

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATES IN OBSTETRICS & GYNECOLOGY, :
on behalf of itself and its patients :
and **STEVEN C. BRIGHAM, M.D.** :
677 West DeKalb Pike, Suite 301, :
King of Prussia, Pennsylvania 19406 :
Plaintiffs :

v. :

UPPER MERION TOWNSHIP; :
TOWNSHIP BOARD OF SUPERVISORS; :
BARBARA S. FRAILEY, individually and in her official :
capacity as a borough supervisor; :
DAN ROONEY, individually and in his official :
capacity as a borough supervisor; :
FIORINDO A. VAGNOZZI, individually and in his :
official capacity as a borough supervisor; :
RALPH P. VOLPE, individually and in his official :
capacity as a borough supervisor; :
ANTHONY J. VOLPI, individually and in his official :
capacity as a borough supervisor; :
TOWNSHIP ZONING HEARING BOARD; :
EDWARD McBRIDE, individually and in his official :
capacity as a member of the Zoning Hearing Board; :
MICHAEL FIORE, individually and in his official :
capacity as member of the Zoning Hearing Board; :
WILLIAM WHITMORE, individually and in his official :
capacity as a member of the Zoning Hearing Board; :
RONALD G. WAGENMANN, individually and in his :
official capacity as Manager of Upper Merion Township; :
MARK A. ZADROGA, individually and in his official :
capacity as the Township Zoning Officer; :
all having places of business at :
175 West Valley Forge Road, :
King of Prussia, Pennsylvania 19406 :
and :
DOES I-X, individuals residing in this judicial district, :
Defendants :

CIVIL ACTION
NO: 03-CV-
JURY TRIAL DEMANDED

COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this Complaint against the above-named Defendants for violation of their rights guaranteed under the United States Constitution and pendent state claims, and in support thereof allege as follows:

INTRODUCTION

Upper Merion Township (the “Township”), its Board of Supervisors and Zoning Hearing Board, the individual members of said Boards, and their agents and employees, including but not limited to the Defendant Township Manager and Township Zoning Enforcement Officer, together with Does I-IX, have unlawfully, intentionally, and maliciously conspired to interfere and interfered with the Constitutional rights of plaintiff physician and medical practice (“Plaintiffs”) to conduct a legitimate business and with their patients’ and prospective patients’ Constitutional rights of privacy and association and of access to safe, lawful abortions in order to force Plaintiffs and their patients seeking abortions out of the Township and to deprive those patients of their Constitutionally protected right to abortion. Defendants have done so by 1) arbitrarily defining the Plaintiffs’ practice as a “clinic” under the Township zoning ordinance, when it is indistinguishable in all relevant respects from other medical practices in the Township which are not so defined; 2) selectively targeting the Plaintiffs, and no other physicians practicing in the Township, for non-compliance with the Township zoning ordinance and; 3) subjecting Plaintiffs, and Plaintiffs only, to discriminatory and unlawful enforcement proceedings all in violation of Plaintiffs’ and their patients’ equal protection and due process rights solely because Plaintiffs offer, and their patients may seek, Constitutionally-protected abortions within the Township. This lawsuit seeks compensatory and punitive damages against the Defendants and preliminary and permanent injunctive relief for (1) deprivation of Plaintiffs’ and their patients’

rights to equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution, under color of state law, in violation of 42 U.S.C. §1983; (2) deprivation of the rights of Plaintiffs and their patients to privacy, freedom of choice, freedom of speech and freedom of association under the First and Fourteenth Amendments to the United States Constitution under color of state law in violation of 42 U.S.C. §1983; (3) deprivation of contractual and property rights of Plaintiffs without due process of law in violation of 42 U.S.C. § 1983; (4) impairment of contracts in violation of Article 1, Section 10 of the United States Constitution; (5) conspiring with and among themselves in order to hamper or interfere with the plaintiffs' patients' ability to exercise their Constitutional right to secure abortion services in violation of 42 U.S.C. § 1985(3); (6) malicious prosecution and wrongful use of civil proceedings; (7) tortious interference with contractual relationships; (8) tortious interference with prospective business relationships between Plaintiffs and their patients; (9) civil conspiracy.

Plaintiffs Associates in Obstetrics and Gynecology ("Associates"), for itself and its patients, and Steven C. Brigham, M.D. ("Brigham"), by their undersigned attorneys, in support of this Complaint aver as follows:

JURISDICTION AND VENUE

1. This is an action under 42 U.S.C. §§1983 and 1985(3) seeking damages and redress, by declaratory and injunctive relief, for the deprivation, under color of state law, of rights guaranteed by the United States Constitution and the First, Fifth, and Fourteenth Amendments to the United States Constitution and for pendent common law and statutory claims under the laws of the Commonwealth of Pennsylvania. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1343(a)(3), and it has supplemental jurisdiction over the plaintiffs' state law claims under 28 U.S.C. §1367(a).

2. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) because all of the defendants reside within this judicial district and all of the claims asserted by plaintiffs arose within this District.

PARTIES

3. Plaintiff, Associates in Obstetrics & Gynecology ("Associates"), is a corporation organized under the laws of the Commonwealth of Pennsylvania with a place of business located at 677 West DeKalb Pike, Suite 301, King of Prussia, Montgomery County, Pennsylvania 19406 (the "Subject Premises").

4. Plaintiff, Steven C. Brigham, M.D. ("Dr. Brigham"), is a licensed physician and is the owner of Associates with an office located at 677 West DeKalb Pike, Suite 301, King of Prussia, Montgomery County, Pennsylvania 19406. Dr. Brigham and Associates are referred to collectively as "Plaintiffs."

5. In addition to their own claims, Plaintiffs have standing to seek vindication of their patients' Constitutional rights to abortion and other gynecological services because: 1) said patients would otherwise have standing to sue in their own right; 2) the interests they seek to protect are germane to the Plaintiffs' purpose in providing the services which underlie Defendants' motivation for the acts complained of herein; 3) neither the claims asserted nor the relief requested herein requires the participation in this litigation of individual patients.

6. Defendant, Upper Merion Township, is a municipal corporation and body politic, organized under the 2nd Class Township Code, Act of May 1, 1933, P.L. 103, No. 69, as amended by the Act of November 9, 1995, P.L. 350, No. 60, see 53 P.S. §65101-68701, with offices located at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406.

7. Defendant Board of Supervisors is the governing body of the Township of Upper Merion, composed of the individually-named defendant supervisors.

8. Defendants Barbara S. Frailey, Dan Rooney, Fiorindo A. Vagnozzi, Ralph P. Volpe and Anthony J. Volpi are members of the Board of Supervisors and adults residing in this judicial district with a place of business at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406. Each is sued in his official and individual capacity.

9. Defendant Zoning Hearing Board is the entity charged with conducting hearings and appeals regarding, *inter alia*, zoning enforcement determinations by the Township. Plaintiff is informed and believes and thereupon alleges that the Zoning Hearing Board and the Board of Supervisors are separate entities.

10. Defendants Edward McBride, Michael Fiore, and William Whitmore are members of the Zoning Hearing Board of Upper Merion Township and adults residing in this judicial district with a place of business at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406. Each is sued in his official and individual capacity.

11. Defendant Ronald G. Wagenmann, is the Manager of Upper Merion Township and is an adult residing in this judicial district with a place of business at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406. He is sued in his official and individual capacity.

12. Defendant Mark A. Zadroga, is the Township Zoning Officer and is an adult residing in this judicial district with a place of business at 175 West Valley Forge Road, King of Prussia, Montgomery County, Pennsylvania 19406. He is sued in his official and individual capacity.

13. Defendants, Doe I-X, are citizens of the United States and residents of this

judicial district who engaged in concerted efforts with the named individual defendants to hinder and prevent the provision of and access to abortion services because of their animus toward abortion providers and toward patients' exercise of their Constitutionally protected right of access to abortion services.

FACTS

14. In April 2001, Associates began operating as a professional medical office at 677 West DeKalb Pike, Suite 301, King of Prussia, Montgomery County, Pennsylvania 19406 (the "Subject Property"), where it provides a variety of obstetrical and gynecological services, including family planning, sexually transmitted disease testing and treatment and abortion services.

15. Associates makes known to the public its provision of obstetrical and gynecological services, including family planning, sexually transmitted disease testing and abortion services, through such channels as advertising in the local telephone directory.

16. Plaintiffs are informed and believe and thereupon allege that the abortion services provided by Associates are significantly less expensive than hospital-based providers of such services and significantly less expensive than abortion services provided by medical professionals who do not advertise abortion services.

17. Associates' practice is targeted to women seeking abortions who do not have a doctor-patient relationship with a medical practice from which they can secure abortion services and to women who seek less expensive abortion services than those provided by hospitals and most physicians.

18. Associates is under contract with the Pennsylvania Department of Health, Bureau of Communicable Diseases, Division of TB/STD, STD Program, pursuant to which it examines,

diagnoses, counsels and treats patients diagnosed with or suspected of having or being exposed to sexually transmitted diseases (“STD”), including HIV (AIDS), syphilis, gonorrhea, chlamydia and Hepatitis B at no charge to the patient.

19. Pursuant to the above contract to provide STD services, Associates provides information, examinations, counseling, testing, drugs and vaccines to anyone seeking STD care who has tested positive for, been exposed to or is suspected of having a sexually transmitted disease, including patients referred to its care by state, county and municipal health departments.

20. The effects of certain of the above-named STDs can range from infertility to death, and STDs pose a significant threat to public health and to the well being of Associates’ patients and prospective patients.

21. Plaintiffs are informed and believe and thereon allege that Associates is the only provider of state-sponsored free STD services in King of Prussia.

22. Plaintiffs’ STD services are particularly targeted to individuals who do not have a doctor-patient relationship with a medical practice from which they can secure such services, especially those who are uninsured and cannot afford to secure such services on a fee-for-service basis.

23. In early August 2001, anti-abortion protesters began picketing and other activities around the Subject Property specifically targeted against Associates because of its lawful provision of abortion services and facilitation of pregnant women’s Constitutionally protected right of access to abortion.

24. On August 15, 2001, the Township Zoning Officer appeared at the Subject Premises alleging he was there to conduct an inspection of the premises and its use.

25. Plaintiffs are informed and believe and thereupon allege that the Zoning Officer’s

inspection was occasioned by Doe defendants who approached employees, agents and representatives of Upper Merion Township, including the named individual Defendants, to object to Plaintiffs' lawful use of the property and for the purpose of hindering and impeding Plaintiff physicians' patients' and prospective patients' lawful procurement of abortion services.

26. Plaintiffs are informed and believe and thereupon allege that the individual named Defendants, acting in both their individual and official capacities, conspired with each other and the Doe defendants to engage in a pattern of harassment, selective enforcement and procedural abuses against Associates in order to deprive them and their patients and prospective patients of their Constitutionally protected rights, as hereinafter described.

27. Plaintiffs are informed and believe and thereupon allege that the individual Defendants were motivated by their animus toward Plaintiffs because of their lawful provision of abortion services and because they are a target of abortion protesters, and by animus toward their patients' and prospective patients' lawful procurement of abortion services.

28. Plaintiffs are informed and believe and thereupon allege that in furtherance of said conspiracy, the individual named Defendants, acting in both their individual and official capacities, directed the Township Zoning Officer to conduct an inspection of Associates' offices for the purpose of finding a basis to force Associates to cease operations.

29. Under the Township Zoning Code ("Code"), professional office use is permitted in the Commercial Office ("CO") District on lots of at least 20,000 square feet, but "clinic" use is restricted to lots of at least three acres.

30. The Code permits professional office use, including physician's offices, in almost all zoning districts, but limits medical and dental "clinic" use to property located **only** in the CO District and **only** on lots of at least three acres.

31. The Code contains no definition of the terms “clinic” or “professional office.”

32. Prior to the events complained of herein, the Township had uniformly applied the Code to permit medical offices in all districts zoned for offices for professional use.

33. On August 16, 2001, the Township Zoning Officer, acting beyond his authority but under color of state law, issued a cease and desist order advising Plaintiffs’ that its operations constitute a "clinic" use and are not permitted on the Building's lot size in the CO District and because they had not secured a use and occupancy permit. A true and correct copies of the cease is desist order are attached hereto as Exhibit “A”.

34. The Township Zoning Officer’s determination that Plaintiffs’ medical practice constitutes a "clinic" was based solely on the fact that Associates provides abortions.

35. The determination of the Township Zoning Officer that Plaintiffs’ medical practice constitutes a “clinic” was arbitrary and capricious and bears no rational relationship to any legitimate state or municipal concern.

36. The Township’s ordinary practice where a professional office lacks a use and occupancy permit is not to issue a cease and desist order, but to request that such permit be obtained.

37. Plaintiffs are informed and believe and thereupon allege that at or around the same time that it demanded that Plaintiffs’ occupancy cease and desist for lack of a use and occupancy permit, the Township simply wrote to other professional offices in the same building to request that such permit be obtained.

38. Plaintiffs are informed and believe and thereupon allege that the Township has made no consistent effort to determine whether other private physician practices in the Township, which include gynecologists, general surgeons and family practitioners, provide

abortion services to their patients.

39. Until the Township Zoning Officer issued said cease and desist order, no other physicians' or dentists' offices had been classified as "clinics" and none had been restricted to three-acre lot minimums in the CO District.

40. Associates is registered as an abortion facility by the Commonwealth of Pennsylvania and complies with all statutory and regulatory requirements of the Commonwealth for such facilities.

41. The provision of abortion services is less regulated by the Commonwealth of Pennsylvania than the provision of ambulatory surgical services, for which the Commonwealth imposes more stringent licensure requirements.

42. At least two doctors' offices in the Township are licensed as ambulatory surgical centers ("Township surgical centers") by the Commonwealth of Pennsylvania; both are allowed to operate outside the CO District, in districts that permit only professional office, and not "clinic", use.

43. Plaintiffs are informed and believe and thereupon allege that the Township surgical centers which operate as doctors' offices are staffed by more than one physician at a time, routinely see more than one patient at a time, and routinely perform procedures which are subject to significantly more regulation by the state than abortions.

44. Plaintiffs are informed and believe and thereupon allege that the Township has never taken any action to enforce the "clinic" requirements against Township surgical centers or against other doctors offices performing procedures that are at least equivalent in risk and level of invasion to procedures performed by Associates'.

45. Associates appealed the cease and desist order to the Upper Merion Township

Zoning Hearing Board.

46. The Zoning Hearing Board held seven nights of hearings, during which Plaintiffs' counsel was not allowed to adduce evidence or cross-examine witnesses regarding arbitrary and selective enforcement, discriminatory animus motivating such enforcement and issues related to the Constitutionally protected rights of Plaintiffs or their patients.

47. The Zoning Hearing Board announced on June 5, 2002, that it had affirmed the decision of the Zoning Officer.

48. The Zoning Hearing Board stated that it found that Associates was a "clinic" because it is a "doctor's office that performs medical treatment" and, as such, fits more appropriately in the category of "medical clinic for treatment of humans" requiring a three-acre minimum lot size under the Code.

49. Plaintiffs are informed and believe and thereupon allege that there are throughout Upper Merion Township numerous similarly-situated "doctors offices that perform medical treatment" which have not been categorized as "medical clinics for the treatment of humans" and have not been required to be situated on a three-acre minimum lot size or to be in the CO district.

50. The Zoning Hearing Board's act in characterizing Associates as a "medical clinic for treatment of humans" was arbitrary and capricious and constitutes selective enforcement of the Code against Associates for reasons which are unlawful and are not rationally related to any legitimate state interest.

51. Plaintiffs are informed and believe that the members of the Zoning Hearing Board would automatically approve any enforcement action against an abortion provider, because of their own animus and/or the animus of Defendant Township Supervisors and Does I-X toward providers of abortion services and toward the patients' exercise of their Constitutionally

protected rights to secure abortions.

52. The Zoning Hearing Board's decision finding Associates' use of the Subject Property a "clinic" is so arbitrary and capricious as to amount to an abuse of government power, and was made for the improper purpose of hampering or curtailing Associates' provision of lawful reproductive and other medical services, including abortion services, and of hampering and impeding Associates' patients' access to abortion services.

53. There is no rational basis or legitimate state or municipal interest in classifying Plaintiffs' practice as a "clinic" while the Township surgical centers and all other physicians' and dentists' offices are classified as doctors offices.

54. The enforcement of the "clinic" requirements against Associates' is thus arbitrary and capricious and a flagrant abuse of discretion unrelated to any legitimate state interest which functions to deprive Plaintiffs and their patients of their Constitutionally guaranteed rights without due process of law.

55. The Zoning Hearing Board's rulings during the hearing on Associates' appeals, limiting Associates' presentation of evidence and cross-examination regarding such issues as other uses allowed by the Township in the same zoning district and selective enforcement were so arbitrary and capricious as to amount to an abuse of government power and a denial of Associates' rights of procedural due process.

56. Associates timely appealed the Zoning Hearing Board decision to the Montgomery County Court of Common Pleas, which affirmed the decision after argument, but without hearing.

57. On June 11, 2002 (a mere six days after the Zoning Hearing Board announced its decision and well before the 30-day appeal period had expired), the Township issued an

Enforcement Notice seeking to enforce the Zoning Hearing Board decision against Associates. A copy of the Enforcement Notice is attached hereto as Exhibit "B."

58. The June 11, 2002 Enforcement Notice issued by the Zoning Hearing Board is governed by the Pennsylvania Municipalities Planning Code ("MPC"), Section 616.1(c), 53 P.S. §10616.1(c).

59. The Pennsylvania Municipalities Planning Code ("MPC"), Section 616.1(c), 53 P.S. §10616.1(c) contains a mandatory requirement that an Enforcement Notice issued by the Township contain notice of the right to appeal the Enforcement Notice to the Zoning Hearing Board and notice of possible sanctions for failure to comply.

60. The June 11, 2002 Enforcement Notice issued by the Township contained no notice of Associate's right to appeal the Enforcement Notice to the Zoning Hearing Board and no notice of possible sanctions.

61. In addition to issuing the Enforcement Notice, the Township simultaneously filed a complaint for injunctive relief, seeking the immediate closure of Associates' office.

62. The Township's request for injunctive relief was denied by the Court of Common Pleas on July 24, 2002.

63. The Court of Common Pleas based its denial of the Township's request for injunctive relief on the grounds that the Township had failed to prove a violation of the Code and irreparable harm to the Township. Attached hereto as Exhibit "C" is a true and correct copy of said order.

64. Notwithstanding the failure of the Enforcement Notice to advise Associates of its right to appeal to the Enforcement Order, Associates timely filed an appeal to the Zoning Hearing Board.

65. Six weeks after the filing of Associates' appeal to the Zoning Hearing Board, the Zoning Hearing Board heard the appeal.

66. At the hearing on Associates' appeal, the Zoning Hearing Board refused to allow Associates to cross-examine the Zoning Officer regarding Associates' contention that the Township was engaged in selective construction and enforcement of the Code against Associates because it provides abortions.

67. At the hearing on Associates' appeal from the Enforcement Order, the Township Solicitor acknowledged that the Township had intentionally omitted notice of Associates' right to appeal the Enforcement Order to the Zoning Hearing Board.

68. Plaintiff is informed and believes and alleges thereon that the Township, its agents or employees, intentionally omitted notice of Associates' right to appeal the Enforcement Notice in order to deprive Associates of its right to due process of law.

69. Despite the facially invalid nature of the Enforcement Order, the Zoning Hearing Board upheld its validity on or about October 10, 2002.

70. Associates timely appealed the Zoning Hearing Board's decision to uphold the Enforcement Notice to the Court of Common Pleas, where the appeal is presently pending.

71. The MPC expressly provides that an appeal to the Zoning Hearing Board operates as an automatic stay of enforcement, (Sections 616.1(c) and 915.1, 53 P.S. §§10616.1(c) and 10915.1) and that all enforcement proceedings are civil in nature (Section 617.1, 53 P.S. §10617.1).

72. Notwithstanding the aforesaid automatic stay of enforcement during the pendency of said appeal and the civil nature of enforcement proceedings, beginning in June 2002, the Township issued criminal citations of Associates on a near-daily basis and secured summonses

from the local District Justice imposing criminal fines against Associates of \$500.00 plus costs for each day Associates provided services on the Subject Property.

73. The accumulated summary criminal sanctions were listed for trial before the District Justice on October 18, 2002.

74. On October 18, 2002, the District Justice did not conduct trial on the above-described summary offenses, but rather announced he had made his determination after oral argument.

75. The District Justice issued an order on about October 18, 2002, finding Associates guilty of summary criminal offenses based on its alleged violations of the Code and imposed criminal fines of \$40,000.

76. Under the laws of the Commonwealth of Pennsylvania, fines of \$40,000 are in excess of the jurisdictional authority of the District Justice.

77. The District Justice thereafter issued a series of "District Justice Payment Orders" to Associates. A copy of one such orders is attached hereto as Exhibit "D".

78. The attached District Justice Payment Order cites to rules that were not then and are not now in place and is thus on its face invalid.

79. The attached District Justice Payment Order states that there was "hearing" on Associates' ability to pay the fines.

80. In fact, no hearing was ever held before the District Justice regarding Associates' ability to pay the fines.

81. On November 18, 2002, Associates appealed the District Justice Judgment to the Court of Common Pleas and applied for a stay of that judgment.

82. At the hearing on the stay before the Court of Common Pleas, the Township

acknowledged it had no legal basis for seeking enforcement of zoning determinations against Associates through criminal process.

83. Associates' application for stay was granted by the Court of Common Pleas. A true and correct copy of the Order granting the stay is attached hereto as Exhibit "E".

84. The Township next filed a civil complaint against Associates and Dr. Brigham with the same District Justice seeking judgment in the amount of \$500.00 per day plus costs, retroactive to June 11, 2002.

85. The MPC provides that no judgment can be commenced, imposed, levied or payable until the date of the determination of a violation by the District Justice [Section 617.2(a), 53 P.S. §10617.2(a)].

86. The Township's civil enforcement action was heard by the District Justice on January 15, 2003.

87. The District Justice imposed separate civil penalties against both Associates and Dr. Brigham in the amount of \$585.00 - a \$500.00 fine and \$85.00 in costs - and ruled that the \$500.00 per day fines were retroactive to June 13, 2002. A true and correct copy of the Notices of Judgment against each plaintiff are attached hereto as Exhibit "F".

88. Because they purport to impose penalties prior to the date of the hearing, the January 15, 2003 judgments fail to comport with the MPC.

89. Plaintiffs timely filed a Notice of Appeal from these judgments with the Montgomery County Court of Common Pleas, with petition for stay. (Civil Action no. 03-01767).

90. Plaintiffs' petition for stay of the January 13, 2003 judgments was denied.

91. In response to Plaintiffs' appeal, the Township filed a Complaint seeking the

imposition of civil fines against Associates and Dr. Brigham from the date of the District Justice January 2003 hearing, which is also currently pending.

92. On January 10, 2003, the Township filed a second complaint in equity with the Montgomery County Court of Common Pleas against Associates, again seeking the immediate closure of Associates' office. (Civil Action No. 03-00544).

93. In response, Associates filed an Answer, New Matter and Counterclaim in Civil Action No. 03-00544 raising, *inter alia*, its claim that the Township was engaged in selective enforcement of the Zoning Code against plaintiffs because of their provision of abortion services.

94. On March 11, 2003, the Court of Common Pleas issued a temporary injunction pursuant to which Associates was forced to cease operations.

95. The forced cessation of operations by Associates does irreparable harm to Associates, by damaging, *inter alia*, its income, goodwill, relationships with current and prospective patients and its reputation.

96. The forced cessation of operations by Associates does irreparable harm to Associates' current and prospective patients by hindering or impairing their Constitutionally protected right of access to abortion and their access to STD testing and treatment services.

97. Associates has appealed the issuance of the temporary injunction to the Commonwealth Court.

98. Associates' emergency application to stay enforcement of the order enjoining its operations was denied by the Commonwealth Court; on review, the Supreme Court of Pennsylvania declined to reverse the stay.

99. Associates is informed and believes and therefore avers that other similarly situated doctors' offices that perform outpatient medical and surgical procedures and treatment in

the Township have been issued use and occupancy permits by the Township even though these doctors' offices are in the CO District on lots of less than three acres or in other districts where medical clinic use is not permitted under the Code.

100. Associates is informed and believes and therefore avers that no other similarly situated doctor's office that performs medical treatments in the Township has been subject to inspection, cease and desist orders and other enforcement actions by the Township, even though such offices are located in the CO District on lots of less than three acres or in other districts that permit professional office use, but not clinic use.

101. Associates is informed and believes and therefore avers that the Zoning Officer has not inspected any other doctors' offices to determine whether such offices violate the Code as constituting a clinic use as defined by the Zoning Hearing Board, nor has the Township sought to enforce requirement of three-acre minimum lot size against any other doctors' office that performs medical treatment in the Township.

102. The Township's unlawful and unjustified actions as described in the preceding paragraphs constitute a gross and shocking abuse of government authority undertaken for the improper, unconstitutional and malicious purpose of closing down Associates' office because it provides Constitutionally-protected abortion services and counseling services related to abortions and promotes the availability of safe and legal abortion and/or in order to hinder Constitutionally-protected access to abortion by Associates' patients.

103. Plaintiffs are informed and believe and therefore aver that the discriminatory enforcement actions of the Township, as described in the preceding paragraphs, were taken and continue to be taken at the direction of the individual defendants, in their official and individual capacities, with the sole, express, malicious, and unlawful intent of depriving Associates, its

patients and Dr. Brigham of their rights to equal protection, due process, privacy, freedom of choice, free speech and association, of impairing Associates' contract under its Lease with the Owner, and of interfering with Associates' relationship with its patients, in order to drive Associates and its patients out of the Township, specifically and only because they provide or seek Constitutionally-protected abortions.

104. Plaintiffs are informed and believe and thereupon allege that the individual defendants knowingly participated in the unlawful activity and fully understood that their acts unfairly and unlawfully discriminated against Associates, its patients, and Dr. Brigham in violation of plaintiffs' and their patients' Constitutional rights.

105. Plaintiffs are informed and believe and thereupon allege that the individual defendants participated in such activity with the intent of punishing Associates for providing abortions and of driving Associates out of the Township and of hampering the access of Associates' patients to lawful abortions.

106. Defendants have acted at all times relevant herein under color of state law.

107. Plaintiffs are informed and believe and thereupon allege that the individual defendants named herein acted at all times with no good faith belief in the legality of their acts above-described.

108. Plaintiffs are informed and believe and thereupon allege that there are no other providers of abortions in Montgomery County who advertise their services to the public.

109. Plaintiffs are informed and believe and thereupon allege that the individual Defendants knowingly participated in and/or acquiesced in said acts, with full awareness of the unlawful nature of said acts for the purpose of and with the intent to eliminate the provision of abortion services in the Township.

110. Plaintiffs are informed and believe and thereupon allege that the individual defendant Supervisors, Zoning Hearing Board members and Township Manager, acting in both their individual and official capacities and outside of their legislative functions, directed agents and employees of the Township, including the zoning officer, to take whatever action necessary, by whatever means, to shut down the business of plaintiff Associates, including but not limited to:

- a) issuing an invalid cease and desist order;
- b) issuing improper and legally insufficient notice of enforcement proceedings;
- c) arbitrarily and selectively enforcing zoning requirements against Associates which are not enforced against similar medical practices which do not or are not known to provide abortion services;
- d) initiating enforcement proceedings despite the automatic stay pending appeal;
- e) seeking criminal sanctions against Associates, despite the availability only of civil penalties for such breach; and
- f) seeking retroactive sanctions against Associates, despite the fact that penalties can not be imposed retroactively.

111. The actions of the defendants described above were undertaken to deprive Associates and Dr. Brigham of their right to conduct a legitimate business in the Township and to deprive Associates' patients of access to medical treatment, including abortions.

112. The actions of the defendants described above shock the conscious.

113. The actions of the defendants described above have resulted in significant damage to the Plaintiffs, including but not limited to attorneys fees and costs, lost use of their property, impairment of their contractual relationships with patients, with their landlord and with the Commonwealth of Pennsylvania, damage to their reputation and goodwill and lost income.

114. The actions of the individual defendants were undertaken pursuant to a municipal

policy, custom and practice to make unlawful use of zoning regulations in order to drive plaintiffs out of the Township because they provide abortion services, with full knowledge of the unlawfulness of such acts and with unlawful and improper motive to do so.

115. Associates occupies the Subject Property pursuant to its lease agreement (“Lease”) with property owner John D. McAllister (“Owner”), in which Associates agrees to use and occupy the Subject Property as a “Medical Office.”

116. Associates’ predecessor in the Subject Property was also a professional medical office that provided obstetrical and gynecological services in the Subject Property, including medical procedures, but did not advertise the provision of abortion services.

117. Plaintiffs are informed and believe and thereupon allege that said predecessors in the Subject Property’s occupation was pursuant to a substantially similar lease and that said predecessors performed medical procedures on their patients at the Subject Property, consistent with their lease.

118. The Owner of the Subject Property also rents space in the same building to other medical practitioners.

119. Plaintiffs are informed and believe and thereupon allege that the other medical practitioners occupying the same building perform medical procedures in their offices, consistent with their leases.

120. The Lease contains no limitations on Associates’ use of the Subject Property other than as a medical office.

121. When it assumed occupancy of the Subject Property, Associates made no material changes to the Subject Property as it existed during its occupancy by Associates’ predecessor.

122. On June 11, 2002, the Owner of the Building filed a complaint in ejectment against Associates based upon Associates' alleged unlawful use of the Subject Property in violation of the zoning regulations, which complaint is pending in the Court of Common Pleas.

COUNT I
Deprivation of Due Process and Equal Protection
42 U.S.C. §1983

123. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

124. The above-described acts of Defendants have deprived Associates, its patients and Dr. Brigham of their rights to equal protection and due process of law.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office, including for the provision of abortions;
- c) Compensatory damages,
- d) Punitive damages against the individual defendants in their individual capacities;
- e) An award of attorneys fees and costs pursuant to 42 U.S.C. §1988; and
- f) Such other and further relief as the Court deems just and proper.

COUNT II
Rights of Association and Privacy
42 U.S.C. §1983

125. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

126. Defendants' unlawful actions, motivated by discriminatory animus toward plaintiff Associates and its patients, are intended to impose and will, if successful, impose an undue burden on women seeking abortions in the Township, and there is no legitimate state interest sufficient to justify this burden.

127. Defendants' unlawful actions, motivated by discriminatory animus toward plaintiff Associates and its patients, violate the right of privacy and freedom of choice secured to plaintiffs' patients by the First and Fourteenth Amendment of the United States Constitution.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office, including for the provision of abortions;
- c) Compensatory damages,
- d) Punitive damages against the individual defendants in their individual capacities;
- e) An award of attorneys fees and costs pursuant to 42 U.S.C. §1988; and
- f) Such other and further relief as the Court deems just and proper.

COUNT III
Conspiracy to Deprive Persons of Constitutionally Protected Rights
42 U.S.C. §1985(3)

128. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

129. The individual Defendants by their acts above-described acted in concert among themselves and/or with unnamed third parties for the unlawful purpose of hindering or preventing the exercise of the Constitutionally protected rights of Associations patients to secure abortions.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office including for the provision of abortions;
- c) Compensatory damages,
- d) Punitive damages against the individual defendants in their individual capacities;
- e) An award of attorneys fees and costs pursuant to 42 U.S.C. §1988; and
- f) Such other and further relief as the Court deems just and proper.

COUNT IV
Deprivation of Property without Due Process
42 USC § 1983

130. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

131. The Lease between Associates and the Owner of the Building is a valid and

enforceable contract.

132. Defendants' enforcement of the decision of the Zoning Hearing Board against plaintiffs constitutes a *de facto* amendment of the Code and, as such, constitutes an unlawful deprivation of Associates' Constitutionally protected property rights without due process of law.

133. Defendants' construction and enforcement of the Code against Plaintiffs constitutes an arbitrary exercise of discretion for unlawful purposes which deprives Plaintiffs of their liberty and property interests without due process of law.

134. Defendants' implementation of hearing, appeal and enforcement procedures against Plaintiff in a manner which effectively precluded Plaintiffs' having a meaningful opportunity to be heard, circumvented stays pending appeal and secured punitive sanctions without hearing constitutes an unlawful deprivation of Associates' Constitutionally protected liberty and property rights without due process of law.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office including for the provision of abortions;
- c) Compensatory damages,
- d) Punitive damages against the individual defendants in their individual capacities;
- e) An award of attorneys fees and costs pursuant to 42 U.S.C. §1988; and
- f) Such other and further relief as the Court deems just and proper.

COUNT V
Impairment of Contracts in Violation
US Constitution Article 1, Section 10 and
Constitution of the Commonwealth of Pennsylvania Article 1, Section 17

135. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

136. Defendants' enforcement of the decision of the Zoning Hearing Board against plaintiffs constitutes a *de facto* amendment of the Code which substantially impaired Plaintiffs' lawful contract with the Property Owner and with the Commonwealth of Pennsylvania, which has no rational relationship to a legitimate state interest and is not a valid exercise of legitimate state power.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office including for the provision of abortions;
- c) Compensatory damages,
- d) Punitive damages against the individual defendants in their individual capacities;
- e) An award of attorneys fees and costs pursuant to 42 U.S.C. §1988; and
- f) Such other and further relief as the Court deems just and proper.

COUNT VI
Malicious prosecution/use of process

137. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

138. The actions of the named Defendants, in knowingly and intentionally and for malicious purpose unlawfully filing summary criminal citations against Associates on a near-daily basis beginning in June 2002, culminating with the imposition of criminal fines against Associates, when the MPC provides only for a civil remedy for alleged zoning violations, constitutes malicious prosecution under the common law of the Commonwealth of Pennsylvania.

139. The criminal proceedings terminated in favor of Associates.

140. The above-described acts constitute a concerted pattern of unlawful harassment and discrimination against Plaintiffs because of their provision of abortion-related services.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office including for the provision of abortions;
- c) Compensatory damages,
- d) Punitive damages against the individual defendants in their individual capacities;
- e) Such other and further relief as the Court deems just and proper.

COUNT VII
Wrongful Use of Civil Proceedings
42 Pa. C. S. A. §8351

141. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

142. The above-described actions of the non-judicial defendants constitute wrongful use of civil proceedings under Pennsylvania law, 42 Pa. C.S.A. §8351.

143. Said acts were malicious, grossly negligent and/or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings were based.

144. The relevant proceedings terminated in favor of plaintiffs.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office including for the provision of abortions;
- c) Compensatory damages,
- d) Punitive damages against the individual defendants in their individual capacities;
- e) An award of attorneys fees and costs pursuant to 42 Pa. C. S. §8351; and
- f) Such other and further relief as the Court deems just and proper.

COUNT VIII
Tortious Interference with Contractual Relationships

145. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

146. At all relevant times, defendants knew of the existence of the Lease between Associates and the Owner, and knew or should have known of the existence of the contract for STD testing and treatment.

147. In undertaking such acts, the defendants knew or should have known that their actions would cause the Owner to seek to eject Associates, thereby providing another means by

which defendants could force Associates to shut down its legitimate business operations and force Associates out of the Township; and knew or should have known that their actions would make impossible the fulfillment of Associates' contract for STD testing and treatment.

148. By issuing the cease and desist order and taking the other enforcement actions as described in the preceding paragraphs, the defendants intentionally, maliciously and with unlawful motive, interfered with plaintiff Associates' Lease with Owner of the Building, causing the Owner of the Building to file a Complaint in Ejectment against Associates, and interfered with Associates' ability to fulfill its obligations agreement for STD testing and treatment.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and/or permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office;
- c) Compensatory and punitive damages;
- d) Such other and further relief as the Court deems just and proper.

COUNT IX
Plaintiffs v. Individual Defendants
Civil Conspiracy

149. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

150. On information and belief, plaintiffs aver that the above-described acts were undertaken by individual Defendants acting in combination with each other and with individual residents and non-residents of Upper Merion Township, with the common intent to unlawfully

deprive plaintiffs of their civil rights and property without due process, under color of state law.

151. By engaging in these actions, defendants in their official and individual capacities, intended to injure plaintiffs and their patients without justification.

WHEREFORE, Plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;
- b) A preliminary and permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office including for the provision of abortions;
- c) Compensatory and punitive damages;
- d) Such other and further relief as the Court deems just and proper.

COUNT X

Tortious Interference with Prospective Business Relationships

152. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

153. By issuing the cease and desist order and taking the other enforcement actions as described in the preceding paragraphs in an effort to force Associates from the Township solely because Associates provides abortions, defendants intentionally, maliciously and with unlawful motive interfered with the prospective business relationships between Associates and its patients by attempting to prevent Associates' current and prospective patients from obtaining medical services, including abortion, from Associates.

WHEREFORE, plaintiffs request the following relief:

- a) A judgment declaring defendants' actions to enforce the Ordinance

discriminatory, unconstitutional, arbitrary, unreasonable, and unlawful;

b) A preliminary and/or permanent injunction enjoining defendants from taking any and all enforcement action against Associates arising out of its use of the Subject Property as a medical office including for the provision of abortions;

c) Compensatory and punitive damages;

d) Order defendants to pay to plaintiffs the costs and expenses of this litigation, including reasonable attorneys' fees; and

d) Such other and further relief as the Court deems just and proper.

COUNT XII
Plaintiffs v. Upper Merion Township
Respondeat Superior

154. Plaintiffs incorporate the averments contained in the previous paragraphs as if set forth at length.

155. In the alternative, individual defendants acted as above described pursuant to municipal policy and with a good faith belief in the legality of their actions.

156. Under the doctrine of *respondeat superior*, the Township of Upper Merion is liable for the acts of their agents, representatives and employees above described.

WHEREFORE, plaintiffs respectfully request that this Court:

a) Enter a judgment in favor of plaintiffs and against Defendant Upper Merion Township for all damages attributable to the acts of their agents, representatives and employees;

b) Order defendants to pay to plaintiffs the costs and expenses of this litigation, including reasonable attorneys' fees; and

c) Such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

_____Plaintiffs demands trial by jury on all counts of this Complaint.

Respectfully submitted:

Date: April 14, 2003

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