

## MUNICIPAL ZONING OF ABORTION CLINICS: THE FRAMINGHAM CLINIC, INC. v. ZONING BOARD OF APPEALS

First trimester abortion<sup>1</sup> clinics, when attempting to locate within municipalities, often meet with stubborn resistance from local officials.<sup>2</sup> Zoning administrators use a variety of techniques in attempting to exclude the clinics.<sup>3</sup> The most common technique is to deny

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1. The United States Supreme Court upheld the constitutionality of abortions in *Roe v. Wade*, 410 U.S. 113 (1973). The Court stated that under the due process clause, a woman's right to choose an abortion is a fundamental right. Therefore, a state cannot prohibit it, or burden it significantly, during the first trimester of pregnancy. *Id.* at 164. All that a state could require is that a first trimester abortion be performed by a licensed physician. *Id.* at 165.

In the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), the Court held that first trimester abortions do not have to be performed in a licensed hospital. The court found no reasonable relationship between hospital accreditation and any compelling state interest. *Id.* at 193-95. The Court reaffirmed this position in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), holding that in the first trimester of pregnancy, the state cannot interfere with either the abortion decision or with the physician-patient relationship unless there is a compelling countervailing state interest. *Id.* at 64. See generally Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974); 26 DRAKE L. REV. 716 (1977).

2. See, e.g., *Framingham Clinic, Inc. v. Selectmen of Southborough*, 373 Mass. 279, 367 N.E.2d 606 (1977). Shortly after the Framingham Clinic had obtained assurance that its use would not be in violation of any applicable zoning ordinance, Southborough approved an amendment to its zoning by-law adding "Abortion Clinics" to its list of prohibited uses. *Id.* at 282, 367 N.E.2d at 608.

The issues in the *Framingham* case are substantially different from those decided in the *Southborough* decision. In *Southborough*, the town attempted to exclude the use of land for an abortion clinic, while the city of Framingham wanted the Clinic to obtain a special building permit. Brief for Appellants at 5, *Framingham Clinic v. Zoning Bd. of Appeals*, — Mass. —, 415 N.E.2d 840 (1981). In *Southborough*, the Massachusetts Supreme Judicial Court held that the ban against abortion clinics unjustly discriminated against and unduly burdened a woman's constitutional right to a first trimester abortion. 373 Mass. at 285, 367 N.E.2d at 610. In *Framingham*, the court never reached the constitutional issue. See *supra* note 7.

3. See, e.g., *Mahoning Women's Center v. Hunter*, 610 F.2d 456 (6th Cir. 1979) (after Center leased space for use as a first trimester abortion clinic, the city enacted an ordinance requiring all first trimester abortions to be performed in a hospital); *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974) (applicant for an abortion clinic li-

building permits.<sup>4</sup> In *The Framingham Clinic, Inc. v. Zoning Board of Appeals*,<sup>5</sup> the Supreme Judicial Court of Massachusetts held that, pursuant to the town's zoning by-law,<sup>6</sup> the town must grant a building permit to a proposed abortion clinic as a matter of law.<sup>7</sup> The decision promises to restrict hostile municipalities from construing their zoning ordinances in bad faith in order to exclude abortion clinics from within their borders.

The Framingham Clinic, a proposed first trimester abortion clinic,<sup>8</sup>

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cense required to disclose *inter alia*, his training, what he had done for the last five years, and the names of all physicians using the facilities to perform abortions); *West Side Women's Servs., Inc. v. City of Cleveland*, 450 F. Supp. 796 (N.D. Ohio 1978) (after abortion clinic had secured a zoning permit, the city council passed an ordinance prohibiting the issuance of abortion service licenses in the district); *Fox Hill Surgery Clinic, Inc. v. City of Overland Park*, No. 77-4120 (D. Kan. July 11, 1977) (order granting preliminary injunction) (tract of land once zoned for a surgery clinic was rezoned when intended use as abortion clinic was discovered).

4. See, e.g., *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977). When a family planning organization purchased a facility intended for a first trimester abortion clinic, the St. Paul City Council, motivated by public opposition to the construction of the facility, passed a six-month moratorium on the construction of separate abortion facilities. The city architect then refused to issue a building permit until the moratorium expired. *Id.* at 863-64.

5. — Mass. —, 415 N.E.2d 840 (1981).

6. — Mass. at —, 415 N.E.2d at 844. The court describes the Framingham zoning by-law.

The by-law divides the town into six classes of districts, the first two of which are "residence districts" and "business districts." § IIA(1) and (2). Uses permitted in a residence district include, among others, a "[p]rofessional office . . . within the principal residence of a physician . . . provided that not more than two other persons are regularly employed therein," . . . , § IIIA(1)(c), and "private and public hospitals and dormitories accessory thereto," § IIIA(1)(d). Section IIIF of the by-law sets forth the uses permitted in business districts. Section IIIF(1)(a) permits "[a]ll uses that are permitted in General Residence Districts. . . ." Use of a property for "[b]usiness or professional offices" is permitted by § IIIF(1)(c). The following section, § IIIF(1)(d), lists specifically thirty-nine permitted uses, ranging from "baker" to "wheelwright," then authorizes "such other uses as the Board of Appeals may grant."

— Mass. at —, 415 N.E.2d at 844-45.

7. — Mass. at —, 415 N.E.2d at 845. The by-law under consideration in the *Framingham* case should be distinguished from the by-law invalidated in the *Southborough* decision. See *supra* note 2. The court, in *Framingham*, stated that a proper interpretation of the Framingham by-law would not create an outright ban of abortion clinics. This was contrary to the interpretation of the Southborough by-law. *Id.* at —, 415 N.E.2d at 848 n.10. This observation allowed the *Framingham* court to bypass the constitutional issue. See *supra* note 2.

8. — Mass. at —, 415 N.E.2d at 842. Gynecological services would also be provided at the Clinic. From its review of a preliminary floor plan, the court believed

applied to the Framingham building commissioner<sup>9</sup> for permission to locate within a business district permitting "hospitals" and "professional offices."<sup>10</sup> In response to public opposition against this application,<sup>11</sup> the commissioner informed the Clinic that it would need a special building permit<sup>12</sup> from the zoning board of appeals.<sup>13</sup> In reaching this decision, the commissioner reasoned that the Clinic was not a "professional office" within the meaning of the by-law.<sup>14</sup> The

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that the proposed six-room outpatient facility would include a laboratory, a treatment room for performing abortions, and recovery rooms for immediate postoperative care. The court then assumed that, in the absence of any contrary allegations, the facility complied with all state health requirements. *Id.*

9. *Id.* For an explanation of the building commissioner's responsibilities, see *infra* note 24 and accompanying text.

10. *Id.* at —, 415 N.E.2d at 844. See *supra* note 6.

11. *Id.* at —, 415 N.E.2d at 843. Prior to this opposition, the building commissioner had stated in a letter to the clinic that "he considered the Clinic's proposed use to be a '[b]usiness or professional office,' a use permitted as of right by the applicable provisions of the by-law." *Id.*

Pursuant to the building commissioner's preliminary opinion, the Clinic purchased the property to be used for their operations, and sought approval of a parking plan. *Id.* This could be considered a material change of position by the Clinic subsequent to an assurance that the municipality would issue a building permit. In such circumstances, courts often deem that the developer holds a vested property right. See, e.g., *Town of Largo v. Imperial Homes Corp.*, 309 So.2d 571, 572 (Fla. Dist. Ct. App. 1975); *People ex rel. Skokie Town House Builders, Inc. v. Village of Morton Grove*, 16 Ill. 2d 183, 191, 157 N.E.2d 33, 36 (1959).

12. The commissioner is granted the authority to issue special permits in the Massachusetts Zoning Enabling Act. MASS. ANN. LAWS ch. 40A §§ 9, 10 (Law. Co-op. Supp. 1981).

Municipalities grant special permits for proposed facilities that are considered essential or desirable for the welfare of the community and its citizens. The proposed facility may not be appropriate at every location, without restrictions or conditions being imposed. These restrictions prevent special problems concerning traffic congestion, safety, health and noise. The state zoning enabling act permits a municipality to require agency approval of the location of any special district facility. See *Tullo v. Millburn Township*, 54 N.J. Super. 483, 490-91, 149 A.2d 620, 624-25 (1959).

13. Section 8 of the Massachusetts Zoning Enabling Act provides for appeals to the local zoning board of appeals by persons aggrieved from action of the zoning enforcement officer or building commissioner. Section 17 provides for appeals from the zoning board to the superior court. MASS. ANN. LAWS ch. 40A, §§ 8, 17 (Law. Co-op. Supp. 1981).

14. — Mass. at —, 415 N.E.2d at 843. Among the building commissioner's reasons for denying a building permit to the Clinic was his view that abortions would not "promote life." The by-law expressly required his use of this criterion. *Id.* Although the Massachusetts Supreme Judicial Court held here that "the Clinic's entitlement to a building permit turned solely on a correct interpretation of the by-law," *id.* at —, 415 N.E.2d at 849, the court has previously held that a zoning board of appeals may

zoning board upheld his determination.<sup>15</sup> The Clinic then appealed to Superior Court, claiming that this bad faith construction of the zoning ordinances was a violation of the due process clause,<sup>16</sup> which enables a woman to secure a first trimester abortion without interference.<sup>17</sup> Without reaching this constitutional issue,<sup>18</sup> the trial judge ruled that the clinic was a permissible use, and deserved a building permit as of right.<sup>19</sup> The Massachusetts Supreme Judicial Court affirmed, holding that regardless of whether the proposed Clinic was strictly a "hospital" or a "professional office," its function was within the range of uses permitted in Framingham's business districts.<sup>20</sup>

Like most states,<sup>21</sup> Massachusetts authorizes municipalities to enact administrative procedures that implement zoning requirements.<sup>22</sup> These procedures require application for a building permit before er-

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not assert an opinion of the social value of a proposed facility when denying a building permit. *See Baker v. Planning Bd.*, 353 Mass. 141, 228 N.E.2d 831 (1967) (town planning board exceeded its authority when it disapproved a subdivision sewerage plan because it assumed that the disapproval would be in the public interest); *Daley Constr. Co. v. Planning Bd.*, 340 Mass. 149, 163 N.E.2d 27 (1959) (planning board exceeded its authority when it disapproved a subdivision plan because it believed that existing water sources would be strained); *McCaffrey v. Board of Appeals*, 4 Mass. App. Ct. 109, 343 N.E.2d 154 (1976) (when apartment was entitled to a building permit as of right, zoning board could not require a special permit).

15. — Mass. at —, 415 N.E.2d at 844. Politics often cause zoning boards to ignore individual property rights and rational land use planning in order to meet political necessities. Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335, 342 (1974). *See generally Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1431 (1978).

16. U.S. CONST. amend. V.

17. *See supra* note 1. *See also* Reply Brief for Appellants at 2. The Clinic attempted to convince the court on appeal that since the city could not exclude abortion clinics after *Southborough*, it sought to use a bad faith construction of its zoning by-law to achieve this unconstitutional end. *Id.* *See supra* note 2.

18. *See supra* note 7.

19. — Mass. at —, 415 N.E.2d at 844. The judge not only granted summary judgment for the Clinic, but also directed the Superior Court to retain jurisdiction over the matter "to ensure that the relief granted herein is not frustrated by further arbitrary, capricious and discriminatory conduct on the part of the defendants." *Id.*

20. *Id.* at —, 415 N.E.2d at 846.

21. *See, e.g.*, ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEPT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926). Most state enabling acts are modeled after this standard act, which delegates state police power to municipalities, so they may zone to promote the health, safety, morals or general welfare of the community. *See* Note, *Abortion Clinic Zoning: The Right to Procreative Freedom and the Zoning Power*, 5 WOMEN'S RTS. L. REP. 282, 284 (1979).

22. MASS. ANN. LAWS ch. 40A (Law. Co-op. 1973 & Supp. 1981).

ecting or altering a structure.<sup>23</sup> This requirement provides zoning authorities with knowledge of the contemplated use and enables them to determine whether that use complies with existing zoning regulations.<sup>24</sup>

When the permit application pertains to a contemplated use well within the zoning requirements, the municipality does not have the authority to deny the permit.<sup>25</sup> In *Fellsway Realty Corp. v. Building Commissioner of Medford*,<sup>26</sup> the Massachusetts Supreme Judicial Court upheld this proposition by stating that the building commissioner had no authority to refuse issuance of the permit.<sup>27</sup>

23. *Id.* §§ 9-13. The Massachusetts zoning enabling act authorizes municipalities to regulate nonconforming uses, *id.* § 9, and variances, *id.* § 10; to review special permit applications, *id.* § 11; and to grant power to a zoning board of appeals, *id.* § 12, and to a zoning administrator, *id.* § 13.

24. 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.150 (3d ed. 1980). In order to enforce zoning restrictions, the Massachusetts zoning enabling act provides:

The Inspector of buildings, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designated by local ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law. . . . MASS. ANN. LAWS ch. 40A § 7 (Law. Co-op. Supp. 1981).

25. 8 E. MCQUILLIN, *supra* note 24, § 25.150. See also *infra* note 28.

26. 332 Mass. 471, 125 N.E.2d 791 (1955).

27. *Id.* at 472, 125 N.E.2d at 792. The plans and specifications for the proposed structures complied in all ways with the city building code. *Id.* at 471, 125 N.E.2d at 791-92. The Massachusetts courts have held that the issuance of permits is a purely ministerial act. In *Ouellette v. Building Inspector*, 362 Mass. 272, 285 N.E.2d 423 (1972), the court held that when a building inspector acts outside the scope of his authority by refusing to issue a lawfully mandated permit, mandamus would be the appropriate remedy. *Id.* at 279, 285 N.E.2d at 427. In *Caputo v. Board of Appeals*, 330 Mass. 107, 111 N.E.2d 674 (1953), the court held that the building commissioner's failure to grant a permit for the erection of a structure that complied with the zoning ordinances was violative of the city building code. *Id.* at 110, 111 N.E.2d at 676. Massachusetts has also held that a building commissioner or zoning board must strictly follow the provisions of a zoning ordinance. Otherwise "[t]he right to build would be utterly lacking in substance if its exercise could be prevented by the arbitrary and capricious refusal of a permit, or if the granting or denial of the permit rested in the discretion of some official or board." *Kenney v. Building Comm'r*, 315 Mass. 291, 293-94, 52 N.E.2d 683, 685 (1943). *But cf.* *Holbrook v. Board of Selectmen*, 354 Mass. 769, 238 N.E.2d 366 (1968) (mandamus to compel issuance of a building permit was properly denied because property owner had failed to exhaust his administrative remedy by appealing to the zoning board of appeals).

Other states have also held that when a proposed structure conforms to the building code and zoning ordinance, the building inspector must issue the permit as a matter of law. See, e.g., *Ellis v. City Council*, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963)

When the contemplated use is an abortion clinic, courts vary in determining whether the particular zoning district permits that use.<sup>28</sup> Depending on the permitted uses within a city's zoning code,<sup>29</sup> these clinics have been restricted to areas allowing "medical and dental clinics,"<sup>30</sup> "hospitals,"<sup>31</sup> and "business and professional offices."<sup>32</sup> A New York Supreme Court, in *State v. Mitchell*,<sup>33</sup> classified an abortion clinic as an "out-of-hospital health facility" for licensing and regulatory purposes.<sup>34</sup> In *Mitchell*, a businessman was prohibited from soliciting pregnant women from Michigan to come to a New York clinic in order to obtain abortions.<sup>35</sup> The court disagreed with defendant's contention that his proposed abortion clinic was similar to a doctor's office.<sup>36</sup> It based its decision on the lack of any doctor-

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(writ of mandate to compel issuance of swimming pool construction permit that building inspector had arbitrarily refused); *United States Home Dev. Corp. v. LaMura*, 89 N.J. Super. 254, 214 A.2d 538 (1965) (action by developer to compel issuance of building permit for subdivision); *Quadrant Corp. v. City of Kinston*, 22 N.C. App. 31, 205 S.E.2d 324 (1974) (building inspector had no discretion to withhold requested building permit where applicable zoning restrictions permitted construction of apartment building); *Lohman v. City of Aberdeen*, 246 N.W.2d 781 (S.D. 1976) (mandamus lies when refusal to approve a plat of land is withheld arbitrarily and capriciously). See generally 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, § 9.03 (4th ed. 1982).

28. Courts often have to characterize abortion clinics because this use is not specifically categorized by most zoning ordinances. Since abortions were illegal in most states prior to 1973, only 178 abortion clinics existed at that time. The general lack of response from hospitals to the legalization of abortions led to a rapid increase in the numbers of abortion clinics. By 1977, there were 522 clinics nationwide. See Note, *Obstructionist Activities at Abortion Clinics: A Framework for Remedial Litigation*, 8 N.Y.U. REV. L. & SOC. CHANGE 325, 328-29 (1979). See also Note, *supra* note 21.

29. A city zoning code will usually contain a list of specific property uses that are permitted within a district as a matter of right. *Developments in the Law—Zoning*, *supra* note 15, at 1434.

30. See *infra* note 42 and accompanying text.

31. See *infra* notes 33-36 and accompanying text. See also *People v. Wickersham Medical Center*, 69 Misc. 2d 196, 333 N.Y.S.2d 366 (Sup. Ct. 1972) (abortion clinic classified as a hospital, requiring the approval of the public health council prior to opening).

32. See *infra* note 57 and accompanying text.

33. 66 Misc. 2d 514, 321 N.Y.S.2d 756 (Sup. Ct. 1971).

34. *Id.* at 521, 321 N.Y.S.2d at 762-63. An "out-of-hospital health facility" required the approval of the New York Public Health Council before it could open. *Id.*

35. *Id.* at 515, 321 N.Y.S.2d at 758. At the time of the case, abortions were illegal in Michigan, but legal in New York. *Id.*

36. *Id.* at 519, 321 N.Y.S.2d at 761.

patient relationship.<sup>37</sup> The court then held that since the facility was more like a hospital than a doctor's office, it should be subject to the same regulations as a hospital.<sup>38</sup> Because it had failed to receive the requisite approval of the New York Public Health Council, the clinic was enjoined from continued operation.<sup>39</sup>

A district court in Louisiana indirectly classified an abortion clinic as a hospital in *Bossier City Medical Suite v. Bossier City*.<sup>40</sup> In *Bossier City*, the zoning administrator denied an occupancy permit<sup>41</sup> to an abortion clinic in a zoning district that allowed doctors' offices.<sup>42</sup> The city zoning code categorized these offices as "medical or dental clinics."<sup>43</sup> Hospitals, as well as operating rooms for major surgery, were prohibited uses within that district.<sup>44</sup> Classifying an abortion as major surgery,<sup>45</sup> the court upheld the zoning administrator's denial of an

37. *Id.* at 514, 321 N.Y.S.2d at 756. The court stated that the clinic was similar to a hospital because patients would come to receive medical service, regardless of the doctor administering it. "Patients are merely being brought or solicited to come to a place where abortions are performed instead of coming to see a particular doctor." *Id.* at 519, 321 N.Y.S.2d at 761. The court also distinguished the clinic from a doctor's office because it openly advertised for patients, something that doctors were prohibited from doing in New York. *Id.*

38. *Id.* at 521, 321 N.Y.S.2d at 762. Under New York's State Public Health Law, a "hospital" is defined as "a facility or institution engaged principally in providing services by or under the supervision of a physician." N.Y. PUB. HEALTH LAW § 2801 (McKinney 1977). Neither the court nor the public health law defined "doctor's office."

39. *See supra* note 34.

40. 483 F. Supp. 633 (W.D. La. 1980).

41. *Id.* at 639. An occupancy permit is different from a building permit. Although zoning administrators use both devices to ensure compliance with zoning regulations, building permits are ineffective once permission for construction or alteration has been given. An occupancy permit, however, ensures conformity to proposed plans and specifications after a building is completed and inspected. *See generally* 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 17.02-.03 (2d ed. 1977).

42. 483 F. Supp. at 639 n.4.

43. *Id.* The Bossier City zoning ordinance permitted dental or medical clinics in their B-1 Transition Business Districts. "A building in which one or more physicians, dentists, and allied professional assistants are engaged in carrying on their profession; the clinic may include inpatient care or operating rooms for minor surgery." *Id.* *But cf.* *People ex rel. D'Iorio v. Alfa Realty Co.*, 69 Misc. 2d 475, 330 N.Y.S.2d 403 (N.Y. City Ct. 1972) (prohibited a methadone maintenance program clinic from locating in a zone prohibiting hospitals).

44. 483 F. Supp. at 633. Bossier City originally permitted hospitals in the B-1 Transition Business District, but because of traffic congestion and the need for other business in proximity, hospitals were restricted to B-3 districts. *Id.* at 649.

45. 483 F. Supp. at 640. The Louisiana "informed consent" statute, describing

occupancy certificate.<sup>46</sup>

The confusion regarding the classification of abortion clinics is also apparent in *Long v. Elk Grove Village*.<sup>47</sup> The plaintiff in *Long* applied for a building permit in order to construct an ambulatory surgical treatment center.<sup>48</sup> An Illinois statute describes this as a place devoted to the performance of surgical procedures, including abortions.<sup>49</sup> The trial court ruled that the proposed abortion clinic be granted the building permit as of right in a zone permitting "business and professional offices" such as a doctor's office.<sup>50</sup> As in *Bossier City*, "hospitals" were prohibited in this zone.<sup>51</sup> Refusing to grant the building permit, the Illinois Court of Appeals reversed and remanded the case for an evidentiary hearing, to determine if the proposed clinic was more like a "business and professional office" or a "hospital."<sup>52</sup>

The Kentucky Supreme Court, in *Crain v. City of Louisville*,<sup>53</sup> looked to the function of the structure involved to interpret the terms of the municipal zoning ordinance. In *Crain*, the municipality granted a building permit to a nursing home, even though nursing

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what a woman must be told before she can have an abortion, defines abortion as major surgery. LA. REV. STAT. ANN. § 40:1299.35.6(B) (West Supp. 1982). *But see* Fox Hill Surgery Clinic, Inc. v. City of Overland Park, No. 77-4120 (D. Kan. July 11, 1977) (order granting preliminary injunction) (abortion is a minor surgery procedure).

46. 483 F. Supp. at 640.

47. 64 Ill. App. 3d 1006, 382 N.E.2d 79 (1978).

48. *Id.* at 1007, 382 N.E.2d at 81.

49. *Id.* at 1009, 382 N.E.2d at 82. The Ambulatory Surgical Treatment Center Act provided that such facilities could not provide beds or accommodations for a patient's overnight stay. The act also expressly excluded from its scope those institutions that were licensed pursuant to the Hospital Licensing Act. ILL. ANN. STAT. ch. 111 1/2, § 157-8.3(A) (Smith-Hurd 1977).

50. *Id.* at 1007, 382 N.E.2d at 80. Based upon the pleadings, the Ambulatory Surgical Treatment Center Act and the village zoning ordinance, the trial court ruled that the denial of a permit was unreasonable and arbitrary. The court therefore ordered the village to issue the construction permit. *Id.*

51. *Id.* at 1009, 382 N.E.2d at 82. The ordinance permitted retail sales, consumer service, business and professional offices and institutional and governmental uses within the district. *Id.*

52. *Id.* at 1010, 382 N.E.2d at 82. The court remanded to determine the time of use, possible traffic patterns, emergency vehicle use and the extent of service related to the proposed facility. *Id.*

53. 298 Ky. 421, 182 S.W.2d 787 (1944).



homes were not explicitly permitted by the zoning code.<sup>54</sup> The district involved did allow "hospitals" and "boarding and lodging houses" however.<sup>55</sup> The court held that the function of a nursing home was within the functions implied in the plain meanings of these two permitted uses.<sup>56</sup> Thus, the court created a "range of uses" rationale to explain its holding—that permitted uses were not limited to those explicitly stated in the zoning ordinance.<sup>57</sup>

Framingham's by-law did not define the terms "hospital" or "business or professional office."<sup>58</sup> Consequently, the Supreme Judicial

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54. *Id.* at 424, 182 S.W.2d at 789. Since "hospitals" were not defined in the zoning ordinance, the court used the common dictionary definition, noting that they are institutions for the reception and treatment of the sick or injured, differing in kind according to the class of persons served. *Id.* at 424, 182 S.W.2d at 789-90. Courts generally use the common meanings of words in the absence of definitions in the ordinance. *See infra* notes 57-58.

55. 298 Ky. 423, 182 S.W.2d at 789. *Cf.* N.R. Fairbanks Co. v. City of Blaine, 308 Minn. 315, 242 N.W.2d 99 (1976) (unreasonable for the city to deny a special use permit for a combination retail sales and automotive service operation merely because the proposed hybrid use was not explicitly listed in the zoning code); Petition of North Mansuring Wildlife Sanctuary, 52 Misc. 2d 96, 274 N.Y.S.2d 915 (N.Y. Sup. Ct. 1966) (failure of an ordinance to state that bird and wildlife sanctuaries were permitted did not exclude such use).

56. 298 Ky. 425, 182 S.W.2d at 790. The court stated that "whether appellant's institution be regarded strictly as a hospital or not, it has the attribute of both a hospital and a boarding house." *Id.*

The court noted, similar to the *Framingham* court, that the function of a structure, not its name, is the controlling fact. *Id.* at 423, 182 S.W.2d at 789. *See also* Carpenter v. Zoning Bd. of Appeals, 352 Mass. 54, 223 N.E.2d 679 (1967). "[I]t is the use to which the premises are put rather than the external indicia of use which is controlling under the by-law." *Id.* at 59, 223 N.E.2d at 683. *See generally* 1 A. RATHKOPF, *supra* note 27, § 9.06.

57. 298 Ky. at 425, 182 S.W.2d at 790. The court explained its "range of uses" methodology in the following manner:

While perhaps [a nursing home] could not be characterized as either [a hospital or boarding house] exclusively, it is certainly something in between the two establishments and, as the ordinance permits use for either purpose, it must be construed as permitting use of an institution that is between the two in character, for the extremes include the mean.

*Id.*

58. Although Framingham's by-law does not expressly define hospitals, some zoning ordinances do so indirectly. The Residential Four (R-4) district of Lakewood, Colorado permits "[h]ospitals, nursing homes and clinics, but not including institutions exclusively for the mentally disturbed, mental defectives or for contagious or infectious diseases." *Humana, Inc. v. Board of Adjustment*, 189 Colo. 79, 84, 537 P.2d 741, 744 (1975). The Hospital District of Methuen, Massachusetts permits "(1) Hospital; (2) Clinic; (3) Diagnostic or treatment facility; (4) Professional office building for physicians, surgeons, dentists and other medical and para-medical and

Court of Massachusetts, in *Framingham Clinic*, used the plain meaning of these words in interpreting the by-law.<sup>59</sup> The court held that a

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para-dental personnel . . . ; (5) Nursing home, extended care, convalescent or rest home facility . . ." *Woodland Estates, Inc. v. Building Inspector*, 4 Mass. App. Ct. 757, 758 n.2, 358 N.E.2d 468, 468 n.2 (1976).

Courts have also permitted various other facilities to come under definition of "hospital" in zoning ordinances. *See, e.g.*, *School Lane Hills, Inc. v. East Hempfield Township Zoning Hearing Bd.*, 18 Pa. Commw. 519, 336 A.2d 901 (1975) (rehabilitation center for crippled children and adults); *State ex rel. Lyon v. Snohomish County Bd. of Adjustment*, 9 Wash. App. 446, 512 P.2d 1114 (1973) (alcoholic recovery-rehabilitation-intermediate care center); *Scerbo v. Board of Adjustment*, 121 N.J. Super. 378, 297 A.2d 207 (1972) (narcotic rehabilitation and treatment center); *Kastendike v. Baltimore Ass'n for Retarded Children, Inc.*, 267 Md. 389, 297 A.2d 745 (1972) (nursing home for retarded adults). *See generally* Annot., 27 A.L.R.3d 1028 (1969).

Zoning ordinances do not generally define "professional offices," but instead provide for professional offices to be permitted as an accessory use in residential districts. These zoning provisions arise because municipalities recognize that professionals often have offices in their homes. Annot., 24 A.L.R.3d 1128, 1129-30 (1969). *But cf.* *Seaman v. Zoning Bd. of Appeals*, 340 Mass. 488, 165 N.E.2d 97 (1960) (real estate brokerage was not a professional use for zoning purposes); *Building Comm'r v. McManus*, 263 Mass. 270, 160 N.E. 887 (1928) (undertaker's business was not a professional use for zoning purposes).

59. — Mass. at —, 415 N.E.2d at 845. Courts generally interpret municipal zoning ordinances in the same manner as state statutes, focusing on ascertaining legislative intent from the language of the ordinance. *See, e.g.*, *Martin v. King*, 417 F.2d 458 (10th Cir. 1969) (same rules of construction are to be applied to any legislative enactments, whether statute or ordinance); *Tower Realty, Inc. v. City of East Detroit*, 196 F.2d 710 (6th Cir. 1952) (same presumption of constitutionality that applies to state statute should be applied to ordinances of a city government); *Town of Clayton v. Colorado & S. Ry. Co.*, 51 F.2d 977 (10th Cir. 1931) (when legislative intent can be discerned from looking to the provisions of a statute as a whole, the real purpose of the legislative body prevails over a literal reading of the statute); *Anderson v. Town of Forest Park*, 239 F. Supp. 576 (W.D. Okla. 1965) (look to the municipality's broad purpose in enacting an ordinance). *See generally* 6 E. McQUILLIN, *supra* note 24, §§ 20.38-45; 1 A. RATHKOPF, *supra* note 27, § 9.03.

Courts have generally held that the legislative intent behind municipal zoning ordinances requires strictly construing restrictions on the use of property in favor of the property owner. The rationale behind this procedure is that zoning ordinances are in derogation of the common law right of private ownership. The freedom of a property owner to use his property in any manner, therefore, should be emphasized in interpreting zoning ordinances unless there are clearly articulated limitations. *See* 3 R. ANDERSON, *supra* note 41, § 16.02; 8 E. McQUILLIN, *supra* note 24, § 20.51; 1 A. RATHKOPF, *supra* note 27, § 9.03.

Additionally, it is settled law in Massachusetts that in the absence of an express definition of a term used in a zoning ordinance, it is assumed that the municipality intended the term to be given its ordinary meaning. *See, e.g.*, *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 361 N.E.2d 1239 (1977) (usual and accepted meanings of "books" and "magazines"); *Shuman v. Board of Aldermen*, 361 Mass. 758, 282 N.E.2d 653 (1972) (common meaning of "dormitory"); *Jackson v. Building Inspector*,

first trimester abortion clinic was within the range of permissible uses in Framingham's business districts—somewhere along a continuum between the plain meanings of “professional office” and “hospital.”<sup>60</sup> By this method, the court placed less importance on classifying an abortion clinic as either a professional office or a hospital, and looked instead to the purpose behind the proposed clinic—the “delivery of medical services.”<sup>61</sup>

Framingham had no restrictions in its by-law similar to those in *Bossier City*, which limited clinics to minor surgery procedures.<sup>62</sup> Framingham's by-law can also be distinguished from those in *Bossier*

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351 Mass. 472, 221 N.E.2d 736 (1966) (common meaning of “farming”); *Kurz v. Board of Appeals*, 341 Mass. 110, 167 N.E.2d 627 (1960) (ordinary meaning of “educational use”). Courts have also assumed the plain meanings of undefined terms within ordinances. See generally 3 R. ANDERSON, *supra* note 41, § 16.05; 6 E. MCQUILLIN, *supra* note 24, § 20.47.

Several states, including Massachusetts, have held that a definition given in a state statute is irrelevant in determining the meaning intended in a local zoning ordinance, absent a manifest intent to incorporate the statutory meaning. *E.g.*, *County of Lake v. Gateway Houses Found.*, 19 Ill. App. 3d 318, 311 N.E.2d 371 (1974) (definition of “treatment” and “drug addiction” in an Illinois statute held as not controlling the meaning of “treatment center for drug addiction” in local zoning ordinance); *Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962) (Massachusetts statute defining “mobile home” did not control the definition of “mobile home” in a municipal zoning ordinance).

60. — Mass. at —, 415 N.E.2d at 846. The court noted that although other courts have expressed concern over the meaning of the term “professional office,” § IIIA(1)(c) of Framingham's by-law explicitly states that a physician's office is a professional use. *Id.* The court noted that Webster's New International Dictionary defines “profession” as a “calling in which one professes to have acquired some special knowledge used by way either of instructing, guiding or advising others, or of serving them in some art.” *Id.* See *supra* note 58.

A hospital is commonly defined as “an institution providing health services, primarily for inpatients, and medical or surgical care of the sick or injured including as an integral part of the institution, such related facilities as laboratories, outpatient departments, training facilities, central service facilities, and staff offices.” 3 R. ANDERSON, *supra* note 41, § 16.05. See *supra* note 58.

61. — Mass. at —, 415 N.E.2d at 847. The court noted that since both doctors' offices and private hospitals were permitted, an abortion clinic, “however labeled, seems plainly to be within the range of uses allowing in Framingham's business districts.” *Id.* at —, 415 N.E.2d at 846. The court also noted that the relevant consideration was whether an abortion clinic fit into the category of a facility used for the delivery of medical services. “When a municipality allows as of right uses which lie at both ends of the spectrum in terms of a particular category of uses—here, the delivery of medical services—less importance need be attached to fixing precisely where on that spectrum a specified use lies.” *Id.* at —, 415 N.E.2d at 847.

62. See *supra* note 43.

*City*<sup>63</sup> and *Long*<sup>64</sup> because *both* hospitals and business or professional offices are permitted within Framingham's business districts.<sup>65</sup> Thus, the *Framingham Clinic* court was able to apply *Crain*'s "range of uses" rationale to abortion clinics.<sup>66</sup> As in *Crain*, this rationale was interpreted as the legislative intent of the by-law.<sup>67</sup> Most importantly, pursuant to its holding in *Fellsway Realty*,<sup>68</sup> the Massachusetts Supreme Judicial Court held that since the Clinic had clearly demonstrated that it was permitted under Framingham's zoning by-law, the building commissioner was required, as a matter of law, to issue a permit.<sup>69</sup>

Because the Massachusetts Supreme Judicial Court did not regard specific nomenclature as important, the absence of the word "clinic" from Framingham's by-law as a permitted use was not dispositive.<sup>70</sup> The court looked to the function of the proposed clinic, delivery of medical services, as controlling.<sup>71</sup> Although abortions would be per-

63. See *supra* notes 40-46 and accompanying text.

64. See *supra* notes 47-52 and accompanying text.

65. See *supra* note 6. By cumulative zoning such as this, residences or hospitals are permitted in districts zoned for light industry or commercial uses. See *generally Developments in the Law—Zoning*, *supra* note 15, at 1429. The modern trend is away from cumulative zoning, in order to prevent economic injury to commercial or industrial units caused by the presence of residential units. 2 R. ANDERSON, *supra* note 41, § 9.14-38.

66. — Mass. at —, 415 N.E.2d at 846.

67. The court did not explicitly state that the "range of uses" rationale followed the legislative intent of the by-law. This is implied, however, throughout the opinion. The court states, for example, that it is using ordinary principles of statutory construction in interpreting Framingham's by-law. — Mass. at —, 415 N.E.2d at 945. This included looking to the plain meanings of words "from sources presumably known to the [by-law's] enactors." *Id.*, citing *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369, 361 N.E.2d 1239, 1240 (1977).

68. *Fellsway Realty Corp. v. Building Comm'r*, 332 Mass. 471, 472, 125 N.E.2d 791, 792 (1955). See *supra* notes 26-27 and accompanying text.

69. — Mass. at —, 415 N.E.2d at 849. The court noted that the clinic would not be automatically entitled to a building permit simply because the town officials had interpreted the by-law unreasonably. *Id.* at —, 415 N.E.2d at 848. Since the clinic had demonstrated in superior court that it was entitled to a permit, the supreme court could compel the commissioner to issue the permit. *Id.* at —, 415 N.E.2d at 849.

70. *Id.* at —, 415 N.E.2d at 846. Cf. *Montgomery County Mental Health Clinic v. Norristown Borough*, 86 Montgomery Co. L. Rptr. 194 (1965) (since "clinic" was not mentioned in the zoning ordinance, it was reasonable to conclude that a mental health clinic, with outpatient care, was intended to be included in the term "hospital").

71. See *supra* note 61 and accompanying text.

formed on an outpatient basis only, the court deemed this single criterion insufficient to differentiate the clinic from a hospital.<sup>72</sup> The fact that the clinic proposed to employ nurses and trained counselors, as well as doctors, to assist in the "delivery of medical services," and required a laboratory, treatment room and recovery rooms did not take the clinic beyond the character of a "professional office."<sup>73</sup> Moreover, the court stated that there would be nothing unusual about the frequency of the clinic's use to differentiate it from other professional uses.<sup>74</sup>

The *Framingham Clinic* decision will enable courts to alleviate some of the confusion caused by names such as "ambulatory surgical center,"<sup>75</sup> "medical suite,"<sup>76</sup> and "out-of-hospital health facility."<sup>77</sup> A court will also be able to look to *Framingham Clinic* as persuasive authority for interpreting the legislative intent behind a zoning ordinance in which terms such as "hospital" and "office" are not de-

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72. — Mass. at —, 415 N.E.2d at 847. The court noted a similarity between the terms "hospital" and "clinic" in a Massachusetts licensing statute, MASS. ANN. LAWS ch. 111, § 52 (Law. Co-op. 1975). The only significant difference was that hospitals provide inpatient, as well as outpatient, care. Despite the similarity of terms, the court stated that the statutory definitions were unrelated to the interpretation of the by-law. *Id.* See also *County of Lake v. Gateway Houses Found.*, 19 Ill. App. 3d 318, 325, 311 N.E.2d 371, 377 (1974) (definition in a state statute is irrelevant when interpreting a local zoning ordinance). Cf. *Manchester v. Phillips*, 343 Mass. 591, 593 n.3, 180 N.E.2d 333, 335 n.3 (1962) (definitions in state licensing statute could not be used to interpret a zoning by-law).

73. — Mass. at —, 415 N.E.2d at 846. Framingham's by-law only permitted two assisting personnel in any professional office located within a residential district. The court held that this provision should be interpreted to allow more than two assistants in a less restrictive business district. *Id.*

Since the clinic would be run for profit, the court noted that it might also be characterized as a "business office." — Mass. at —, 415 N.E.2d at 847 n.9.

74. *Id.* at —, 415 N.E.2d at 849. The court conceded that if the submitted affidavits had indicated that the Clinic would be larger than six rooms or more heavily used than other generically similar uses permitted in the district, it may have supported the denial of the building permit. *Id.*

The other generically similar medical and medical-related facilities located in Framingham are: Oral Surgery Associates, Inc.; Trinity Medical Health Association, Inc.; Anesthesia Associates of Framingham, Inc.; Veterinary Clinic; Cardio-Thoracic Surgery Associates, Inc.; Harrington Cardiology Associates, Inc.; Radiology Associates of Framingham, Inc.; Associated Psychologists, Inc.; a weight-loss clinic and an institute for marital and sexual counseling. Brief of Appellants, *supra* note 2, at 25.

75. See *supra* notes 47-49 and accompanying text.

76. See *supra* note 40 and accompanying text.

77. See *supra* note 34 and accompanying text.

fined.<sup>78</sup> Any proposed structure within the range of ordinary meanings of permitted uses should be allowed as a matter of law.<sup>79</sup> The Massachusetts Supreme Judicial Court's approach of looking to the actual function of a proposed facility will also greatly aid courts in the difficult task of construing zoning laws to accommodate controversial but valid uses.

Finally, the decision in *Framingham Clinic* should serve as a model for several groups. For abortion clinics attempting to locate in potentially hostile municipalities, the value of *Framingham Clinic* is clear. A first trimester abortion clinic attempting to locate in a district permitting "hospitals" and "professional offices" should be granted a building permit as a matter of law.<sup>80</sup> In addition, the *Framingham Clinic* decision will deter zoning administrators from excluding abortion clinics from their communities by a bad faith construction of the zoning ordinance.<sup>81</sup> The general rule for courts to realize in future cases is that the label applied to a clinic is less important than its actual function.<sup>82</sup>

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78. *See supra* notes 58-59 and accompanying text.

79. *See supra* notes 66-67 and accompanying text.

80. *See supra* note 69 and accompanying text.

81. *See supra* note 17 and accompanying text.

82. *See supra* note 61 and accompanying text.