

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

PLANNED PARENTHOOD CHICAGO )  
AREA, an Illinois non-profit Corporation, and )  
GEMINI OFFICE DEVELOPMENT LLC, )  
an Illinois limited liability company, )

Plaintiffs, )

v. )

CITY OF AURORA, ILLINOIS )

Defendant. )

No. 07 C 5181

Judge Norgle

Magistrate Judge Brown

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION  
FOR PRELIMINARY INJUNCTION**

Plaintiffs, Planned Parenthood Chicago Area and Gemini Office Development (hereafter "Planned Parenthood"), are entitled to an injunction to avoid the irreparable harm to their constitutional rights, and to the rights of Planned Parenthood's patients, now being caused by Aurora's ("Aurora") continued refusal to allow Planned Parenthood to open its outpatient medical facility at 3051 E. New York Street.

Defendants' Response to Planned Parenthood's Motion contains a number of factual admissions which should be fatal to Aurora's opposition to the entry of a preliminary injunction. First, Aurora incorrectly contends that its conduct should be assessed under the "rational basis" test, rather than heightened strict scrutiny demanded of any interference with fundamental constitutional rights. This is an apparent admission that Aurora cannot withstand scrutiny under the higher standard and dooms its further opposition.

Next, Aurora admits that it has made its decisions "within the politically charged abortion issue," Affidavit of Alayne Weingartz, at ¶7, and that "Aurora has indicated that

it will not allow Plaintiffs to use their facility as an abortion clinic.” Defendant’s Response Brief at ¶12. Thus, Aurora has conceded what it would not at the initial hearing: its decisions were based on the fact that the Planned Parenthood facility would provide abortions, not simply a broad concern about the enforcement of the Aurora Zoning Code.

Third, Aurora contends, incorrectly, that Planned Parenthood cannot assert the constitutional injuries of its patients. Yet, a line of cases extending more than 25 years has held precisely the opposite. Providers of contraception and abortion services can and have asserted claims both on their own behalf and on behalf of their patients. *See e.g. Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328, 333-34 (5th Cir. 1981).

Finally, Aurora attempts to revive its *Williamson* argument which it raised in a motion to dismiss and which this Court denied at the initial hearing. But Aurora has cited no new cases nor presented new arguments that could present any basis for this Court to reverse its decision.

Most glaringly, however, despite the explicit request of this Court, Aurora has given no time frame for its “review” of Planned Parenthood’s permit documents, the nature of those reviews, or the process by which this review will be conducted and, more importantly, concluded. Instead, it has now fired its second attorney and has referred this matter to the Kane County State’s Attorney for further “review.” Nothing speaks more clearly to the political nature of this debate than this eleventh hour referral to an elected official. It is precisely because of this open-ended, indefinite and undefined “review” of its permits, that Planned Parenthood has sought injunctive relief from this Court.

### **Statement of Supplemental Facts**

Today, at the corner of Oakhurst and New York streets in Aurora, a \$7.5 million, state-of-the-art medical outpatient facility sits empty. This Planned Parenthood facility is fully staffed with doctors and nurses, administrators and clerical staff. Trombley Affidavit at ¶17. From the first days after Planned Parenthood announced that it would open the facility in Aurora, patients from the City and surrounding communities have telephoned seeking appointments. See Trombley Affidavit at ¶18. Among the services Planned Parenthood will provide to both men and women are the following:

- Annual gynecological exams;
- Cancer screening for cervical, breast, and other cancers;
- Examinations and counseling about birth control and family planning, including education about abstinence;
- Prescribing and dispensing contraceptive drugs and devices;
- Screening and treatment for sexually transmitted infections;
- Screening and treatment for vaginal and urinary tract infections;
- Confidential HIV testing and counseling;
- Immunizations;
- Pap tests, as well as colposcopy and cryotherapy for abnormal Pap results; and
- Medical and surgical abortions.

Supplemental Trombley Affidavit at ¶5

Planned Parenthood provides these services on an “as needed basis” to its patients, regardless of means. Supplemental Trombley Affidavit at ¶6. For many people, then, this facility offers the only affordable gynecological, contraceptive or reproductive medical care within a reasonable distance. Supplemental Trombley Affidavit at ¶6. And

despite the public outcry surrounding this new facility, less than 10 percent of the services which Planned Parenthood provides relate to abortions. Supplemental Trombley Affidavit at ¶7.

On August 16, 2007, with the full knowledge that Planned Parenthood would operate the new medical facility, Aurora granted a Temporary Occupancy Permit to Planned Parenthood. *See* Trombley Affidavit at ¶10. On July 27, 2007, the Chicago Tribune published a front page article describing the Aurora clinic and Planned Parenthood's role. Supplemental Trombley Affidavit at ¶8. In response to this article, opponents of abortion staged a candlelight vigil at the outpatient facility on August 9, 2007, a week before Aurora issued the Temporary Occupancy Permit. Supplemental Trombley Affidavit at ¶9.

Aurora's awareness of Planned Parenthood was not limited to the Chicago Tribune article and the candlelight vigil. *See* Supplemental Trombley Affidavit at ¶10-12. Representatives of Planned Parenthood had conversations with officials of Aurora in February 2007. Supplemental Trombley Affidavit at *See* Supplemental Trombley Affidavit at ¶10. These conversations are supported by contemporaneous email and telephone records. Supplemental Trombley Affidavit at ¶10. Further, the bond financing which Planned Parenthood obtained through the Illinois Finance Authority required certain public disclosures. Supplemental Trombley Affidavit at ¶11. In and around May 2007, therefore, the Chicago Sun Times published public notices describing the relationship between Planned Parenthood and Gemini, and the Aurora medical facility. Supplemental Trombley Affidavit at ¶11.

Finally, the architectural drawings that Gemini submitted to Aurora contained unusual security features: bullet resistant glass in the reception area, bullet resistant doors and bullet resistant drywall. Supplemental Trombley Affidavit at ¶12. These security measures were necessary protection given the violence that has occurred at many abortion facilities, but also were early signals to Aurora. Supplemental Trombley Affidavit at ¶12.

The decision to revoke Planned Parenthood's occupancy permit was the result of complaints from the community about abortion, not concern for the integrity of the Zoning Code. As Alayne Weingartz, Aurora's Corporation Counsel admits in her affidavit, "Because allegations of fraud were made within the context of the politically charged abortion issue," Aurora "modified" the permit to include a provision that Plaintiffs could not open for business. Affidavit of Alayne Weingartz at ¶7. The City has since informed Plaintiffs: "We have no intention of allowing you to open for business." See Exhibit 6 of Trombley Affidavit. Perhaps the best statement of Aurora is set forth in the Defendant's Response Brief at ¶12: "Aurora has indicated that it will not allow Plaintiffs to use their facility as an abortion clinic until a review of allegations related to Plaintiff's actions during the permitting process has been completed."

The highly unusual and "politically charged" review of Plaintiff's permit applications has also become a quagmire. On August 28, Aurora named Richard Martens, a former chair of the ABA Section of Municipal Law, as the attorney conducting the "independent review" of Planned Parenthood's applications. Supplemental Trombley Affidavit at ¶13. On August 31, Aurora terminated Mr. Martens in response to complaints from City Council members. Supplemental Trombley

Affidavit at ¶14. Aurora then named Phillip Luetkehans as the new “independent” counsel. Supplemental Trombley Affidavit at ¶15. However, questions soon arose about Mr. Luetkehans political contributions. Supplemental Trombley Affidavit at ¶15. Last night, Aurora designated Kane County State’s Attorney John Barsanti as the new counsel to oversee the “independent review.” Supplemental Trombley Affidavit at ¶16.

### **ARGUMENT**

#### **A. PLANNED PARENTHOOD MEETS ALL THE REQUIREMENTS FOR INJUNCTIVE RELIEF.**

##### **1. Likelihood of Success on the Merits**

Planned Parenthood has asserted a claim for violation of its civil rights under 42 U.S.C. 1983. Specifically, Planned Parenthood contends that by “modifying” the Temporary Occupancy Permit and subjecting it to an undefined and indefinite review process in response to vague and unsubstantiated charges of “fraud” and “deceit,” Aurora has treated Planned Parenthood differently than any other medical provider and interfered with its constitutionally-protected right to provide contraception, reproductive and abortion services. This discriminatory treatment constitutes a denial of equal protection and a violation of Section 1983.

In response, Aurora contends that there is no record that it has acted with animus toward abortion rights and, because this is the basis for Planned Parenthood’s claims, there can be no likelihood of success. Aurora, however, is wrong on both points: Planned Parenthood’s claims are broader than a specific charge of “animus” and even assuming that its claims rested on this narrow basis, there is sufficient evidence of such animus now in the record to support Planned Parenthood’s claims on that basis.

- a. **Planned Parenthood can demonstrate that Aurora has placed a substantial obstacle in the path of women seeking abortions, violating its constitutional rights.**

The question this court must ultimately resolve is whether the actions of Aurora have improperly interfered with a fundamental right of Planned Parenthood and its patients. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68-69 (1981); *Marks v. City of Chesapeake, Va.*, 883 F.2d 308, 311 (4<sup>th</sup> Cir, 1989). Once Planned Parenthood demonstrates that a classification is based on the exercise of a constitutional right, or infringes on a constitutional right, the burden shifts to Aurora to justify its treatment and strict scrutiny is applied. *Schad*, 452 U.S. at 68 (“[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest.”); *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5<sup>th</sup> Cir. 1988) (when the exercise of zoning power burdens a fundamental right, government must justify the burden by showing a compelling interest.)

The fundamental right at issue in this case is the right to reproductive and contraceptive services, including abortion services. As the United States Supreme Court reaffirmed just this term, “Before viability a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy.’” *Gonzalez v. Carhart*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1610, 1626 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)) (emphasis added). In *Gonzales*, the Supreme Court further reiterated its holding in *Casey*, noting that the State “may not impose upon this right an undue burden, which exists if a regulation’s **purpose or effect is to place a substantial obstacle** in the path of a woman seeking an abortion.” *Id.* at 1626-27 (quoting *Casey*, 505 U.S. at 878).

Once Planned Parenthood demonstrates that either the “*purpose or effect*” of Aurora’s actions is to place a “*substantial obstacle* in the path of women seeking an abortion,” the burden shifts to the City to justify its treatment of Planned Parenthood and to demonstrate that its actions are “narrowly tailored” to further a “sufficiently substantial” or “compelling state interest.” *Schad*, 452 U.S. at 69, *Islamic Ctr.*, 840 F.2d at 299. *See also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 33-36) (5<sup>th</sup> Cir. 1981) (preliminary injunction appropriate where clinic was denied a permit and city justifications did not “fit within a defined plan or scheme of logical development serving legitimate state ends”).<sup>1</sup>

Thus, while “animus” to abortion rights is a clear basis for a violation of Section 1983, simply demonstrating that the effect of Aurora’s conduct is to place “substantial obstacles in the path of women seeking abortion” and that Aurora has not “narrowly tailored” its conduct to meet a “compelling state interest” is also sufficient to demonstrate a likelihood of success on the merits.

Here, Aurora has not only placed a substantial obstacle in the path of women seeking an abortion, they have shuttered the facility altogether. Aurora has done this, while admitting it is an unprecedented action, because of “allegations of fraud made within the context of the politically charged abortion issue.” Affidavit of Alayne Weingartz at ¶7. The City has pulled Planned Parenthood’s permits, permits which are required to be issued within **three days** under the Aurora Municipal Code, and instead subjected Planned Parenthood to an open-ended, indefinite and undefined review process.

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<sup>1</sup> In its Response, Aurora contends incorrectly that the more lenient “rational basis” test applies. This test is inapplicable, however, where fundamental, constitutional rights apply. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985).

This process has already consumed more than a month and may not conclude for weeks, if not months, in the future.<sup>2</sup>

If unsubstantiated allegations of “fraud” by anti-abortion protestors are sufficient to allow a municipality to withdraw a valid permit and close a facility indefinitely, few medical facilities in the country will be providing abortion services in the very near future. *See Deerfield Med. Center*, 661 F.2d at 336 (the right to an abortion “would be adversely affected if abortion facilities were restricted to the most unattractive, inaccessible and inconvenient areas of a city.”).<sup>3</sup>

**b. There is Evidence of Aurora’s Animus in the Record.**

Even assuming that Planned Parenthood must demonstrate Aurora’s ‘animus’ to abortion to state a claim under Section 1983, there is sufficient evidence to do so. First, as recognized in *Planned Parenthood of Northern New England v. City of Manchester*, N.H., No. CIV. 01-64-M, 2001 WL 531537, at \*3 (D.N.H. April 27, 2001), the fact that decisions were made following a hearing in which “significant numbers of people expressed personal objection to Planned Parenthood” is evidence of a general animus to abortion rights.<sup>4</sup> As the court noted in *Manchester*, “if proof of a civil right[s] violation depends on an open statement by an official of an intent to discriminate, the Fourteenth

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<sup>2</sup> By contrast, the Aurora Municipal Code recognizes the importance of prompt resolution of zoning issues. For example, the Code requires that Certificates of Occupancy “shall be acted upon within three (3) days. Section 10.3-2. Similarly, Appeals to the Zoning Board must be made within four (4) days of the Zoning Board’s decision. Section 10.2-5.3.

<sup>3</sup> Aurora’s contention that Planned Parenthood has failed to name individual patients as additional parties is completely unsupported by the case law. For more than 25 years, Court’s have recognized that providers of abortion services have standing to assert claims on behalf of their patients. *Deerfield Medical Center*, 661 F.2d at 333-34 (plaintiffs have standing to assert the claims of pregnant women whose privacy rights would be “adversely affected.” *See also Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood v. Atchison*, 126 F.3d 1042 (8th Cir. 1997).

<sup>4</sup> The City’s Response incorrectly asserts that *Manchester* involved 24 individual plaintiffs in addition to Planned Parenthood and was, therefore, distinguishable on that basis. In fact, *Manchester* involved two plaintiffs, Planned Parenthood and the developer, and is therefore identical to our case. The developer and second plaintiff was “24 Penacook Street, LLC” which may have been the cause of the confusion.

Amendment offers little solace to those seeking its protection. [I]t is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals.” *Id.* (quoting *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10<sup>th</sup> Cir. 1970)).

The record contains, however, the actual animus expressed by a member of Aurora’s City Council. The following emails obtained by Planned Parenthood demonstrate the basis for its unfair treatment specifically by members of the Aurora City Council. A September 17, email from City Council member Chris Beykirch states as follows:

**We will have to parade our children past protests and face the fact daily that lives are being aborted in that building . . . I will tell you they are a deceitful organization and I am angry that they located where they did without ever consulting anyone in our government.**

A second email sent by Alderman Beykirch on September 18, 2007 further states:

I think PP and its leaders are widely deceptive to the governments of communities all around the U.S. I do not like the fact they took our ability to plan out of our hands with their deception. I can’t imagine that even a pro-PP person could see that the long term effects of their location are not good for my neighborhood.

**I do believe life begins at conception. Why else would people put ultrasounds on their refrigerator? Even though I am elected, I come to the office with life experiences that lead me one way or another. I am Pro-Life. I will also abide by the law of the land as I am sworn to do. I will not go along with it though until the law says I must. I will also never think positively about a “medical practice” that will perform abortions on minors without their consent regardless of their extremist ideals of why they should be allowed to.**

It would be difficult to describe “animus” by an elected official more clearly than is set forth in these emails.

**c. There is No Evidence of Fraud or Deceit by Plaintiff**

Despite the swirling allegations of “fraud and deceit” against Planned Parenthood there is no evidence that anything like this occurred. First, Aurora issued the Temporary Occupancy Permit after the full disclosure that Planned Parenthood would occupy the facility, including a front-page article in the Chicago Tribune. Anti-abortion protestors had even staged a “candlelight vigil” at facility making their views known to Aurora a full week before the Temporary Occupancy Permit issued.<sup>5</sup>

Beyond this, public tax documents demonstrated the connection between Planned Parenthood, Gemini Office Development and the Aurora Outpatient Facility as early as May 2007. The Chicago Sun Times carried a public notice relating to the \$8 million bond issue for the new property at this time.

Most importantly, representatives of Planned Parenthood and Aurora discussed the outpatient facility in February 2007. Contemporaneous email and telephone records confirm that these conversations took place. Accordingly, there is no basis for the claim of “fraud” which serves as the only justification for Aurora’s actions.

Aurora’s actions place a substantial obstacle in the path of women seeking an abortion. There is no justification for these actions, let alone a “narrowly tailored” response to meet a “compelling state interest.” Planned Parenthood, therefore, has a strong likelihood of prevailing on the merits of its equal protection claim under 42 U.S.C. 1983, and a preliminary injunction is appropriate under the circumstances.

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<sup>5</sup> As the court noted in *Manchester*, however, the entire argument over whether Aurora was somehow “misled” is a red herring. The only relevant question is whether the area was designated for medical use and whether Planned Parenthood properly described its intended use of the property for “medical purposes.” There is no question that Planned Parenthood and Gemini did just that. The narrower question of whether Gemini disclosed its relationship to Planned Parenthood and whether Aurora knew that the medical services were abortion services is irrelevant to the zoning question. Aurora could make no valid decision based on the fact that Planned Parenthood was to be the tenant or that the facility would provide abortion services.

2. **Irreparable Injury for which there is no adequate remedy at law**

Irreparable harm is presumed where, as here, violations of fundamental or constitutional rights are alleged. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Aurora agrees with this proposition and there is no need for further elaboration on this point. The City is incorrect that individual plaintiffs must be named. No such plaintiffs were named in *Planned Parenthood v. Casey*, *Planned Parenthood v. Manchester* or *Planned Parenthood v. Atchison*. There simply is no such requirement and Aurora cites no case law to support its unusual contention.<sup>6</sup>

B. **WILLIAMSON RIPENESS STANDARDS DO NOT APPLY TO PLAINTIFFS' EQUAL PROTECTION CLAIM**

Defendant attempts to revive its claim that plaintiffs' injunctive relief complaint is not ripe for judicial consideration under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Without asserting any new facts or law, Defendant argues that *Williamson* bars the Court's consideration of plaintiffs' equal protection claim because the review process initiated by the Aurora City Council "has not resulted in a final administrative decision that has been formalized and its effects felt in a concrete way by Plaintiffs." *Defendant's Response to Plaintiffs' Motion for Preliminary Injunction* at ¶13.

The 7th Circuit has clearly stated, however, that equal protection claims arising from land-use decisions are not subject to *Williamson* ripeness standards. See *Forseth v. Village of Sussex*, 199 F.3d 363, 370 (7th Cir. 2000) (citing *Hager v. City of West Peoria*,

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<sup>6</sup> Aurora does not cite any case law or otherwise respond to Planned Parenthood's contention that the balance of the hardships tips in favor of Planned Parenthood. Further, while Aurora contends that the public interest favors even-handed enforcement of the Aurora Zoning Code, it is silent on the far greater public interest in health care and protection of constitutional freedoms. These, not the zoning code, are most clearly in the public interest. *Planned Parenthood of Northern New England v. City of Manchester, N.H.*, No. CIV. 01-64-M, 2001 WL 531537, at \*5 (D.N.H. April 27, 2001).

84 F.3d. 865, 870 (7th Cir. 1996)) (emphasis added) (“[B]ona fide equal protection claims arising from land-use decisions can be made independently from a takings claim **and without being subject to *Williamson* ripeness.**”); *see also Northwestern University v. City of Evanston*, No. 00 C 7309, 2001 WL 219632, at \*5 (N.D. Ill. March 6, 2001) (emphasis added) (“[T]he Seventh Circuit has held that *Williamson* ripeness does not apply to equal protection claims.”).

In *Hager*, the Court concluded that “rather than just a single takings claim with different disguises (including one for equal protection), in this case at least, in addition to a takings/inverse condemnation claim, plaintiffs have raised a legitimate equal protection claim to be considered on its merits.” *Id.* As a result, the Court held that *Williamson* provided no reason for the court to postpone consideration of plaintiffs’ equal protection claims. *Id.*

In the present case, plaintiffs’ complaint certainly evidences a *bona fide* equal protection claim meaning *Williamson* ripeness standards are inapplicable to their claim. As in *Hager*, plaintiffs’ prayer for relief seeks primarily injunctive relief rather than damages. *See Plaintiffs’ Verified Complaint For Preliminary Injunction And Other Relief* at ¶38. Plaintiffs’ prayer for relief devotes three paragraphs to injunctive relief and only one line to damages. *See Hager*, 84 F.3d at 870 n.4 (holding that plaintiffs’ pled a *bona fide* equal protection claim because their prayers for relief under their equal protection claims sought preliminary and permanent injunctive relief against the defendant in two separate sections and included only one sentence requests for damages). Plaintiffs equal protection claim would also “disappear” if Defendant treated all building permit applicants equally and eliminated the policy of conducting an *ad hoc*

administrative review of the permitting process for medical facilities that provide abortion services. Thus, plaintiffs' claim possesses both factors the *Hager* court identified as evidence of a *bona fide* equal protection claim. Therefore, under *Hager*, *Forsyth* and *Northwestern University*, plaintiffs' equal protection claim is therefore not subject to the *Williamson* ripeness standards.


In addition, it should be noted that plaintiffs are indeed currently suffering a concrete harm. On August 31, 2007, defendant informed plaintiff by letter that plaintiff's Temporary Occupancy Permit was being modified and plaintiff would not be allowed to open its facility until defendant concluded a review of the permitting process. At that time, defendant indicated the review would be complete by plaintiffs' planned opening date of September 18, 2007. In a September 11, 2007 letter, however, defendant informed plaintiff that plaintiff's facility would be closed indefinitely as a result of the administrative review process. By modifying plaintiff's occupancy permit and closing plaintiff's facility for the indefinite future, defendant has "significantly interrupted and delayed [Planned Parenthood's] patients' ability to consider and obtain family planning, contraceptives, and at some point, abortion services, by delaying [Planned Parenthood's] . . . legitimate occupancy of the building." *Manchester*, 2001 WL 531537, at \*5. Such interruption and delay are certainly injurious to plaintiffs.

### CONCLUSION

Accordingly, Plaintiffs, Planned Parenthood Chicago Area and Gemini Office Development, LLC, respectfully request that this court grant its motion for preliminary injunction and enjoin Aurora from modifying the Temporary Occupancy Permit issued

on August 16, 2007 and otherwise enjoining Aurora from interfering with Plaintiffs' lawful business operations.

PLANNED PARENTHOOD CHICAGO AREA and GEMINI  
OFFICE DEVELOPMENT LLC

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