Zoning Administrator. The Zoning Administrator has the authority and duty to enforce the AZO against all of 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.

IV. THE CITY HAS MADE NUMEROUS ZONING DECISIONS, DETERMINATIONS, ORDERS, AND REQUIREMENTS ON THE PROPERTY.

A. Zoning Decisions, Determinations, Orders, and Requirements Are Involved In the Issuance of Every Permit In the City of Aurora.

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, Bates 827)

The procedure actually followed in this case demonstrates the ongoing zoning decisions, determinations, orders, and requirements in this process. "Any permit," under the City's acknowledgement, should include the Certificates of Occupancy the City issued on or about October 1, 2007. The Temporary Certificate of Occupancy ("TCO") issued on August 16, 2007, and expired September 17, 2007, notes, under Special Conditions, "ZONING; OK FOR TCO UNTIL SITE IMPROVEMENTS INSPECTED AND APPROVED." (Bates 17) These conditions indicate that there were still zoning determinations to be made after the issuance of the August 16, 2007, TCO. Clearly, zoning determinations were made here—"site improvements" were "inspected and approved"—since the two TCO's issued October 1, 2007, and expired October 8, 2007, and November 2, 2007, do not include the previous conditional zoning requirement from August 16, 2007. (Bates 18 & 19)

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

Further evidence of subsequent zoning determinations after 2006 is shown by the *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." (*Aurora borealis*, Autumn 2007, pg 2, emphasis added, Bates 703)

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. (*Aurora borealis*, pg 2, emphasis added, Bates 703)

From the Mayor's comments about the "planning and development staff," it is clear that the Zoning Administrator and his staff played a direct role in this review.

Some questions that arose and were 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? (Leutkehans Report, Bates 706-712; Martens Report, Bates 713-820)

Further, 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, Bates 711; cf., Exhibit E, City of Aurora Media Release, 10/1/07; Exhibit F, Council Statement – Alayne Weingartz, made 10/9/07, labeled "12/6/07") While it was not noted at the press conference which administrative official made the zoning actions announced on October 1, 2007, the imposition of additional conditions for the subject land use represents further evidence that zoning orders, requirements, decisions, and determinations were made by the City when the Mayor determined that, "the City of Aurora has no legal basis to deny Planned Parenthood an occupancy certificate." (AZO 10.4-2.4; cf., Exhibit E, City of Aurora Media Release, 10/1/07)

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..." (*Aurora borealis*, Autumn 2007, pg 3, emphasis added, Bates 704) 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.

C. Decided Inaction In the Face of a Zoning Violation Is a Decision That Continues Until Remedied.

On November 15, 2007, the City filed a Motion to Dismiss that made a further zoning determination that "The zoning for the subject property was approved and adopted by the City Council of the City of Aurora via Ordinance O93-124 on December 7, 1993." (Motion to Dismiss, pg 2, Bates 6; Amended Motion to Dismiss, pg 2, Bates 822)

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.

D. The City Told a Federal District Court That Its "Zoning Review" Would Cover "the Whole Process of Application" and Would Result in a "Decision."

On September 17, 2007, during the review, the City appeared in Federal Court before Judge Charles Norgle in the case Planned Parenthood Chicago Area v. City of Aurora, 07 C 5181 (N.D. Ill). 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.

In order to win its defense, the City represented to Judge Norgle that it was performing a "**zoning review**." (cf., Motion for Subpoenas Duces Tecum, 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." (cf., Motion for Subpoenas Duces Tecum, Exhibit J, 9/17/07 transcript, pg 17, lns 1-2)

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. (cf., Motion for Subpoenas Duces Tecum, Exhibit J, 9/17/07 transcript, pg 24, lns 15-18)

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." (cf., Motion for Subpoenas Duces Tecum, Exhibit J, 9/17/07 transcript, pg 25, lns 2-5, emphasis added)

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 "[o]ur position is we haven't decided yet and we'd like to be able to **decide**." (cf., Motion for Subpoenas Duces Tecum, 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. (cf., Motion for Subpoenas Duces Tecum, 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)

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 the City will act upon that investigation**." (cf., Motion for Subpoenas Duces Tecum, Exhibit J, 9/17/07 transcript, pg 37, lns 17-20)

The City represented to the Court that this zoning review would conclude with zoning decisions, determinations, orders and/or requirements—**and it did**. The ZBA should proceed to address and adjudicate the merits of these zoning decisions, determinations, orders and requirements.

V. THE BUILDING CODE BOARD OF APPEALS HAS NO JURISDICTION TO REVIEW ZONING MATTERS.

The City has identified the Building Code Board of Appeals ("BCBA") as the appropriate venue for this appeal. However the BCBA has a very limited jurisdiction, extending solely to

a claim that the true intent of [the Building Code of Aurora] or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of [the Building Code of Aurora] do not fully apply, or an equally good or better form of construction is required. (2000 IBC 112.2, Bates 657, cf., 2000 IBC 101.1, Bates 649)

The jurisdiction of the BCBA extends only to the Building Code, not the Zoning Ordinance. The approvals of plans and issuance of permits in this matter violated the AZO, and the BCBA does not appear to have jurisdiction to hear appeals of such violations. While the Building Code indicates that the BCBA exists to hear appeals generally, it does not indicate that the BCBA has any power or authority to pass on or hear the issues raised by the parties in this appeal.

Further, the BCBA does not appear to have been in existence in any meaningful form when the building permit for this property was issued. The five members of the BCBA appear to have been appointed at the City Council meeting of September 11, 2007. (Exhibit A, Minutes of City Council Meeting, 9/11/07, pg 3) According to minutes listed on the City website, only two meetings of the BCBA have occurred this year: an October 25 meeting "to elect a chairperson...and discuss procedures" and a November 15 meeting. (Exhibit B & C, BCBA Agendas, 10/25/07 & 11/15/07) The BCBA has a 20-day statute of limitations for its appeals.

As the building permit for this facility was issued on or about January 12, 2006, an appeal to the BCBA within 20 days would have been impossible, since the body appears to have been non-existent. Finally, Appellants have previously requested the Rules for the BCBA from the City's Corporate Counsel but still have not received those Rules.

VI. APPELLANTS ARDENTLY HOPE A LAWSUIT UNDER 65 ILCS 5/11-13-15 MAY BE AVERTED AND NUMEROUS ZONING VIOLATIONS MAY BE REMEDIED AT THE LOCAL LEVEL.

Under 65 ILCS 5/11-13-15, owners and tenants of real property within 1200 feet of a property with zoning violations may bring suit in court to remedy the zoning violations. The City is correct that this statute does not give a neighboring landowner a direct right to sue the City. However, under the judicial principle of "exhaustion of remedies," a neighboring landowner may be compelled by a trial court to appeal a zoning decision to the local ZBA prior to bringing an action in court under 65 ILCS 5/11-13-15. Since the City has now acknowledged that the zoning classification previously applied to this property was incorrect and that the correct zoning ordinance is O93-124—under which the current land use is illegal—neighboring landowners and many other Aurora citizens are properly urging Aurora's own ZBA to adjudicate and remedy the gross violations of Aurora law that persist on the property.

VII. A ZONING PERMIT IS REQUIRED AND HAS NOT BEEN OBTAINED FOR THE SUBJECT PROPERTY.

Corporate Counsel for the City stated during the ZBA hearing of December 12, 2007, that the City does not issue zoning permits for any property in the City at the present time, including the subject property. But, according to the AZO,

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)

Appellants respectfully add the admitted lack of a zoning permit as a ground to their appeal. Since a non-existent zoning permit cannot have been "posted in a prominent place," no notice or publication existed to start the running of any statute of limitations for appeal of this defect to the ZBA. Thus, the appeal of the lack of a zoning permit is timely.

The City contended in its Amended Motion to Dismiss that

While there exists [sic] 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...and therefore, are of no legal consequence or authority. (Amended Motion to Dismiss, pg 7, Bates 827)

The City cites no law or ordinance that repeals or invalidates the mandatory requirement, imposed by the AZO, that a zoning permit needed to be issued for the subject property. Without this permit, the building on the property was illegally erected and is an ongoing illegal land use.

WHEREFORE, these Appellant Objectors respectfully request that this Board reject the City's First Amended Motion to Dismiss and/or Transfer Appeal and grant Appellants all other relief which may be warranted upon these premises in accordance with the law.

On behalf of the Appellants,

/s/Peter Breen/s/

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