



Request for City Council Committee Action from the Department of Community Planning & Economic Development—Planning Division

Date: May 20, 2010

To: Council Member Gary Schiff, Chair, Zoning & Planning Committee and Members of the Committee

Referral to: Zoning & Planning Committee

Subject: Appeal of the decision of the Board of Adjustment denying the appeal of the Zoning Administrator's interpretation that a birth center is a *hospital* for the property located at 2604 Chicago Avenue South in the OR2 High Density Office Residence District.

Recommendation: The following action was taken by the Board of Adjustment on April 22, 2010 (BZZ-4746):

3. 2604 Chicago Avenue South (BZZ-4746, Ward 6)

Variance: Steve Calvin has appealed the decision of the Zoning Administrator's interpretation that a birth center is a *hospital* and instead contends that the use is a *clinic, medical or dental*, for the property located at 2604 Chicago Avenue South in the OR2 High Density Office Residence District.

Clinic is defined as "[a]n establishment where patients are admitted for medical or dental exams and treatment on an outpatient basis only".

ACTIONS: The Board of Adjustment **adopted** the findings and **denied** the appeal of the decision of the zoning administrator's interpretation that a birth center is a hospital and instead contends that the use is a clinic, medical or dental, for the property located at 2604 Chicago Avenue South in the OR2 High Density Office Residence District.

Ward: 6

Prepared by: Shanna Sether, Senior Planner (612-673-2307)
Approved by: Jason Wittenberg, Planning Manager
Presenters in Committee: Shanna Sether, Senior Planner

Financial Impact

- No financial impact

Community Impact

- Neighborhood Notification: Phillips West and Midtown Phillips neighborhood associations were notified of the appeal application.
- City Goals: See staff report
- Comprehensive Plan: See staff report
- Zoning Code: See staff report
- End of 60/120-day decision period: On May 4, 2010, staff sent a letter to the applicant extending the 60 day decision period to no later than July 16, 2010.

Supporting Information

Steve Calvin has filed an appeal of the decision of the Board of Adjustment to deny an appeal of the decision of the Zoning Administrator's interpretation that a birth center is a *hospital* for the property located at 2604 Chicago Avenue South in the OR2 High Density Office Residence District. The appellant believes instead that the use would have been more appropriately classified as a *clinic, medical or dental*. At its meeting on April 22, 2010, the Board of Adjustment voted 4-3 to adopt staff findings and deny the appeal of the decision of the Zoning Administrator. The appeal (attached) was filed on May 3, 2010. In addition, the appellant has submitted a request for the committee to review the proposed use and consider it to be instead an *office*. The appellant's complete statement of the action being appealed and reasons for the appeal are attached. The Board of Adjustment minutes and Planning Division staff report are also attached.

Department of Community Planning and Economic Development – Planning Division
Appeal of the Decision of the Zoning Administrator
BZZ-4746

Date: April 22, 2010

Applicant: Steve Calvin

Address of Property: 2604 Chicago Avenue

Project Name: Appeal of the ZA determination regarding “birth center”

Contact Person and Phone: Steve Calvin, (612) 669-2052

Planning Staff and Phone: Shanna Sether, (612) 673-2307

Date Application Deemed Complete: March 18, 2010

End of 60-Day Decision Period: May 17, 2010

Ward: 6 Neighborhood Organization: Phillips West; adjacent to Midtown Phillips

Existing Zoning: OR2 High Density Office Residence District

Zoning Plate Number: 26

Legal Description: Not applicable for this application

Proposed Use: Birth Center

Appeal of the decision of the Zoning Administrator: interpretation that a “birth center” is a *hospital* and instead contends that the use is a *clinic, medical or dental*

525.170. Appeals of decisions of the zoning administrator. All findings and decisions of the zoning administrator, planning director or other official involved in the administration or the enforcement of this zoning ordinance shall be final subject to appeal to the board of adjustment, except as otherwise provided by this zoning ordinance. Appeals may be initiated by any affected person by filing the appeal with the zoning administrator on a form approved by the zoning administrator. All appeals shall be filed within ten (10) calendar days of the date of the decision. Timely filing of an appeal shall stay all proceedings in the action appealed, unless the zoning administrator certifies to the

board of adjustment, with service of a copy to the applicant, that a stay would cause imminent peril to life or property, in which case the proceedings shall not be stayed. The board of adjustment shall hold a public hearing on each complete application for an appeal as provided in section 525.150. All findings and decisions of the board of adjustment concerning appeals shall be final, subject to appeal to the city council as specified in section 525.180.

Background and Analysis: The appellant has filed an appeal of the decision of the Zoning Administrator regarding the interpretation that a “birth center” is a *hospital* and instead contends that the use is a *clinic, medical or dental*. According to the appellant, a birth center is predominately outpatient prenatal care, providing prenatal appointments, ultrasounds and annual exams. In addition, a birth center is place for women to give birth with the help of midwives; however, no medications or invasive procedures occur. The appellant has stated that they expect approximately 25 births per month. The length of stay for patients is typically 12 hours or less, but not longer than 18 hours. If the use is determined to be a *clinic*, additional land use applications will be required including a conditional use permit to extend the hours of operation beyond what is allowed in the OR2 District and a variance to reduce the required parking.

Licensure legislation is under review by both the MN State Senate and House of Representatives; the proposed bill intends to define birth centers as “a facility licensed for the primary purpose of performing low-risk deliveries that is not a hospital or licensed as part of a hospital and where births are planned to occur away from the mother’s usual residence.” While the proposed statutory definition differentiates birthing centers from hospitals for the specific purposes of the legislation related to licensing, birthing centers are not currently distinguished from hospitals in state statute or in the City’s zoning ordinance.

The appellant argues that the use of the property is a *clinic* and not a *hospital*. *Hospital* is not currently defined in the zoning code. *Clinic* is defined in the Minneapolis zoning code as:

Clinic. An establishment where patients are admitted for medical or dental exams and treatment on an outpatient basis only.

A zoning code text amendment is currently being considered that revises a number of the code’s definitions. In order to provide further clarity to differentiate clinics from hospitals, staff has proposed the following definition as part of the amendment:

Hospital. An establishment where patients are admitted for medical, surgical, or psychiatric treatment for outpatient and/or inpatient, overnight accommodation.

Findings:

1. *Clinic* is defined in the Minneapolis zoning code as: “[a]n establishment where patients are admitted for medical or dental exams and treatment on an outpatient basis only. Staff believes that patients the scope of services provided at the proposed birth clinic are

beyond medical exams and treatment. Further, the intended use of the property as a birth center is not outpatient in nature.

2. *Outpatient* is not defined in the zoning code. If a word is not defined in the zoning code, the zoning administrator applies the common meaning as required by section 520.160 of the zoning code.

520.160 Definitions. Unless otherwise expressly stated, or unless the context clearly indicates a different meaning, the words and phrases in the following list of definitions shall, for the purposes of this zoning ordinance, have the meanings indicated. All words and phrases not defined shall have their common meaning.

To find a word's common meaning, a dictionary(s) is referenced. For example, the American Heritage Dictionary defines *outpatient* as "a patient who is admitted to a hospital or clinic for treatment that does not require an overnight stay"¹

3. A person who gives birth during the late p.m. or early a.m. hours is, in all likelihood, going to be spending the night at the facility, which is not consistent with the common understanding of the term outpatient.
4. Hospitals are intended to accommodate urgent medical situations that can and do occur 24 hours per day and that can also require a period of time for recovery. Further, hospitals are not subject to zoning code section 547.60 for regulations of hours open to the public, which exempts them from maximum hours of operation. Therefore, the use of a "clinic" cannot be open to customers beyond the hours permitted in the district, which are 7am – 10pm Sunday through Thursday and 7am to 11pm Friday and Saturday. These proposed hours of operation are not consistent with the nature of this use.

RECOMMENDATIONS

Recommendation of the Department of Community Planning and Economic Development – Planning Division for the appeal of the decision of the zoning administrator:

The Department of Community Planning and Economic Development – Planning Division recommends that the Board of Adjustment adopt the above findings and **deny** the appeal of the decision of the zoning administrator's interpretation that a birth center is a *hospital* and instead contends that the use is a *clinic, medical or dental*, for the property located at 2604 Chicago Avenue South in the OR2 High Density Office Residence District.

Attachments:

- 1) Zoning Administrator interpretation in an e-mail dated March 9, 2010.

¹ "outpatient." *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 05 Apr. 2010. <Dictionary.com <http://dictionary.reference.com/browse/outpatient>>.

Department of Community Planning and Economic Development – Planning Division
BZZ - 4746

- 2) Written descriptions and findings submitted by the applicant
- 3) Zoning map
- 4) Site survey
- 5) Floor plans
- 6) Photographs

Minutes of April 22, 2010 Board of Adjustment

2604 Chicago Avenue South (BZZ-4746, Ward 6)

Variance: Steve Calvin has appealed the decision of the Zoning Administrator's interpretation that a birth center is a *hospital* and instead contends that the use is a *clinic, medical or dental*, for the property located at 2604 Chicago Avenue South in the OR2 High Density Office Residence District.

Clinic is defined as “[a]n establishment where patients are admitted for medical or dental exams and treatment on an outpatient basis only”.

Shanna Sether: Good afternoon Mr. Chair, members of the Zoning Board of Adjustment. Item number three is an application for an appeal of the decision of the Zoning Administrator regarding the property at 2604 Chicago Avenue which is zoned OR2 High Density Office Residence District. The Zoning Administrator has made the interpretation that a *birth center* is a *hospital*. The Appellant instead contends that the proposed use for a birth center at 2604 Chicago Avenue is instead a *clinic, medical or dental*, as defined by the Zoning Code. The Appellant states that a birth center is predominantly outpatient including prenatal care, prenatal appointments, ultrasounds, annual exams, and in addition, birth centers are a place for women to give birth with the help of midwives without the use of medication or invasive procedures. The Applicants believe that there will be approximately 25 births that occur at the facility per month and the length of stay is right around 12 hours or less with a maximum stay of about 18 hours for females that have recently given birth. Birth centers are currently under review by the Minnesota State Senate and House and they are proposing the following definition:

“A birth center would be defined as a facility licensed for the primary purpose of performing low risk deliveries not in a hospital or a licensed as part of a hospital and where births are planned to occur away from the mother's usual residence.”

The proposed definition before the legislature differentiates a *birth center* from a *hospital* as related to licensing. However, birth centers are not currently distinguished from hospitals in the present State Statute nor in the City's Zoning Code. The Appellant argues that a *clinic* is the more appropriate use classification based on the definition, and that it's not a *hospital*. *Hospitals* are not presently defined in our Zoning Ordinance, however we are proposing a text amendment along with a variety of uses that are not currently defined in the Zoning Code and we're cleaning up some of our others. It's an outstanding text amendment that we've had on our agenda established by the City Council for well over two years now and the staff member is actually bringing it forward to the City Planning Commission at the next public hearing. The proposed text amendment that staff is considering is for the definition of *hospital* would be “an establishment where patients are admitted for medical, surgical or psychiatric treatment

for outpatient and/or inpatient overnight accommodations.” Staff is recommending denial of the Applicant’s appeal of the decision of the Zoning Administrator based on the following findings: A *clinic*, which is defined by the Minneapolis zoning code as: “[a]n establishment where patients are admitted for medical or dental exams and treatment on an outpatient basis only. Staff believes that patients and the scope of services provided at the proposed birth center are beyond medical exams and medical treatment. Further, the intended use of the property as a birth center is not outpatient in nature. Therefore staff does not believe that the proposed use as a birth center meets the definition of a *clinic*.

Further, number 2, *outpatient* is not defined by the Zoning Code. However, when a use or a word is not defined in the Zoning Code, we apply the most common meaning. So we went to *dictionary.com* and found the following definition for *outpatient*: “A patient who is admitted to a hospital or clinic for treatment that does not require an overnight stay.”

The third finding is that a person who gives birth during the late p.m. or early a.m. hours is, in all likelihood, going to be spending the night in the facility, which is not consistent with the common understanding of the term *outpatient*. And *outpatient*, again, is part of the definition of *clinic, medical or dental*.

The fourth finding is that hospitals are intended to accommodate urgent medical situations that can occur 24 hours a day and that can also require a period of time for recovery. Further, hospitals are not subject to the Zoning Code regulation for hours open to the public. That particular section of the Code, 546.60, exempts them from maximum hours of operation. Therefore, the use of a clinic cannot be open to customers beyond the permitted hours in the OR2 District, which are 7a.m. to 10p.m. Sunday through Thursday and 7a.m. to 11p.m. Friday and Saturday. These proposed hours of operation are not consistent with the nature of the proposed use.

There’s one further finding as to why staff is recommending denial of the application before you. Therefore staff is recommending denial of the appeal of the decision of the Zoning Administrator’s interpretation that a birth center is a *hospital* and instead contends that the use is a *clinic, medical or dental* for the property located at 2604 Chicago Avenue South in the OR2 High Density Office Residence District. And with that I can take questions.

Matt Perry: Thank you for your presentation Ms. Sether. Does staff, oh I see we have questions. Alright. Mr. Ditzler and then Mr. Sandberg.

Matt Ditzler: Thank you Mr. Perry. Ms. Sether what are the hours of proposed use?

Shanna Sether: The Appellant has stated that a woman can come in at any time when labor begins. So it could occur in the late p.m. hours, the early a.m. hours or during the regular business hours.

Matt Ditzler: Okay, thank you.

Matt Perry: Mr. Sandberg and then Mr. Koch.

Dick Sandberg: Thanks Mr. Chair. I'm trying to think of analogous situations to a birth center. One I can think of is that surgery center that's run by some of the local medical organizations where people would go in, have the surgery during a day, even be under anesthetic and with quite a bit of medication but be out by the end of the day. Are *surgery centers* defined separately or are they defined as a *clinic* with regard to the Zoning Code?

Shanna Sether: I personally am not aware of any uses for surgical centers that we have identified as either a *clinic* or a *hospital*. That would take a little more staff research.

Dick Sandberg: Okay. Thank you.

Matt Perry: Mr. Koch.

Chris Koch: What are some other examples of OR2 businesses?

Shanna Sether: OR2 is a High Density Office Residence District so it's basically what it says, office, residential, we allow for some general retail sales and service when it's accompanied in a larger scale development. For example, a larger mixed use building is allowed to have a small coffee shop associated with it, or a small general retail sales clothing store for example. The uses are generally encouraging of a higher density for residential uses and very lower scale commercial uses, but predominantly office.

Chris Koch: So if you had to say that 99% of the OR2 businesses that are allowed – what are those? I'm just curious, would they be coffee shops? Would they be

Shanna Sether: They would not be coffee shops on their own. They have to be located within a building of at least 20,000 square feet. So the predominant uses in the OR2 District are really things like schools, places of assembly such as a church or a mosque, offices, including chiropractic offices, clinics are another type of use that are common in the OR2 District.

Chris Koch: So like a chiropractic office would fall underneath?

Shanna Sether: A clinic or an office depending upon the intensity of services provided. If it includes things such as acupuncture you'd typically classify those as a clinic and not an office.

Chris Koch: Okay, so like acupuncture would be allowed as long as they weren't open 24 hours, or?

Shanna Sether: A *clinic* is defined in the Code as *medical or dental exams* on an outpatient basis only.

Chris Koch: Okay, but would the hour, I'll call it restriction, supersede?

Shanna Sether: It's one of the tests.

Chris Koch: It's one of the tests.

Shanna Sether: Right, for meeting that definition.

Chris Koch: Okay.

Shanna Sether: So the providing of the services, medical or dental exams, and treatment, and then also the second prong of that test would be on the outpatient basis only. I would say based on the findings that we supplied to the Board of Adjustment today in our staff report.

Chris Koch: Okay, thanks.

Matt Perry: Alright, Mr. Gates I think I saw you indicating that you'd like to speak.

Paul Gates: Thank you Chairman Perry. Just a quick question regarding the length of stay. You mentioned 12 to 18 hours. Is that simply the postpartum period or is that from the time the patient walks in to the time that they walk out?

Shanna Sether: It was my understanding from the Appellant that it would be from the point of admittance into the birth center to the point of which they are released. I think that would probably be a better question for the Appellant to make sure that that's answered most accurately or that was staff's understanding.

Paul Gates: Okay.

Matt Perry: Are there other questions of staff? I see none, thank you so much.

Shanna Sether: Thanks very much.

Matt Perry: Before we have the Appellant speak I'd like to remind, as I think staff probably has but I'll remind the public, we are dealing with a very narrow question here. This isn't a question of a variance, but it's a question of definition of the Code. Did the Zoning Administrator look at the Code and make the correct interpretation. Variances have a different set of findings that are used and are, maybe in some respects, give us a little broader latitude in our discussion. But here it's a very narrow focus on the definitions and the interpretation of the Code itself. So questions of policy and other matters that stray outside that I'm going to say right up front that I will probably gently remind you that you're going off topic. Don't think I'm being rude, I'm just trying to keep the proceedings in line with what we are required to do as a Board here before us today. So is the Appellant here and would they like to speak? Thanks, and as I mentioned, if could you state your name and address for the record please.

Steve Calvin: My name is Steve Calvin. I am a resident of Minneapolis in the Longfellow neighborhood and currently the owner of 2604 Chicago Avenue. My colleague Cheryl Heitkamp, Certified Nurse Midwife is here with me as well. I'm a high risk OB doctor and have practiced in Minneapolis for 21 years. Mostly at Abbott Northwestern Hospital. So we, over time, have been looking at providing birth center care for women. I know every disaster that can happen to some pregnant women but we don't serve low risk pregnant women very well so there's a great need for that and there are a couple of birth centers occurring in Minnesota and as Ms. Sether mentioned there's a current licensing bill that is in the State legislature as well. In addition, actually the Federal Health Care Reform Bill has sort of a promoting of birth centers as well. So in January we noticed that this house was for sale and made some inquiry into it. And also looked at, I looked at the zoning and saw Office Residential 2 and went through the list and was not surprised to find that birth center was not one of the permitted uses in those areas. But I, so I looked through it and figured you know I think we're as close to *clinic* as we can possibly be, and Cheryl will also make some arguments in that direction as well. So we purchased, I purchased the house with the intention of remodeling it. We've also done some inquiry into the neighborhood. Spoken to people in the Phillips West area, the hospitals in general and I think Cheryl also – we also have a letter from Abbott Northwestern and Allina saying that they do not oppose, for legal reasons they don't endorse but they don't oppose this use across the street from them. In any case, you know we're just here to appeal the designation of it as a *hospital* and I will not stray into any policy things or anything like that because I believe that on the merits of the case when you even look at the *birth center* definition which has been in use in the United States for more than 35 years, the definition specifically states this is a location where a woman chooses to have a baby that is not at her home, that it is not a hospital. Although I know that maybe within the Zoning Code, if it doesn't fit *clinic* then, and I will let Cheryl speak to the reasons why birth in these kinds of patients is a normal physiologic process. And the reason we're locating it right close to a hospital, to the very best place to take care of complicated things, is because if these normal pregnant women become abnormal that's the best place for them to be. So just with respect to the question I, we're just appealing that designation. And also hoping potentially down the road, maybe there will be a change in the Zoning Ordinance making birth center a permitted use. That obviously would change the whole dynamic. And we're approaching from all of those avenues but we currently own a house that has been abandoned for about three years and has been inhabited by squatters basically. And we really want to do something to turn it into a productive member of the community and in an attempt to be a good neighbor to all of the neighbors there as well. So because of that as well, we attended the Chicago Avenue renovation or revitalization meetings and we had a lot of interest in people saying look, this is great, we're happier to have something that is not another hospital and another parking ramp. It's something that is sort of into a wellness corridor and that's our hope. And we just intend to persist and just respectfully ask for a change in the definition that has been given. So with that I'll turn it over to Cheryl Heitkamp, Certified Nurse Midwife, my colleague.

Matt Perry: Sure, and again if you could please state your name and address for the record.

Cheryl Heitkamp: Alright, thank you. Cheryl Heitkamp, you want my home address or the property?

Matt Perry: Sure.

Cheryl Heitkamp: The home address is 717 Applewood Circle in Victoria, Minnesota.

Matt Perry: Thank you.

Cheryl Heitkamp: Well I wanted to start out with introducing the birth center concept and I think some of that you've already had. I don't want to keep you here 'til midnight. I've been singing this dog and pony show for a few months now working with the Legislature. But the point I want to emphasize is that birth center concept which was introduced in 1975 and has grown to 200 birth centers throughout the country, though it's new to Minnesota, is really an outgrowth of a consumer movement for a type of care that's desired outside of hospital but not their own home and services provided by skilled and licensed practitioners. It's an entrepreneurial concept. These are not big chain operations. Usually every birth center that's owned is started by some new midwife or a pair who wants to offer this service to women. So when we found 2604 Chicago we saw it as the perfect spot. It's a beautiful, or has great potential to be beautiful again. It has plenty of room to do what we do. We plan to serve a fairly low volume of clients, 20 to 25 birthing women per month. But also the clients who are coming for their prenatal outpatient care and no invasive procedures are going to be done there at all. When we first approached the City about building out the property and knew that the property was in OR2 it actually came as a shock to us that they would define us as *hospital* and the letter that I just distributed to you from the sort of grandmother of the birth center movement talks about this being the first time she's ever heard of a birth center being called a *hospital* by zone. And understanding that the Zoning Administrator's determination came from two primary concerns, one is the intensity of the use, that being child birth. And I think it says right in their prose that that's a belief and not necessarily a definition. I would argue that there are some clinics that are doing quite intense procedures, excuse me, in them. For example, a *clinic* could be a dental clinic removing four wisdom teeth is a fairly invasive and intense procedure require significant recovery, anesthesia. Things that are also being done in clinics are liposuction, face lifts, significant GYN procedures are done in clinics that involve sedation and you know, equipment that is, you know, fairly invasive. So what we would argue is that the nature of the belief that our use being more intense than a typical clinic is really a matter of opinion, not so much something that's found in ordinance. So speaking to the next issue about the 24-hour operation and the *outpatient* definition, the definition that Ms. Sether used for *outpatient* is one, but I have a few other definitions that I found for *outpatient*. One is a patient who is not an inpatient, not hospitalized, but instead is cared for elsewhere as in a doctor's office, clinic, or day surgery center. The term *outpatient* dates back to at least 1715. Outpatient care today is also called ambulatory care. Definition of

ambulatory care: medical care including diagnosis, observation, treatment and rehabilitation that is provided on an outpatient basis. Ambulatory care is given to persons who are able to ambulate, or walk about. A well baby visit is considered ambulatory care even though the baby may not yet be walking. Another definition: health care services provided to patients on an ambulatory basis rather than by admission to a hospital or their health care facility. Another definition: a patient who receives medical treatment without being admitted to a hospital. So as you can see, none of those definitions consider the 24- hour nature of service and in fact, emergency departments in hospitals are considered outpatient services regardless of the time the client enters the property for care or how intense their services needed are. They're open 24 hours because the need is there for the services 24 hours and a patient may be served and leave the hospital but not be considered an inpatient because they're not technically admitted to the hospital. So I would also argue that there are some different kinds of definitions that could be used for *outpatient* that wouldn't necessarily prevent us from using the property as a clinic giving that there's some dispute about definition. I think that I've addressed most of our concerns and I appreciate your questions.

Matt Perry: Thanks for your presentation. I think we'll all have some questions, maybe of both of you. Mr. Ditzler and then Mr. Koch?

Matt Ditzler: Thank you Mr. Perry. I go back to the hours again, and I apologize if I didn't understand your previous statement about the hours. Are you going to see patients between the hours of 10 p.m. and 7 a.m.?

Cheryl Heitkamp: Yes.

Matt Ditzler: Thank you.

Matt Perry: Anything else Mr. Ditzler at this time? Okay thank you.

Matt Ditzler: Not at this time.

Steve Calvin: I could just add just an addendum to that too. I mean, we aren't seeing prenatal patients. We would see a client who is in labor and we are planning on having at most two women in labor at any given time. There will be just two birthing rooms. So there won't be nighttime clinic hours it's one mother and her family.

Matt Ditzler: So what would happen if there were two in labor and somebody else came?

Steve Calvin: We've made arrangements at Abbott Northwestern.

Matt Ditzler: Okay, thank you.

Matt Perry: Alright, thanks for that clarification. Mr. Koch?

Chris Koch: Maybe you comment a little bit, the staff believes that by saying the intended use of the property as a birth center is not outpatient in nature, they're basically saying that giving birth is not outpatient in nature. How do you look at that?

Cheryl Heitkamp: Well, I think that we have a little bit of a cultural bias about childbirth belonging in hospitals and the fact of the matter is that when this house was built and its neighbors, almost all of them were birth centers because people were having their births in those homes. So it's a fairly new phenomenon that 75 years ago or so, that babies were come to be born in hospital with the belief that that was safer. But the literature, the medical literature has demonstrated that clearly birth center care is as safe as hospital care and this migration toward out of hospital birth for a very select clientele has proven itself very well in the literature. The other thing I would answer that question with is that if a woman could pick what time to be in labor, my guess is she would usually pick the daytime hours, but it just so happens that labor occurs at any time of day or night.

Chris Koch: What is the likelihood that someone who gives birth at any time of day will require an overnight stay?

Cheryl Heitkamp: Nobody will be admitted and then have their baby and then tucked in and slept for the night. The way that it works is it's all a very active process. When a woman comes in in labor she's attended actively, she's moving, she's active, she's laboring, she has her baby and then during the recovery period of about six hours after the birth, that's all the longer a woman stays there after she has her baby, she's being taught how to nurse, she's helping, you know, getting help getting into the shower. Her system is being analyzed as stable, the baby is looked at to see that it's making the transition to extrauterine life safely. So it's all a very awake and active and participatory process. Which is how I think we see that differently than inpatient care where for the most part, you're trying to get people on a day-night rhythm. During the night you're bathing them, tucking them in, hoping that they get a good nights rest, which is much different than the situation with labor.

Chris Koch: Thank you.

Matt Perry: Ms. Lasky, then Mr. Ditzler.

Marissa Lasky: You're prescreening your client to be healthy and able to go home in a relatively short period of time. You're not taking any clients that would not be able to do so. So this in not like a hospital that would have to take all clients regardless of their health status, right? So they are obligated to be performing within the guidelines of your clinic.

Cheryl Heitkamp: Ambulatory. Correct, yes.

Matt Perry: Thank you Ms. Lasky. Mr. Ditzler.

Matt Ditzler: A question for the Applicant. From my understanding and research on this subject, I know that this has got a lot of legs in the Minnesota legislative body right now and I'm curious as to why you haven't waited. Because it seems to be that out of this is going to come some licensing and some other stuff and then the City will follow. It will be a licensed use and it will be classified and the City will follow. Why not wait until the legislative body does that and the City will follow and then you would not have to do this? I'm just questioning your timing on this. It seems odd.

Cheryl Heitkamp: Well I think that there's not certainty that this bill will pass in the Legislature so we still may be operating as an unlicensed birth center and there is, birth centers are not illegal so we could still go forward and operate as an unlicensed facility. From my understanding and discussions with Ms. Sether, it's irrelevant what the licensing bill states or what the law is it states does forward, you know, if it passes – even if the definition is stated in the State law the City Ordinance would still make the determination whether we were a *hospital* or a *clinic*.

Steve Calvin: And if I could add a little bit too. Part of what happens in healthcare reform or reform in any industry is that some people usually have to kind of walk the plank and just say we're going to do something disruptive - and I have to stop using the term disruptive innovation, but that's one of the books about, it's called *The Innovator's Prescription*. But most of the time these innovations don't follow legislation. They follow people saying, you know what? This is a different way to do it. They do it in Holland, they do it in England, they do it in Ireland. We should try this. And then legislative bodies and other folks will say hey that's not such a bad idea. And then licensing is required and hopefully changes in ordinances. So that would be my answer to why we did it now. It's just we saw a need and we really felt now's the time to push the issue.

Matt Perry: Does anybody else have any questions? Yes, Mr. Gates.

Paul Gates: Thank you Chairman Perry. Ms. Heitkamp, hi. I'll ask the question again that I began to ask Ms. Sether about the proposed length of stay, 12 to 18 hours. In my limited experience, which is very, very limited to three episodes, labor itself can go on for a good bit or even more of that time so I'm wondering how you're arriving at the 12 to 18 hours? Are patients, if that's the right term even, being encouraged to stay at home for a longer period before they come in? Or tell me about that.

Cheryl Heitkamp: There's a lot of education in our process that goes into helping women prepare for labor. We will have staff that may be, I mean a midwife will be available by phone and we do that when we work in hospitals as well. Try to assess people over the phone. Try to hear how they're handling contractions at home, what they've tried, who's with them, how comfortable they feel staying home and try to delay the entry to the point where they feel like they need the assistance of the midwife. So the reason that we – so typically in a person who is having their second or third baby, they will come and have their baby within a couple hours of being admitted. But the longer labors are typically the first time labors so we may be able to help someone stay home

until they're half way through their labor. But that second half of that labor will still probably take another 12 hours – up to 12 hours and then 6 more hours of recovery.

Paul Gates: Okay, thank you. I didn't catch if you mentioned it, whether or not patients would actually be discharged between the hours of 10 p.m. and 7 a.m. if they are ready to go home?

Cheryl Heitkamp: We have made a commitment, although that isn't, you know, in writing or formalized anywhere, but because of the context of the neighborhood that we're in and with respect to the neighbors themselves, we would like to encourage our clients to stay until daylight hours for discharge. If they have to enter the home during the night because they're in labor then we have to let them in, but we could encourage them to leave during daytime hours which would minimize the, you know, activity during the nighttime hours.

Paul Gates: So you're expecting, I think I read about 10 admits per month during that period?

Cheryl Heitkamp: Because of the law of averages yeah. About half of the women will go into labor during the first 12 hours of the day and the other in the second 12.

Paul Gates: Ten admits and then no discharges.

Cheryl Heitkamp: Right.

Paul Gates: Okay. I wonder if you have data on the percentage of low risk pregnancies that you'd be taking on that might become problematic during the delivery process and would have to be transported to hospital?

Cheryl Heitkamp: It's about 8 – 10%.

Paul Gates: And how would they be transported to hospital?

Cheryl Heitkamp: Well, very rarely in any kind of emergent fashion because we've screened out clients we're really minimizing emergencies. We're not going to have lights and sirens and we are right across the street from the hospital if we do have to go in an emergency fashion. By far and wide the most often people leave the birth center because they've had one of the horrendously long labors and they've tired out and they've dehydrated and they need medication and they need IV fluids and they need possibly surgery or tools to help with their delivery. So it's not, baby's not in trouble, mom's not in trouble, it's just time to go somewhere else that can be more helpful.

Paul Gates: So no one is ...

Cheryl Heitkamp: ...or potentially.

Paul Gates: ... arriving by emergency vehicle and 8% might need to leave by emergency vehicle.

Cheryl Heitkamp: But not by emergency. Of the 8%, about 1 % would be emergency.

Paul Gates: Uh huh. Okay. And that wouldn't be with the siren at 3 in the morning.

Cheryl Heitkamp: That's right.

Paul Gates: Alright, thank you.

Matt Perry: Alright, Ms. Lasky did you have something else?

Marissa Lasky: I think I'm clear but is there a gynecologist obstetrical physician on staff 24 hours, not on staff which is what I'm thinking is the case and you're getting that help if you need it from Abbott, is that correct?

Cheryl Heitkamp: Right. The midwives will be serving the clients at the birth center and we're Certified Nurse Midwives and mostly have experience in hospitals and are doing births in hospitals currently. There are about 200 nurse midwives in the Twin Cities who are working in hospitals. So it's people who are very familiar with the process and very skilled and comfortable with hospitals but also we have an agreement with and OB/GYN consultant group who is always on call 24/7 so that when we do have to make a transfer there's someone there.

Marissa Lasky: I'm just trying to establish differences and is anesthesia administered never? sometimes?

Cheryl Heitkamp: Never.

Steve Calvin: Just aside, psycho prophylaxis. What Cheryl and her colleagues do is to just say yes, birth is a painful process. And having been around 3,000 deliveries it seems to me that it is, but I've never experienced it and alot of moms really are – just encouragement is what sometimes it takes. That's what my wife has shared with me, so that's – there is pain relief, but it's not medication, just put it that way.

Matt Perry: Any other questions of Ms. Heitkamp? Thanks.

Cheryl Heitkamp: Thank you.

Matt Perry: Is there anyone else to speak in favor of this application, this appeal, actually, not application, this appeal given the constraints that we have with respect to the discussion? Yes ma'am, if you would like to give your name and address?

Mary Norah Ellefson: My name is Mary Norah Ellefson. I live at 2608 Chicago Avenue. I work at Children's and I would like to say that there are different definitions of *inpatient* and *outpatient* as well there, in use there. But also as a woman that I would like to have had birth centers and we need them.

Matt Perry: Alright. Thanks for coming down and sharing that with us. Is there anybody else who would like to speak in favor of this appeal. I see no one. Is anyone here to speak against? I see no one. Let's close the public hearing. Before we have a discussion start, I have a question. During the discussion I became more confused, which may be is typical, maybe not, I don't know, and I need help from staff. I'm looking through this document and it seems that the Zoning Code has one definition...

Shanna Sether: Yes.

Matt Perry: ... related to this whole matter that we can hang on to, like out last breath. There's hospitals all over the city and so there are clinics as well. Without a definition of a *hospital* how do you work with the Zoning Code without the definition of a *hospital* in the Code. I don't get this.

Shanna Sether: In my experience it's very rare that you have a use before you that it's more difficult to define between and one and the other, so a *clinic* versus a *hospital*. I myself have not encountered this type of use of birth center before. The closest we have made to a substantially similar, I know that Cheryl mentioned this earlier, was an ambulatory care center that the University of Minnesota is working towards in the Prospect Park Neighborhood. That use was defined as a *hospital* as well. Essentially when you have one defined and one not, we take a look at whether or not we believe the use fits within that definition of *clinic*. The Zoning Administrator has determined that a birth center does not fit within the definition of a *clinic*, is most substantially similar to a *hospital* based on the findings that we gave you today.

Matt Perry: Okay. I'm going to tip my, again if the Board would indulge me, because I think it might help the discussion a little bit, I hope it does, to tip my constructionist hat a little bit. How do I know that I have a hospital, other than the reasonable person case, which is I look and I say well that's a hospital. How do I know that it is a hospital? How does Planning and Zoning know that you have a hospital before you versus a clinic?

Shanna Sether: As Cheryl mentioned previously, when your talk about the intensity of the proposed use, the hours of operation and whether or not it was mostly defined within our existing definitions.

Matt Perry: So the hours of operation come into really sharp focus here given the lack of a, at this time, and I understand ...

Shanna Sether: A definition of a *hospital*.

Matt Perry: ... a definition of a *hospital* ...

Shanna Sether: That's correct.

Matt Perry: ... as well as intensity of use.

Shanna Sether: Yes.

Matt Perry: Okay. Thank you.

Shanna Sether: As determined by the Zoning Administrator. I just want to make that very clear.

Matt Perry: Thank you for answering those questions and I thank my colleagues for the indulgence in letting me explore that a little bit. So Board comment. Mr. Gates, then Mr. Ditzler, then Mr. Finlayson, and then Mr. Sandberg.

Paul Gates: Thank you Chairman Perry. I want to follow up on that with Ms. Sether a bit further. I think you were on to something there. Ms. Sether, I'll read from the findings, the second finding: If a word is not defined in the Zoning Code the Zoning Administrator applies the common meaning as required by §520.160 of the Zoning Code. Typically going to the dictionary for that and in fact, that's what has been done with regard to *outpatient*.

Shanna Sether: Yes.

Paul Gates: The Zoning Administrator chose though not to do that for *hospital* and instead substituted a proposed text amendment, I believe it was, which strikes me as a little willful if not even a bit disingenuous.

Shanna Sether: I just want to make it, well ...

Paul Gates: We all need to work with the Code as it exists and if there's not a definition we need to go to the dictionary. The Applicant (sic) has provided one definition from a dictionary: *Hospital*, an institution in which sick or injured persons are given medical or surgical treatment. That definition, as you might expect might lend credence to the Applicant's, the Appellant's case. But it strikes me as odd that we wouldn't be going to the dictionary here. Some dictionary, and instead going to and citing, almost as if it is fact, our sort of desire for how the Code actually might want to read. Can you comment on that?

Shanna Sether: Yes. Two things: One, I want to make sure I address the timing of the definitions text amendment was happening long before we received the appeal, or the application previously for the appeal of the Zoning Administrator regarding the birth center. So that was assigned to another staff member. That only came out right around the time that I was writing this staff report that we had a proposed possible definition. Second, is that my most recent example where the Zoning Administrator had defined in word, for the purpose of definitions, was an appeal that was before the Zoning Board of Adjustment just a few months ago where we defined the word *habitable* within the definition of gross floor area. So it's not uncommon to use words within an existing definition to help lend in the staff report and the staff findings whether or not the use is determined to be within that classification or another. *Hospital* is found in our use table, it is, however, not defined. It was the Zoning Administrator's decision to not include the common definition of *hospital* because we already have a definition of *clinic*. It was the Zoning Administrator and staff's opinion that if you don't meet the definition of *clinic* you can in fact be a hospital. Does that answer your question?

Matt Perry: Maybe we could say I don't know if it answers your question but it gives an answer.

Shanna Sether: Okay, there's an answer.

Matt Perry: Do you want to follow up?

Paul Gates: ... I have a difference of opinion and I have an opinion about that answer but I'll defer to other colleagues and talk later.

Matt Perry: Sure, so maybe we'll move on. Mr. Ditzler and Mr. Finlayson and then Mr. Sandberg, I think you also indicated you'd like to speak. Mr. Ditzler.

Matt Ditzler: Yeah, I guess I look at it very differently than Mr. Gates does. I can understand sort of the concern about *hospital* not being defined in the Code, but I look at it from what is defined in the Code? *Clinic* is defined in the Code and is very clear as to what a *clinic* is. With the hours of operation, which I think are, for me, the key here because part of the definition of the OR2 District is businesses that operate within these hour parameters. If these allowed uses, these are the hours that business will be conducted in the OR2 District during these times. The Applicant, you know, as much as I do think that birth center is a need, but the Applicant stated that the use and the hours of operation are in direct opposition to what is allowed by a clinic. They will be seeing patients between the hours of 10 p.m. and 7 a.m. They also said that they won't have patients leaving during that time so they will be having patients stay overnight, which is what I didn't think was going on before and it could be up to 2 or 1 or up to 3 or whatever happens to be. And in addition, if it's between 8 and 10 % of people need to be transferred to another facility, some of those will be by ambulance and my guess is that there could be the case where the sirens will be going, and I think the intent of the OR2 District is that's not allowed there unless you're a hospital. There is exception granted,

the Zoning Administrator gives exception to facilities like that so they can coexist there. And that's what I think that he has done. I think for me, Mr. Gates, it's really a matter of hours of operation. When you come down to the definition of it these are the hours that are allowed by a *clinic*. If you're not going to follow those hours you can't call yourself a *clinic*. And I haven't heard any testimony, the Applicant's own admissions saying we aren't going to follow those hours. So I can't grant them the use of a *clinic* then if they're not going to agree to that and they haven't presented to me any evidence to give them any exception.

Matt Perry: Thank you Mr. Ditzler. Not that Mr. Gates needs anybody to answer for him, but I don't think he actually has stated a position yet. He simply asked some questions. But I see you're prime to talk about his position when that comes forth. Mr. Finlayson.

John Finlayson: Well, part of what I had to say Mr. Ditzler already said, and essentially it looks to me as if the location was picked without regard to the zoning because of its convenience to the hospital. So, in essence, they picked the wrong zoning for this particular intended use and I support staff recommendation.

Matt Perry: Okay, I didn't hear a motion, in fact I would like us not to have a motion on the floor if we could because I think this warrants some further discussion.

John Finalyson: I can specifically say that was not a motion.

Matt Perry: Thank you.

Mr. Sandberg: Thank you Mr. Chair. I also agree with some of the thinking that's been stated so far. I do agree that this is an admirable idea concept to bring to the area. It's a – the location across the street from the hospital, if we were making a decision on particular use is a great location. Unfortunately it's in an OR2 and this decision will apply to many other OR2 locations throughout the City. So because of that, because of the hours of operation, because of the statement that's in the Code that says that a clinic treatment is on outpatient basis only and the dictionary defines *outpatient* as the treatment or admission that does not require an overnight stay, and in many cases this use will require an overnight stay, I'm inclined to agree with the Zoning Administrator.

Matt Perry: Thanks for sharing those comments Mr. Sandberg and the same to Mr. Finlayson. Mr. Ditzler, if I haven't said so. Ms. Lasky?

Marissa Lasky: Okay, this one really falls between the cracks and the only thing that it does not comply with is the hours of operation, unfortunately. But it has no place else to go but be a clinic. It is not a hospital. There is no anesthesiologist on staff, there's no doctor on staff. You are not getting the same services as a hospital and you can't call a cat a dog, I'm sorry. My background is health science, I've been in, you know, assisted

in surgeries and this one is not a hospital. So the hours of operation are it. That's the only thing that kinda doesn't make it a *clinic*, but it is a clinic.

Matt Perry: Alright, thank you for your comments. Mr. Koch?

Chris Koch: Thanks Ms. Lasky. The question before us is is it a hospital or is it a clinic? Well ...

Matt Perry: Let Mr. Koch finish.

Chris Koch: Thank you. I mean the as I understand it, and correct me if I'm wrong, it's the Zoning Administrator has said this is a hospital. Right?

Matt Perry: Staff, would you like to ...

Shanna Sether: The Zoning Administrator has determined the proposed use is a hospital.

Chris Koch: Is a hospital. And so the question before us is did he correctly interpret this use and structure as a hospital or is it a clinic? Right? Because a clinic is allowed.

Shanna Sether: If the Board of ...

Chris Koch: Correct?

Shanna Sether: A clinic is a permitted use in the OR2 District.

Chris Koch: Okay.

Shanna Sether: If the decision by the Zoning Board of Adjustment today is that the proposed use, as proposed, is a clinic, or I'm sorry, is not a hospital, staff does not have opportunity to find something else in the Code that it's going to fit. We will classify as a *clinic*.

Chris Koch: Okay, so given that narrow charge before us, we can't, I mean hours of operation does not define a hospital. 7-11 is open 24 hours, but it's not a hospital.

Marissa Lasky: (unintelligible)

Chris Koch: Right, and so I have to kinda go to the idea that a hospital admits patients. A hospital can be a clinic and that there are outpatients. But a clinic can't admit patients and have them – I mean, I look at it that birthing is outpatient in nature. Therefore a

birthing center is outpatient in nature. And so I don't see that this is not a clinic. It's certainly not a hospital.

Matt Perry: Okay ...

Chris Koch: It's not a hospital.

Matt Perry: Mr. Gates, it's been a while since we've heard from you.

Paul Gates: Thank you Chairman Perry. We seem to have a split here down the middle, down the left and right side of the room

Matt Perry: Yes, indeed we do.

Paul Gates: I wonder where that's going to lead us Mr. Perry.

Matt Perry: I know.

Paul Gates: I'm going to take your lead and try to stick a very narrowly to the question here and use the term constructionist.

Matt Perry: Thank you.

Paul Gates: We have a definition for *clinic*. We don't have one for *hospital*. The Code says that if we don't have one that we should look to the common definition. The only common definition that I see in front of me is one provided by the Appellant. I'll read it again: An institution in which sick or injured persons are given medical or surgical treatment. If the proposed use persons are not sick and they're not injured and they won't be given medical or surgical treatment, so it would seem that the proposed use does not comply with the definition of *hospital*. So we have a case where we have neither a *clinic* nor a *hospital* and we have to make a judgment call as to which one it most closely resembles. At that point it's difficult for me or I think any reasonable person to look at that building and that use and conclude that that's a hospital, by any stretch of the imagination and I'm left to share the conviction of my peers on this side of the room in thinking that we do not have a hospital here.

Matt Perry: Thank you. I have a couple of questions if I may. Mr. Finalyson go ahead.

John Finlayson: Go right ahead. I defer.

Matt Perry: For the public, the Chair typically does not vote except in the case of a tie. I am preparing to be having to weigh in here so I want to understand a couple of things a

little bit better myself. Where does an emergency room fall and is that a clinic? Is that a hospital?

Shanna Sether: An emergency room on its own?

Matt Perry: Sure.

Shanna Sether: The use of like an ambulance and call center and the treatment of patients?

Matt Perry: Sure.

Shanna Sether: I would say a hospital because it's 24-hour in nature and not outpatient.

Matt Perry: So you mentioned the hours again.

Shanna Sether: And the services provided are beyond medical and dental examination and ...

Matt Perry: Beyond the *clinic* definitions.

Shanna Sether: Yes.

Matt Perry: Right. So something else I'd like to explore a little bit is that I know when we don't have a definition there is a tendency to go to the, look in the dictionary. I'm always a little bemused by the fact that we're going to *dictionary.com*. Somehow I guess I'm just too old to get used to that, but be that what it may, I think there's something else that happens as well, but maybe this is not the case in these appeals of the Zoning Administrator. There is this notion of *hospital*. There's a bunch of the rest of the Code that acknowledges this thing called *hospital* and so it seems to me that even though we may not have a definition of *hospital* in the Code, we do have a sense of what it is and what it is not based on other particles of evidence as they appear in the Code itself, and then when we piece those together we say, ah, there's a hospital. Is that something that applies here? Or do we still need to refer back to the definition of *hospital* in *dictionary.com*.

Shanna Sether: Can I answer a question with a question? Are you asking where else *hospital* is found in the Zoning Code to lend to a definition of *hospital*, or are you asking something else?

Matt Perry: I'm asking what weight does the existing definition, not by *dictionary.com*, but ... (end of tape) ...

Shanna Sether: ... provided. The proposed hours of operation, the staff available, the intensity of the use. That is what we use to make our determination to call the use a *hospital*. Did that answer your question?

Matt Perry: Sort of, I'm still a little bit confused about how much weight is placed on there being a definition versus the Code I know has references to *hospital* in it, even though it may not be defined. And so, the definition, the references to *hospital* in other parts of the Code help us understand what a *hospital* is.

Shanna Sether: So for example, in 547.60 there is specific exemption for hospitals under hours of operation.

Matt Perry: Sure.

Shanna Sether: In Chapter 536 there is specific development standard related to hospitals which talks about long range plans, and making sure that you have proper landscaping and screening because these uses are intense and can have negative effect on the immediate neighbors. It's also in our Use Table, so for example, a hospital is a prohibited use in the OR2 District. It's first allowed with a conditional use permit in the OR3 District. However, there's a minimum lot area requirement of 20,000 square feet.

Matt Perry: So my argument here to my colleagues, I believe is definition by an on-line service or the paper version is not necessarily, and maybe in this case, maybe not in the appropriate way to define *hospital*. But I would look, this is the question I'm trying to determine from staff, is that an appropriate statement to make or do we need to only look at definitions?

Shanna Sether: When the use ...

Matt Perry: Rather than the ...

Shanna Sether: ... is not defined in the Zoning Code, we use a common meaning. So for the particular common meaning we went to the use that is defined. We chose to use the common meaning for *outpatient*.

Matt Perry: Okay. I don't know that that – I understand what you're saying. I'm not completely sure that brought the clarity I was hoping it would for me. Not that that's your fault. Could you maybe expand a little bit about intensity with respect to clinics and hospitals?

Shanna Sether: Generally speaking the use itself which lends itself first conditional in the OR3 District and some of our higher dense districts, lends itself to a larger institution and that's where it should be located for the purposes of zoning because of the impacts of traffic, noise, light, et cetera. So those are some of the parameters of which zoning is

found. And we're talking about the Zoning Code here, not necessarily a license, so that's why, as Cheryl alluded to earlier, if the licensure defines it, if it's within a license category that doesn't necessarily lend itself to the use, what's physically actually occurring on the property, that is the zoning law. That is a zoning regulation.

Marissa Lasky: (unintelligible)

Matt Perry: Sure, but before you do Ms. Lasky I, in my interest in trying to educate myself I have lost track of who has raised their hand when ...

Marissa Lasky: This is to help define the question.

Matt Perry: Okay. Well Mr. Finlayson has been very patient in waiting so. ..

Marissa Lasky: It's a weird question.

Matt Perry: If you want to do a follow-up then.

Marissa Lasky: I just want you to repeat something. You said that definition of *hospital* in OR3 20,000 square feet or did I just miss that?

Shanna Sether: The minimum lot area requirement for a hospital in the OR3 District is 20,000 square feet. So when we reviewed the use with the Appellant/Applicant at the time there was not an opportunity to change the zoning classification solely to allow for the proposed use as a hospital because they were insufficient in lot area even with a maximum variance allowed.

Marissa Lasky: (unintelligible)

Matt Perry: Mr. Finlayson thanks for your patience.

John Finlayson: I'm not leading at this point up to a motion, but I do have a comment just in general that the Zoning Code is static. It's black and white. It gets updated from time to time. But life is not static. People invent things. People twist things, change scale. This isn't the first time we have seen this. We had the whole *Curves*/health club debate and a health club is commonly a large scale retail operation, lots of people coming and going. *Curves* is a less intense use in storefronts and strip malls and small business nodes. But it was outside of the definition of a permitted use when it first rose to the surface, as is this. And the obvious definition of a *hospital*, or at least minimum size, screening to cover the late night comings and goings, maybe no one will be going out of this late at night, at least it's probably ill advisable but they certainly would be coming. And the OR2 is a mix of commercial and residential. And the idea of the limitation of the hours, which is a maximum from 7 to 10 and 7 to 11 then on the weekends, is an

acknowledgment that people are going to be attempting to sleep in these Districts and they're not going to want a lot of door banging, carrying and going, yelling and carrying on and there certainly would be some of this. So I'm more inclined to look at what I have heard as the definition of a hospital. Not only in that area, by the way hospitals also seem to, for some reason, have a lot of security. And this will have apparently none. So in any event, I see this more as a hospital use being put into an area where people are going to want to be sleeping. My take on it.

Matt Perry: Alright, thank you Mr. Finlayson. Mr. Ditzler?

Matt Ditzler: Just real briefly, to touch on what John, Mr. Finlayson said. I think it, I just can't get past the hours of operation, and while I know that *hospital* wasn't defined, if *hospital* is not defined in the Zoning Code, then the Zoning Administrator could have made the determination that it was most like a birth center, which is also not defined in the Zoning Code. He could have said it is most like some other medical facility that is not defined in the Zoning Code. I just can't get around – I appreciate the testimony from my peers, but I can't get around the zoning text that is before me that defines what a *clinic* is this is not it. We can argue about what may be it is, but to me it's not that. It's not a *clinic*. And I have to in this point, I don't feel – I will defer to the Zoning Administrator if he wants to call it a *hospital* or a *birth center* or something else, I'm going to leave him to do that and I think in this case he made the right call. Could he maybe have called it something else? Yes, but I think he made the right call.

Matt Perry: Okay, I will be entertaining some additional comments but I think we're getting at a point where unless there's some new material, some new arguments I think we should probably wind it down. Mr. Sandberg I think you had a comment? And then Mr. Gates?

Dick Sandberg: Yeah, I think maybe just to follow-up on Mr. Ditzler's comment there, are we necessarily deciding that this is not a hospital or are we deciding that it's not a clinic which is the permitted use? That's what the Zoning Administrator decided as this is not a clinic because it's more like a hospital, but it's not a clinic. Can that be the outcome here? Our decision? Do we have to decide that it is indeed not a hospital? Or if we decide that it's not a clinic have we come to conclusion?

Shanna Sether: The appeal specifically before you is for an appeal of the decision of the Zoning Administrator that interpreted this use to be a hospital.

Matt Perry: Okay, Mr. Gates, then Mr. Koch.

Paul Gates: Thank you Chairman Perry. One more question for staff if you'll allow that.

Matt Perry: Yes, absolutely.

Paul Gates: Ms. Sether, you mentioned that 20,000 square feet was the minimum site ...

Shanna Sether: The lot area, yes.

Paul Gates: ...in an OR2 for a hospital.

Shanna Sether: Yes. Oh sorry, OR3, excuse me.

Paul Gates: Can you tell me if there are other zoning districts which would allow hospitals on smaller sites?

Shanna Sether: No. But for a proxy, churches and places of assembly also require 20,000 square foot lot area requirements so that's not out of the ordinary or large by institutional use standards.

Paul Gates: So a proposed use such as this would not be legal anywhere in the City unless it had 20,000 square feet?

Shanna Sether: Or was able to successfully obtain a lot area variance to reduce the minimum lot area requirement down to 30%. So that would bring us to 14,000 square feet I think.

Marissa Lasky: Which essentially can't be done.

Matt Perry: Folks ...

Paul Gates: It's anywhere ...

Shanna Sether: It of course can be done. There are plenty of properties zoned OR3 with sufficient lot area.

Marissa Lasky: Oh, okay (unintelligible).

Matt Perry: Mr. Gates have you concluded your questions? I apologize if you've gotten interrupted, but Mr. Koch?

Chis Koch: Mr. Chair maybe you could again provide just a little clarification for me. Our decision is that we're not deciding, we don't have to define what this is right? We can just say the Zoning Administrator called it a hospital, and it's not. We don't have to say because it's a clinic. Is that correct?

Matt Perry: I think if I ask staff they would simply repeat what had said which is simply already that the Zoning Administrator has determined that this most closely resembles a hospital in the Code because there isn't a definition there. And we have an Appellant who is saying Nope, we don't think you made the right call. We don't think this is a most likely, most like a hospital. End of story. Do we agree with the Appellant or do we agree with the Zoning Administrator?

Shanna Sether: I would only add that the Appellant further argues that the use is in fact a clinic. So they are saying they are a clinic.

Chris Koch: But no matter what ...

Shanna Sether: The Zoning Administrator's determination is that it is not clinic it is a hospital.

Chris Koch: So we just have to say he made the right call that it's a hospital or not. That's the, that's the question.

Marissa Lasky: That is the question.

Shanna Sether: Ultimately, if you decide it is not a hospital staff does not have a choice to define it as something else – *a birth center*, for example. We must call it a *clinic*.

Chris Koch: Well you can call it whatever you want, but we just have to say he called it a hospital, do we agree with him or not? That's the question.

Matt Perry: Excuse me ...

Shanna Sether: The Appellant's appeal is that it is a *clinic*.

Matt Perry: It's clear, and I did not realize this before today, that there is a great deal of passion around this issue. Which I think is good. And as one of my colleagues has mentioned, and we find in the Zoning Board, we have folks who are being innovative both for social and economic reasons in Minneapolis, and I think that's good as well. I would just ask that my colleagues please respect the decorum of the chambers and the proceedings and respect each other. Thank you. Mr. Finlayson?

John Finlayson: I move we accept the Zoning Administrator's definition.

Matt Perry: So you are making a motion to support staff and deny the appeal?

John Finlayson: That is correct.

Matt Perry: Is there a second?

Dick Sandberg: I'll second.

Matt Perry: There's a motion and a second. Is there further discussion? Yes, Ms. Lasky?

Marissa Lasky: I'll just, I just want to say one last thing that I do believe that the Zoning Administrator has spent no time in a hospital as part of his training. And so his definition is text book. I have spent two years in a hospital and I clearly think this is not a hospital.

Matt Perry: Thanks for those closing comments. I may have comments depending on how the outcome of this vote goes. Now will the clerk please call the roll?

Paul Gates: One more request? Please?

Matt Perry: Oh, I'm sorry. Mr. Gates?

Paul Gates: Thank you Chairman Perry, thank you. I just want to say again that I think, I know the Chair feels, we have a very narrow question in front of us and I want to reiterate my comments that when we lock a definition in the Code we go to the common definition and that the definition that's supplied by the Appellant for *hospitals* would seem to have as much legitimacy as the source cited by staff for the definition of *outpatient* whether it's an on-line source or a print source, I think that we need to look at the evidence in front of us and unless there is some reason to question the validity of that evidence we need to go by the standards prescribed in the Code for determining what an item, a use is. Whether it's in the Code or it's a common definition. So I would urge my peers to look at that definition supplied by the Appellant and see if, in fact, the use that's being proposed does meet that definition of *hospital*. Thank you.

Matt Perry: Mr. Gates is always serves as a good conscience for the Board and often times for me. So I'm going to - it's caused me to pause and ask one more question of staff. I want to understand just a little bit more. I'm going to ask this question again about the common meanings. I have a bit of a problem, and if this is the way it is, this is the way it is, but I have a bit of a problem looking at a particular dictionary as my definition. Especially when I heard for *outpatient* any number of different definitions. This bothers me when I'm looking at the definition of *hospital*. I am looking at a proposed definition as part of an amendment and I have to believe that that came in part by looking at what the other, what the rest of the Zoning Code and other aspects of City Ordinance would indicate is a *hospital* and you've tried to capture that, or the person working on that, is trying to capture that.

Shanna Sether: That's right.

Matt Perry: But you're then suggesting, unless I'm hearing you wrong, that we can't really look at that. We have to look at the common definition and by the way you've defined it would almost suggest that this is not yet the common definition of *hospital*, this proposed definition as part of a proposed amendment to the Code.

Shanna Sether: The proposed definition for *hospital* is, what I would say, staff's existing operating practice. Codifying the Code how we generally understand *hospital* presently ...

Matt Perry: But the question ...

Shanna Sether: It doesn't necessarily have to, that's not necessarily something that you can take into consideration in your decision today because it's not codified within the Zoning Ordinance. Similarly, the definition at the statutory level has not been adopted. Therefore these are both theoretical definitions at this point.

Matt Perry: Alright.

Shanna Sether: I would say that that is the standard operating definition for staff's understanding on what a hospital is for the purposes of zoning.

Matt Perry: Alright. Thank you. I'm sure all of the Board members and the public and those listening have received quite an education. Maybe more than they wanted on this, but I found it quite enlightening and I appreciate everybody's time and patience as we've explored this. One comment that I hear back from folks who have an opportunity to talk to us after these hearings have said something that I think is a good sign for the work that we do, is that if anything, we are thoughtful and deliberative and thorough in our analysis of the questions before us. So I will ask the clerk to call the roll please.

Clerk: Mr. Ditzler?

Matt Ditzler: Yes.

Clerk: Mr. Finalyson?

John. Finalyson: Aye.

Clerk: Mr. Gates?

Paul Gates: No

Clerk: Mr. Koch?

Chris Koch: No.

Clerk: Ms. Lasky?

Marissa Lasky: No.

Clerk: Mr. Sandberg?

Dick Sandberg: Yes.

Clerk: It's a tie.

Matt Perry: And I will vote yes to support the motion and deny the appeal and I'll give my reason for that. I do not believe that we have sufficient definitions to work with. I find this rather frustrating as a Board member. We're not policy makers here so it's kind of hard to invent things as we go along and even though we have what appears to be a definition that we could use, that's outside the bounds of what we have that can be considered as part of our deliberations. So I'm left with looking at intensity and hours of use and that's it. And I find that if the arguments of the Zoning Administrator that the intensity and hours of use are more like a hospital than a clinic are compelling and as much as I appreciate all the deliberations that we've had to the contrary I still find in favor of the Zoning Administrator's decision so that appeal is denied. The Appellant can talk to staff about the options they have going forward. Thanks very much for everyone's time.