



Aurora building department staff issued Gemini a temporary occupancy permit for the proposed facility. *Affidavit of Alayne Weingartz* at ¶ 3, attached hereto and referred to herein as *Exhibit 1*. The process and procedures for acquiring permits to develop property within an Aurora PDD is codified in Section 10 of the Aurora Zoning Ordinance. These procedures include an appeal process of PDD decisions that can be activated by either permit and/or certificate applicants or a member of the City Council. Throughout the permitting process, Gemini, rather than PPCA, submitted materials to obtain requisite permits to build and occupy a medical facility in the PDD.

At various points during August of 2007, Aurora officials, including City Council members, learned that the facility at 3051 East New York Street would be occupied by Planned Parenthood. The city also received complaints that material misrepresentations or fraud was perpetuated by Plaintiffs in obtaining permits. *Id.* at ¶ 2. As part of the allegations, reference was made to a November 16 2006 meeting where a Gemini representative appeared and, when asked by a city alderman if the facility was being built specifically for a client answered that, “[w]e’re in negotiations with a tenant; we do not currently have a lease but we still want to move ahead.” *Id.* In other words, City officials had concerns that PPCA’s withholding of information may have compromised the PDD permitting process and procedures.

The Aurora City Code provides the City Council with the authority to “make investigations as to municipal problems and affairs.” *Aurora City Code*, Article II, § 2-17(4). The Aurora City Council initiated an investigation into alleged improprieties involving the manner in which PPCA secured requisite permits and certificates for its Planned Parenthood facility. The City Council appointed an independent investigator

who does not live in Aurora and has no ties to the city to conduct the inquiry. Defendant indicated to Plaintiffs that it would not issue a permanent occupancy certificate for the Planned Parenthood facility at 3051 East New York Street, nor would the facility be allowed to open, until the review process was completed and findings were made concerning alleged deceptive actions purportedly committed by Plaintiffs.

Plaintiffs filed a complaint for preliminary injunctive relief on September 13, 2007. According to the complaint, the sole reason Aurora has not issued a final certificate of occupancy to Plaintiffs so that they can open for business on September 18, 2007 is “political opposition to the fact that PPCA provides abortion services as part of a broad range of health care services for its patients.” *Verified Complaint For Preliminary Injunction and Other Relief* at ¶ 4. The complaint alleges that Aurora’s review of Plaintiff’s actions related to obtaining permits and certificates will prevent the opening of the Planned Parenthood facility at 3051 East New York Street on September 18, 2007. *Id.* at ¶ 28. Further, Plaintiffs allege that Aurora’s actions will interrupt and delay PPCA patients who have scheduled appointments at the Planned Parenthood facility from obtaining family planning, contraceptive and abortion services. *Id.* at ¶ 30. Plaintiffs seek to enjoin Aurora from delaying the opening of the Planned Parenthood facility on the theory that Defendant’s actions constitute a violation of Plaintiffs’ equal protection rights under § 1983.

**I. The Requirements For Granting A Motion For A Preliminary Junction**

In order to obtain a preliminary injunction, the moving party must show that: (1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm which, absent injunctive relief, outweighs the

irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest. *Joelner v. Village of Washington Park, Illinois*, 378 F.3d 613, 619 (7<sup>th</sup> Cir. 2004); *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7<sup>th</sup> Cir. 2006). In this case, Plaintiffs cannot satisfy the elements for issuance of a preliminary injunction and, therefore, the motion should be denied.

**II. Plaintiffs Cannot Show That They Are Reasonably Likely To Succeed On The Merits Of Their Equal Protection Claim**

Plaintiffs' motion for preliminary injunction should be denied because they cannot demonstrate a reasonable likelihood of success on the merits of their § 1983 Equal Protection claim against Aurora for at least two reasons. First, Plaintiffs' action for preliminary injunction lacks ripeness. Second, assuming *arguendo* that Plaintiff's claim for injunctive relief has requisite ripeness, Plaintiffs cannot demonstrate a reasonable likelihood of success on the merits on their claim that their equal protection rights have been violated because Aurora's actions in withholding a permanent occupancy permit for the Planned Parenthood facility at 3051 East New York Street are rationally related to a legitimate governmental purpose.

**A. Plaintiffs' Cause Of Action Is Not Ripe For Consideration By The Court**

Plaintiffs' attempt to enjoin Aurora from preventing the opening of the Planned Parenthood facility should be denied because the injunctive claim is not ripe for judicial consideration and, consequently, this Court lacks subject matter jurisdiction over the matter. The United States Supreme Court, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, has indicated that in matters concerning land use, a claim is not ripe for judicial consideration until final decisions regarding the

application of pertinent regulations have been obtained. 473 U.S. 172, 186, 105 S.Ct. 3108, 3116 (1985). The *Williamson* Court indicated a distinction between ripeness considerations and exhaustion of administrative remedies in stating that:

Respondent asserts that it should not be required to seek variances from the regulations because its suit is predicated upon 42 U.S.C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. . . . The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. . . . While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

*Id.* at 192-193.

In *Patel v. City of Chicago*, 383 F.3d 569 (7<sup>th</sup> Cir. 2004), plaintiffs were owners of motels located on the far north side of Chicago. The Chicago City Council passed an ordinance designating the area surrounding the motels as a redevelopment zone and identified the motels as potential targets for acquisition by eminent domain. *Id.* at 570. Plaintiffs filed a § 1983 claim alleging their equal protection rights had been violated by the City of Chicago's decision to target their properties for possible acquisition. According to plaintiffs, the designation of their properties for eminent domain proceedings was arbitrary, capricious and exhibited *animus* by defendants towards plaintiffs. *Id.* at 572. The Seventh Circuit affirmed the district court's dismissal of plaintiffs' action, finding that the complaint did not satisfy the *Williamson* requirements for ripeness. The Court noted, "[t]he basic rationale of the ripeness doctrine is 'to prevent the courts, through avoidance of premature adjudication, from entangling

themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Id.* quoting *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1002 (7<sup>th</sup> Cir. 2004) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967)) (internal quotation marks omitted).

Plaintiffs seek to analogize the instant matter to the situation in *Planned Parenthood of Northern New England v. City of Manchester*. In *Manchester*, Planned Parenthood submitted building plans to the municipal Building Commissioner, who, after review of the materials, issued a building permit. Subsequently, a number of individuals sought reversal of the Building Commissioner’s decision from the Zoning Board of Adjustment (hereinafter the “ZBA”). 2001 WL 531537 (D.N.H. 2001) \* 1.<sup>1</sup> Following a public hearing, the ZBA reversed the Building Commissioner’s action and revoked the building permit. *Id.* This revocation decision represented a formal, final administrative decision that had a concrete effect on plaintiffs. Planned Parenthood had invested considerable money in financing and contracting for refurbishment construction. *Id.* at \*6. The individual plaintiffs suffered denial of their constitutionally protected right to abortion because the ZBA revoked the previously issued building permit. *Id.* at \* 5-6.

This case can be distinguished from *Manchester*. The Aurora Zoning Ordinance and the Aurora City Code set forth review mechanisms for permit and certification decisions concerning PDD property developments. The City Council has initiated an independent review of the means by which Plaintiffs received permits and certificates for building and occupying the Planned Parenthood facility at 3051 East New Street. This

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<sup>1</sup> A copy of this Westlaw cited case is attached for the Court’s convenience as *Exhibit 2*.

review has not resulted in a final administrative decision that has been formalized and its effects felt in a concrete way by Plaintiffs. Aurora has indicated that it will not allow Plaintiffs to use their facility as an abortion clinic *until* a review of allegations related to Plaintiffs' actions during the permitting process has been completed. At this point, no final decision has been rendered and Plaintiffs have not suffered injury. Therefore, Plaintiffs' complaint for preliminary injunction falls within the ambit of the *Williamson* doctrine, and, as such, it should be dismissed for lack of ripeness.

**B. Plaintiffs' Claim That Aurora Has Violated Their Equal Protection Rights By Investigating The Process Used In Granting Plaintiffs Building And Occupancy Permits Cannot Succeed Because The City's Actions Are Rationally Related To the Promotion Of A Legitimate Governmental Purpose**

**1. Rational Relatedness Is The Proper Standard To Apply To Plaintiffs' Equal Protection Claim Against Aurora**

Plaintiffs assert that Defendant has undertaken a review process concerning whether or not they committed improprieties that resulted in the city issuing building permits and occupancy certificates solely due to political opposition to the fact that PPCA intends to provide abortion services at the Planned Parenthood facility at 3051 East New York Street. *Verified Complaint For Preliminary Injunction And Other Relief* at § 36. Plaintiffs allege that Aurora's actions in conducting its investigation and delaying the opening of their Planned Parenthood facility results in discrimination due to the nature of the services they provide in violation of the Equal Protection Clause of United States Constitution. *Id.* at ¶ 38.

In evaluating claims brought under the Equal Protection Clause of the Constitution, it is necessary to determine if the allegedly aggrieved party should be considered a member of a suspect class. *City of Cleburne, Texas v. Cleburne Living*

*Center*, 473 U.S. 432, 440-441, 105 S.Ct. 3249 (1985). If governmental action classifies parties by categories such as race, alienage, or national origin, then strict scrutiny is applied and the action will be found constitutional only if it is suitably tailored to serve a compelling governmental interest. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975, 1000 (7<sup>th</sup> Cir. 2006). Action that classified by gender also calls for a heightened standard of review. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. at 440. Strict scrutiny also is appropriate when governmental action interferes with a person's fundamental rights, such as freedom of speech or religion. *Id.* United States Supreme Court caselaw has established that the right to abortion is a fundamental right. *Roe v. Wade*, 410 U.S. 113, 155, 93 S. Ct. 705 (1973); *Hodgson v. Minnesota*, 497 U.S. 417, 462, 110 S.Ct. 2926 (1990). If no suspect class or fundamental right is implicated, then the rational basis test is proper to determine whether the governmental action violates equal protection or not. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d at 1000-1001.

Here, Plaintiffs' allegation that Aurora initiated a review of the process used in granting permits and certificates for the proposed Planned Parenthood facility simply and solely because of political pressure from abortion opponents does not implicate heightened scrutiny. Unlike *Planned Parenthood of Northern New England v. City of Manchester*, plaintiffs in the instant matter *do not include* individually named parties. The complaint for preliminary injunction does not include allegations that would identify an entity that has suspect class status. Further, Plaintiffs' pleadings on their face do not allege that Aurora's actions violated a fundamental right of an aggrieved party.

Therefore, the proper standard for evaluating Plaintiff's Equal Protection claim is the rational basis test.

Plaintiffs undoubtedly will respond that Aurora's actions in investigating the process used in granting building permits and occupancy certificates will delay the opening of the Planned Parenthood facility and, in so doing, work to deny some patients of their fundamental right to abortion. Therefore, if Aurora's actions are likely to result in violation of the fundamental right to abortion, strict scrutiny should be applied. Defendant must show that its decision to investigate Plaintiffs' conduct in obtaining a building permit and an occupancy certificate promotes a compelling governmental interest.

Plaintiffs' argument for the use of strict scrutiny in this matter fails for two reasons. First, nothing on the face of the complaint for preliminary injunction identifies that a fundamental constitutional right has been violated by Aurora's decision to investigate the permitting process used in granting Plaintiffs building and occupancy permits. Second, Plaintiffs' claim that a violation of the fundamental right to abortion will occur due to Aurora's actions depends on a mischaracterization of the controversy in this matter.

The Plaintiffs argue in their *Memorandum Of Law In Support Of Their Motion For Injunctive Relief* that Aurora is treating Planned Parenthood differently than any other medical facility because it will provide abortion services. *Memorandum* at 8. This argument is an assertion unsupported by the record. Further, the argument seeks to turn a dispute regarding Defendant's decision to investigate allegations of PPCA improprieties

during the permitting process – a zoning and land use issue -- into a lawsuit concerning the fundamental rights of individuals who are not parties in the case.

*Planned Parenthood of Northern New England v. City of Manchester* does not further the argument that Aurora's actions implicate the fundamental right to abortion and, therefore, Defendant must show that its decision to investigate the permitting process related to the Planned Parenthood facility at 3051 East New York Street promotes a compelling governmental interest. In *Manchester*, plaintiffs -- Planned Parenthood *and* 24 individuals -- brought suit after the ZBA revoked Planned Parenthood's building permit. The ZBA gave no reasons for its action. 2001 WL 531537 at \* 32. The permit revocation occurred after a public hearing in which "significant numbers of people expressed personal objection to Planned Parenthood's location in the area due to their general opposition to abortion, contraception, or family planning activities." *Id.* at \* 3. In other words, the record in *Manchester* indicates that revocation of a Planned Parenthood building permit resulted after the city conducted a hearing during which anti-abortion *animus* clearly was expressed. Such a record supported the claim that defendant acted to deny a fundamental constitutional right.

Unlike the defendants in *Planned Parenthood of Northern New England v. City of Manchester*, Aurora and its officials have not taken any action based on *animus* to the fundamental right to abortion. No record exists to indicate that Defendant has made any decision that denies a fundamental right that is premised on governmental officials' personal, philosophical, moral, religious, and/or political opposition to abortion. No evidence exists that Aurora's undertaking of a review of the permitting process that resulted in the issuance of building permits and occupancy certificates to Plaintiff was

motivated by political opposition to Planned Parenthood providing abortion services. Importantly, Aurora appointed an independent investigator to conduct the inquiry. Such action constitutes an affirmative step by Defendant to insure that the investigation and the results of the inquiry are not motivated by *animus* concerning abortion. Therefore, Plaintiff's attempt to characterize this matter as involving the denial of the fundamental right to abortion by Defendant is speculative and cannot be the basis for subjecting Aurora's actions in launching its investigation to strict scrutiny analysis.

## **2. Aurora's Investigation Satisfies The Rational Basis Test**

Equal protection jurisprudence directs that governmental action that does not implicate a suspect class or the violation of a fundamental constitutional right should be accessed by applying the rational basis test. Under this standard, governmental action is valid if it is rationally related to a legitimate interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 440.

In this case, the rational basis test should be applied to Aurora's decision to investigate Plaintiffs' actions during the process that resulted in the issuance of a building permit and a certificate of occupancy for the Planned Parenthood facility at 3051 East New York Street. The question is whether Aurora's decision reasonably relates to the promotion of a legitimate governmental interest.

Section 10 of the Aurora Zoning Ordinance establishes the process by which permits and certificates shall be issued for development in a Planned Development District. Aurora decided to investigate Plaintiffs' actions relative to the Section 10 permitting process after allegations were raised that Plaintiffs may not have been truthful with city officials. The decision to investigate allegations of deceptive behavior by an

applicant for PDD permits and certificates seeks to preserve the integrity of an administrative process used by many entities with substantial economic interests at stake. Aurora clearly has an interest in maintaining a process for issuance of PDD permits and certificates that is equitable for all parties who seek to engage in economic development and activity in the city. The investigation into allegations of improprieties by an entity seeking to engage in PDD development activity promotes the legitimate governmental interest of maintaining public confidence and trust in a process that affects the economic welfare of the municipality.

Aurora's decision to review Plaintiff's actions relative to the Section 10 permitting process is rationally related to a legitimate governmental purpose. Plaintiffs are not likely to succeed on the merits of the claim that Aurora has violated their Equal Protection Rights; therefore, this Court should deny the motion for preliminary injunction.

**III. Plaintiffs Have An Adequate Remedy At Law For Any Damages It May Suffer As A Result Of Aurora's Actions In Denying A Permanent Occupancy Permit Until Its Investigation Is Completed**

To prevail on its motion for preliminary injunction, Plaintiffs must show they lack an adequate remedy at law. Plaintiffs' motion for preliminary injunction and their supporting memorandum of law contain no allegations that Plaintiffs lack a legal remedy. This is not surprising because a clear remedy at law stands available to Plaintiffs. In the event that the Planned Parenthood facility remains closed while Aurora completes its investigation, Plaintiffs can sue for damages in state court. Since Plaintiffs can pursue a legal remedy in court, their motion for preliminary injunctive must be denied.

**IV. Plaintiffs Cannot Show That They Have Or Will Suffer Irreparable Harm Unless They Are Granted A Preliminary Injunction**

To prevail on their motion for preliminary injunction, Plaintiffs must show that they will suffer irreparable harm unless injunctive relief is granted. They cannot make such a showing. Plaintiffs are correct that irreparable harm is presumed when a violation of constitutionally protected rights – e.g. rights to abortion – are violated. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). However, in this matter, no individuals have been identified as parties who have suffered violation of their constitutional rights. Further, the record is devoid of any evidence that Aurora officials have rendered a decision regarding the opening of the Planned Parenthood facility at 3051 East New York Street based on opposition to the exercise of abortion rights. Rather, Aurora officials have decided to investigate Plaintiffs’ actions related to the Section 10 PDD permitting process due to a legitimate concern for the integrity of the codified procedures. Such action is not directed at the right to abortion.

Plaintiffs claim that they will suffer irreparable harm to their business interests. *Plaintiffs’ Memorandum Of Law In Support Of their Motion For Injunctive Relief* at 13. Plaintiffs allege in this regard that, “Planned Parenthood has invested more than \$7.5 million in this facility [at 3051 East New York Street]. It has considerable operating costs each day, and has financed this project with more than \$8 million in tax exempt bonds. Like any business, each day it is not open, it is not receiving revenue and not earning the goodwill of its patients.” *Id.* Assuming that these claims of economic hardship are true, Plaintiffs can seek damages in court. Therefore, Plaintiffs cannot show irreparable harm due to Aurora’ actions and their motion for injunctive relief should be denied.

**V. Granting Plaintiffs' Motion For Injunctive Relief Will Harm The Public Interest**

Aurora has significant interests that will be harmed if the Court grants Plaintiffs' motion for preliminary injunction. An injunction that requires Aurora to allow the Planned parenthood facility to open for business would compromise the city's legitimate interest in regulating land use to achieve planning goals. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d at 990; *Civil Liberties For Urban Believers v. City of Chicago*, 342 F.3d 752, 766. The city initiated its investigation into allegations that Plaintiffs failed to disclose material information while seeking and securing requisite permits and certificates in order to preserve the integrity of its Section 10 procedures. Decisions influencing the development of areas like that surrounding the site of the Planned Parenthood facility have significant consequences for the welfare of the community. If the process used to allocate building permits and occupancy certificates is compromised, then the public suffers substantial harm. Public confidence and trust in the fair and honest operation of municipal government could be eroded.

Plaintiffs' argument that the public interest weighs heavily in favor of granting its motion for preliminary injunction rests on the premise that the sole reason for Aurora's actions in this matter is governmental *animus* towards the exercise of the constitutionally protected right to abortion. *Plaintiff's memorandum Of Law In support Of their Motion For Injunctive Relief* at 14. The record does not support Plaintiff's assertion. Aurora commenced an investigation by an independent party of Plaintiffs' actions relative to the Section permitting process *following* allegations that PPCA and Gemini withheld information that was material to their requests for a building permit and an occupancy certificate. If concerns that Plaintiffs compromised the Section 10 permitting process had

not been raised, then Aurora would not need to conduct its investigation before allowing the Planned Parenthood facility to open for business.

Defendant initiated its investigation in response to legitimate public concern that Plaintiff may have acted in ways adverse to the honest and fair operation of municipal government. If the Court orders the Planned Parent facility open before Defendant completes its investigation, then the public interest will suffer substantial harm. Therefore, Plaintiffs' motion for injunctive relief should be denied.

**WHEREFORE**, for all the above-stated reasons, Defendant City of Aurora respectfully requests that this Honorable Court enter an order denying Plaintiffs' motion for preliminary injunction and granting Defendant any relief the court deems fair and just.

Respectfully submitted,

CITY OF AURORA

By:                   /s/Allen Wall                    
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