
MEMORANDUM

TO: City Council of Aurora, IL

FROM: Phillip A. Luetkehans
SCHIROTT & LUETKEHANS, P.C.

SUBJECT: Gemini/Planned Parenthood Facility

DATE: September 17, 2007

FILE: Planned Parenthood.3594

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

I. FACTUAL BACKGROUND¹

After at least two meetings with the City of Aurora's staff, Gemini Office Development ("Gemini") filed a Land Use Petition on July 27, 2006 with the City of Aurora listing Theresa Huyck as President of Gemini. The Land Use Petition, later filed documents and statements made by the applicant at the Planning Commission meeting stated that the "intended use" was "a Medical Office Building" but that no tenant had been determined.

In July, 2006, plans and specifications for the facility were filed showing bullet-proof glass and walls in the entryway. On October 22, 2006, Gemini also filed an application for a foundation permit listing "Teri" Huyck as the contact person for the tenant, Gemini Medical Office. On March 22, 2007, Gemini requested a sign permit, again stating they did not know who would be the tenant. Not until the alarm permit was requested on August 20, 2007 were any documents found listing Planned Parenthood Association of Chicago as the tenant or user of the facility. However, at an Illinois Finance Authority meeting on May 8, 2007, "Terry" Huyck was already listed as Chief Operating Officer of Planned Parenthood Association of Chicago. My review has found no documents filed with the City stating that abortion procedures were to be performed at the facility.

¹Given the expedited time frame within which a report was due because of the federal court litigation, this report is a summary of our findings and research. We have not yet received all the information requested from City staff, and the research on abortion procedures may not be completely exhaustive. It should also be noted that this author is not overly familiar with abortion terminology, and our use of medical terms may not be the correct technical terms used by the medical profession.

Given the fact that the building contained bullet-proof glass and walls in the entryway and the ties between Gemini and Planned Parenthood, it is my opinion that the facility was always intended to be utilized to terminate pregnancies.

II. CITY OF AURORA ZONING ORDINANCE

The subject property originally was annexed into the City of Aurora in 1972 as part of a Planned Development District and was zoned B-2 under that Annexation Agreement. In 1993, the Annexation Agreement was amended and restated pursuant to Ordinance No. 093-123. The amendment and restatement expired in 2003 pursuant to its terms. The underlying zoning of the subject property has remained B-2 Business district since that time.

The City's zoning ordinance in effect at the time of Gemini's application (July 27, 2006) provided that properties used for offices, including medical clinics, are permitted uses in the B-2 Business district. *See* City of Aurora Zoning Ordinance (the "Ordinance"), §§ 12.2-1.34 and 12.3-1.1. Thus, a medical clinic is a permitted use in the B-2 Business district, and no special use permit or public hearing is required for such use. *Id.* Hospitals, however, require a special use permit. Ordinance, § 7.1. In order to obtain a special use permit, a public hearing and ordinance granting the special use permit are required.

The Ordinance contains the following definitions:

Clinic, medical or dental: A building containing an individual practitioner or an association or group of licensed physicians; surgeons, dentists, clinical psychologists, or similar professional health-care practitioners, including assistants. The clinic may include apothecary, dental and medical laboratories and/or x-ray facilities, but shall not include in-patient care or operating rooms for major surgery.

Clinical or medical center: A "medical center" or "medical clinic" is an establishment where three (3) or more licensed physicians, surgeons or dentists engage in the practice of medicine or dentistry, operating on a group or individual basis with pooled facilities, which need not, but may, include coordinated laboratory, x-ray and allied departments, and a diagnosis and treatment of humans, a drug prescription counter (not a drug store), for the dispensing of drugs and pharmaceutical products, orthopedic or optical devices to the patients of said physicians, surgeons and dentists; but not including any exterior display or advertising sign.

Hospital or Sanitarium: An institution open to the public in which patients or injured persons are given medical or surgical care; or for the care of contagious diseases or incurable patients.

Based upon the above-referenced definitions, if Gemini's facility does not include in-patient care or operating rooms for major surgery, it is a permitted use in the B-2 zoning category and does

not require a special use permit. On the other hand, if the facility includes in-patient care or operating rooms for major surgery, the facility would require a special use permit. Accordingly, the decision to grant or deny the occupancy permit without a special use permit having been granted after a public hearing depends, at least in part, on whether the types of procedures performed at the facility are considered to be in-patient care or major surgery. If in-patient care or major surgery is not being performed at the facility, the use is a permitted one and should be allowed.

III. APPLICABLE LAW

A. Land Use Decisions Regarding Abortion Clinics²

"When a zoning law infringes on a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 335 (5th Cir. 1981). Because the instant matter involves a fundamental right, the City's decision on this matter will be subject to strict scrutiny. *See, e.g., Deerfield Medical Center*, 661 F.2d at 335; *P.L.S. Partners, Women's Medical Center of Rhode Island, Inc. v. City of Cranston*, 696 F. Supp. 788, 797 (D. R.I. 1988). A zoning decision that prevents the establishment of an abortion clinic in a particular locality constitutes affirmative governmental interference with the abortion decision rather than merely a determination not to remove restrictions on access to an abortion that already exist. *Deerfield Medical Center*, 661 F.2d at 335.

Our research has not disclosed a court-sanctioned zoning definition of "major surgery." With respect to abortion procedures, however, the weight of authority indicates that at least some abortion procedures are not major surgery. *P.L.S. Partners*, 696 F. Supp. at 797-98 (rejecting the argument that abortion is "major surgery" that cannot be performed in outpatient clinics and citing *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 438, 103 S. Ct. 2481, 2497 (1983), *rev'd on other grounds*); *Evans v. Kelley*, 977 F. Supp. 1283, 1294, 1296 (E.D. Mich. 1997) (only hysterotomy and hysterectomy described as major surgery); *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141, 1153 (7th Cir. 1974) ("Under *Roe* and *Doe*, if North Carolina may regulate the performance of abortions at all, it may do so only to the extent that it regulates tonsillectomies and other relatively minor operations* * *. Doctors may perform other medical procedures - including minor surgery and obstetrical delivery, which is considered more dangerous than first trimester abortion - away from hospitals with neither a transfer agreement nor active staff privileges" quoting *Hallmark Clinic v. Dep't of Human Resources*, 380 F. Supp. 1153 (E.D. N. Cal. 1974)); *Margaret S. v. Edwards*, 488 F. Supp. 181, 210 (E.D. La. 1980) (finding that "in the overwhelming number of cases, abortion is a minor surgical procedure, not a major surgical procedure.").

In *Evans*, the court examined abortion procedures, including vacuum aspiration, dilatation (or dilation) and evacuation, intact dilation and evacuation,³ induction/installation and hysterotomy

²This Memorandum addresses the rights and obligations of the City in connection with the issuance of the occupancy permit requested by Planned Parenthood in the context of land use. In addition to land use, there may be other issues relating to the regulation of this facility by the State of Illinois and its agencies. However, at present we have been unable to make any determination as to the jurisdiction or requirements of any such regulatory bodies.

³Intact dilation and evacuation has since been banned under federal law. 18 U.S.C. § 1531.

and hysterectomy. *Id.* at 1292-97. The court characterized only hysterotomy and hysterectomy as "major surgical procedures." *Id.* at 1294, 1296. *See also Gonzales v. Carhart*, 127 S. Ct. 1610, 1623 (2007). However, at least one case has held the classification of first trimester abortion as major or minor surgery for zoning purposes is a decision for the legislative body. *Bossier City Medical Suite, Inc. v. City of Bossier City*, 483 F. Supp. 633, 649 (W.D. La. 1980). The cases cited above and decided after *Bossier*, however, tend to indicate that the trend among courts is to find that at least several common abortion procedures are not major surgery. Abortion procedures that the courts have held not to be major surgery are as follows:

- 1) Vacuum Aspirations;
- 2) Dilatation (or dilation) and Evacuations (as opposed to intact dilatation and evacuation);
- 3) Induction/Installations.

Given this case law, it appears that other more extensive abortion procedures would be considered major surgery. In fact, the following types of abortion procedures have been held to be major surgery:

- 1) Medical Inductions;⁴
- 2) Hysterotomies; and
- 3) Hysterectomies.

In this matter, however, the City and its zoning authority have never been informed as to what types of abortion procedures will be performed at the facility⁵ and, therefore, cannot make an informed decision as to whether "major surgery" will be conducted. Thus, the zoning authority at the City has insufficient information to determine whether the facility will provide in-patient care or perform major surgery. *See, e.g., Long v. Elk Grove Village*, 64 Ill. App. 3d 1006, 1010, 382 N.E. 79, 82 (1st Dist. 1978) (lack of sufficient information regarding types of surgery provided precluded making determination of whether a facility was an ambulatory surgical treatment center or a hospital).

Notwithstanding the lack of information available to the City, it is my opinion that the following non-major surgeries would be allowed at the facility:

- 1) Vacuum Aspirations;
- 2) Dilatation (or dilation) and Evacuations (as opposed to intact dilatation and evacuation);
- 3) Induction/Installations.

If the applicant wishes to perform other types of abortion procedures at the facility, then it would have to seek a special use permit, text amendment or a zoning determination from the City as to whether a specific type of surgery was major surgery, all of which would be subject to the normal judicial review procedures.

⁴*Gonzales*, 127 S. Ct. at 1623 (2007).

⁵I have also sought this information directly from Planned Parenthood's attorney but have not yet received the requested information.

B. Misrepresentation

Given the history of this project and my subsequent investigation, it is my strong opinion that Gemini always knew that abortions would be performed at the facility in question. If true, Gemini misrepresented that fact in at least some of its permit applications when it stated it did not know who would be the tenant. The identification of the tenant would have given the City the ability to analyze the law on these types of facilities in a more detailed and complete fashion. However, Gemini's failure to identify the tenant or to elaborate on the use of the facility is likely insufficient to provide a reasonable basis for denying the occupancy permit. The authority to deny an occupancy permit based upon a material misrepresentation is inherent in the governing body. See *O'Connell Home Builders, Inc. v. City of Chicago*, 99 Ill. App. 3d 1054, 1058, 425 N.E.2d 1339, 1342 (1st. Dist. 1981). "A misrepresentation is material if it would be likely to affect the conduct of a reasonable man with reference to the transaction in question." *Id.* However, in *Oak Grove Jubilee Center, Inc. v. City of Genoa*, 347 Ill. App. 3d 973, 985, 808 N.E.2d 576, 588 (2d Dist. 2004), the appellate court held that it was error to deny a building permit where a pastor filed a special use application and failed to identify that the application was on behalf of an incorporated church. Thus, Planned Parenthood's use of the name Gemini likely is not a material misrepresentation.

Further, if Gemini knew Planned Parenthood would be the tenant and would be performing abortions, it omitted this information from its application materials. However, neither the Planning Commission nor the City Council inquired about the services to be performed at the facility. Had Gemini identified the tenant, then the question would probably have been raised in the minds of staff and the Planning Commission. We could not find any section in the Ordinance requiring an applicant to state the name of the end-user. Accordingly, Gemini's failure to state the user or elaborate on the intended use of the facility cannot be seen as a material misrepresentation that can be used as a basis to refuse an occupancy permit.

Moreover, Gemini indicated it sought an occupancy permit for a medical clinic. To the extent Gemini failed to specify that it would perform abortions at the facility, such omission would not be a material misrepresentation in light of Gemini's right to perform vacuum aspirations, dilatation (or dilation) and evacuation and induction/installation procedures without a special use permit.

The quantum of missing information necessary to justify a refusal to issue a permit is illustrated in *Archview Investments, Inc. v. City of Collinsville*, 223 Ill. App. 3d 24, 30, 584 N.E.2d 821, 825 (5th Dist. 1991). In *Archview*, a physician attempted to obtain a building permit for an abortion clinic which was denied by the City because, among other things, the City was unable to discover pertinent information missing from the face of the application and, upon request, the applicant repeatedly refused to provide the information. 23 Ill. App. 3d at 26, 584 N.E.2d at 823. The deficiencies in *Archview* included failure to provide a filing fee, the names of the corporate officers, an adequate description of the use and occupancy of all parts of the building, failure to include specifications and plans with sufficient clarity and failure to include detailed dimensions to show the nature and character of the work to be performed, failure to include a site plan scaled to show boundary lines and distances from lot lines and failure to contain adequate plans for electrical, ventilation and plumbing systems. This myriad of failures, coupled with the applicants repeated refusals to provide the information, warranted denial of the permit.

In my opinion, the facts herein are more analogous to the *Oak Grove* decision than to the *Archview* decision. Accordingly, based upon the facts presented to date and the law as set forth above, it does not appear that Gemini made a misrepresentation material enough to allow the permanent certificate of occupancy to be denied.

IV. CONCLUSION

In sum, it is my opinion that the following types of abortion procedures are permitted to occur as of right in the B-2 Business district and, hence, at the Gemini facility:

- 1) Vacuum Aspirations;
- 2) Dilatation (or dilation) and Evacuations (as opposed to intact dilation and evacuation);
- 3) Induction/Installations.

Any other abortion procedures which Planned Parenthood or any other user wishes to perform should require the property owner to seek either a zoning determination or zoning relief from the City of Aurora prior to being undertaken.

Given the fact that not enough information was provided to the Zoning Department to make a proper determination, there is another option. The other option, but one that brings with it a significant risk of a lawsuit under the Civil Rights Act, is to require Gemini to provide further information regarding the services to be provided at the facility to determine whether the facility is a permitted or a special use depending upon whether major surgery will be performed at the facility. To that end, the City could require the submission of that information so it can make a zoning determination as to whether the precise procedures to be performed and services to be provided at the facility are more consistent with either a "medical clinic" or a "hospital."