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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-1655
L.T. CASE NO.: 5D14-2920

PLANNED PARENTHOOD OF GREATER ORLANDO, INC.
n/k/a PLANNED PARENTHOOD OF SOUTHWEST
AND CENTRAL FLORIDA, INC.,
a Florida non-profit corporation,

Petitioner,

MMB PROPERTIES,
a Florida general partnership,

Respondent.

PETITIONER/DEFENDANT PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, INC.'S MOTION TO REVIEW ORDER DENYING MOTION TO STAY

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PETITIONER PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, INC.'S MOTION TO REVIEW ORDER DENYING MOTION TO STAY

COMES NOW Petitioner/Defendant Planned Parenthood of Southwest and Central Florida, Inc., as successor by merger with Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood"), by and through its undersigned counsel, and files this, its Motion to Review the Fifth District Court of Appeal's denial of its Emergency Motion to Stay Issuance of the Mandate.

INTRODUCTION

Planned Parenthood is a non-profit corporation that operates several health centers in Florida. The health center at issue in this lawsuit (the "Kissimmee health center") is located at 610 Oak Commons Boulevard in the Oak Commons Medical Park ("Oak Commons") in Kissimmee, Florida.[1] At the Kissimmee health center, physicians licensed to practice medicine in Florida provide and supervise the provision of reproductive health care similar to care available at most gynecologists' offices. This includes all FDA-approved forms of contraception, breast and cervical cancer screening, HPV screening, HIV testing and counseling,

[1] Planned Parenthood of Greater Orlando, Inc. operated the Kissimmee health center before its recent July 1, 2015 merger with Planned Parenthood of Southwest and Central Florida, Inc., which now operates the Kissimmee health center. All references to "Planned Parenthood" in this brief include actions taken with respect to the Kissimmee health center by either entity, whether before or after the merger.

screening and treatment for other STDs, blood pressure screening, medication abortions, and until the appellate court's mandate issued, surgical abortions.

MMB Properties ("MMB") owns a lot in Oak Commons that is used by a group of cardiologists, many of whom constitute the partners of MMB. On June 12, 2014, MMB served Planned Parenthood with a single-count complaint alleging a breach of the Declaration of Restrictions and the Declarations of Covenants, Conditions, and Restrictions (together "the Declarations," copies of which are attached hereto as composite Exhibit "A") that apply to property owners in Oak Commons. The Declarations prohibit certain uses of property in the Oak Commons Medical Park, including restricting the property from being used as an "Outpatient Surgical Center," a "Diagnostic Imaging Center," or an "Emergency Medical Center" "unless ancillary and incidental to a physician's practice of medicine."

On June 23, 2014, MMB sought a temporary injunction barring Planned Parenthood from performing abortions and providing emergency contraception at the Kissimmee health center, claiming those services are prohibited by the Declarations' "Outpatient Surgical Center" and "Emergency Medical Center" restrictions respectively. The trial court held a temporary injunction hearing on July 14, 2014.

MMB offered the testimony, both by affidavit and live, of one of the cardiologists who practices at the MMB property and of a family physician who

readily admitted that he was strongly opposed to abortion. Both of those doctors testified that, in their opinions, abortions are surgical procedures and emergency contraception is an emergency medical procedure. In response, Planned Parenthood's then-CEO testified, both by affidavit and at the hearing, about the medical services actually provided at the Kissimmee health center. She explained that surgical abortions are a very small percentage of the services provided and that they are performed ancillary and incidental to the medical practice of the physicians who work at the health center.[2]

The trial court entered its own order on July 23, largely granting MMB's motion for temporary injunction. A copy of this order (the "Temporary Injunction") is attached hereto as Exhibit "B." The Temporary Injunction enjoined Planned Parenthood not only from providing surgical abortions, but also from providing a number of other health services, including some that MMB had not asked to be enjoined.[3] In particular, it prohibited Planned Parenthood:

> from directly or indirectly violating the Declaration of Restrictions at 610 Oak Commons, Kissimmee, Florida, including but not limited to the performance of surgical abortions and the provision of sonographic or other diagnostic imaging services.

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[2] She also explained that emergency contraception is an FDA-approved method of contraception and is only "emergent" in that it has to be provided in a narrow window of time after a woman has unprotected sex to be effective. In support of its request for a bond, Planned Parenthood also offered the testimony of the Secretary at that time of its Board of Directors.

[3] The trial court did refuse to enjoin the provision of emergency contraception.

The trial court's Temporary Injunction was supported by several unusual findings. One held that Planned Parenthood cannot be physician's practice because "[i]t is instead a § 501(c)(3) tax-exempt nonprofit organization" that "is heavily involved with various educational, advocacy, and community outreach activities in furtherance of its mission as a non-profit corporation" – although there had been no evidence whatsoever in the record about those "activities."

Five days later, on July 28, Planned Parenthood filed a motion in the trial court to reconsider, dissolve, or modify the injunction ("Post-Hearing Motion"). In support of its Post-Hearing Motion, Planned Parenthood filed a supplemental affidavit from its then-CEO and three additional affidavits from its Medical Director, the general contractor who renovated the Kissimmee health center when Planned Parenthood purchased it, and the attorney who advised Planned Parenthood on the purchase of the property. The new affidavits were directed at both the obvious errors in the trial court's ruling on surgical abortion as well as its ruling enjoining diagnostic imaging and other "including but not limited to" services (i.e., matters about which Planned Parenthood had not presented evidence because they were not requested by MMB). On August 6, the trial court denied Planned Parenthood's Post-Hearing Motion without comment or explanation. The

trial court also denied Planned Parenthood's motion for a stay of the Temporary Injunction while it pursued its interlocutory appeal.

Before the appellate court, Planned Parenthood renewed its motion for stay, and in September 2014, a unanimous three-judge panel of the Fifth District Court of Appeal (the "Stay Panel") stayed the Temporary Injunction in its entirety. In doing so, the Stay Panel considered the complete record on appeal, which included the affidavits that Planned Parenthood had submitted in support of its Post-Hearing Motion. In its order, the Stay Panel concluded that Planned Parenthood had established a likelihood of success on the merits on all of MMB's claims and a likelihood of harm absent entry of a stay ("Stay Op.," a copy of which is attached hereto as Exhibit "C").

Eight months later, on May 22, 2015, a different three-judge panel of the Fifth District (the "Panel") issued a ruling on the merits (the "App. Op," a copy of which is attached as Exhibit "D"). In its divided opinion, the Panel affirmed the Temporary Injunction with regard to Planned Parenthood's performance of surgical abortions (although not other services) at its Kissimmee health center. App. Op. at 3. Importantly, the Panel declined to consider the affidavits filed in support of the Post-Hearing Motion that had been considered by the Stay Panel. It found that in order for those affidavits to be considered, Planned Parenthood had to establish changed circumstances, which the Panel believed it had not. Therefore,

the Panel looked only at the evidence presented prior to and at the temporary injunction hearing. The existence of a conflict between the Fifth District and the Third and Fourth District Courts of Appeal as to whether such evidence may properly be considered was nevertheless expressly acknowledged by the Panel. *See* App. Opp. at 4 n.3 ("We acknowledge conflict with the Third and Fourth District Courts of Appeal, as noted in *Minty v. Meister Financial Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014).").

Planned Parenthood sought rehearing and/or rehearing en banc from the district court, but that motion was denied on August 11, 2015. Planned Parenthood then sought a stay of the mandate which would have allowed Planned Parenthood, during the pendency of this lawsuit, to continue to provide – and women in Kissimmee to receive – surgical abortions, as had been the case since September 2014. Planned Parenthood's stay motion was denied by the Fifth District on August 26, 2015, and the mandate issued on August 28. As a result, women in Kissimmee are currently prevented from accessing surgical abortions at Planned Parenthood's Kissimmee health center. Planned Parenthood now moves this Court to hold that the district court of appeal should have stayed the mandate. This Court should therefore enter a stay for the pendency of Planned Parenthood's appeal.

STANDARD OF REVIEW

In deciding a motion for a stay by this Court, the "[f]actors to be considered are the likelihood that jurisdiction will be accepted by the Supreme Court, the likelihood of ultimate success on the merits, the likelihood of harm if no stay is granted and the remediable quality of any such harm." *State ex rel. Price v. McCord*, 380 So.2d 1037, 1038 n.3 (Fla. 1980); *see also Perez v. Perez*, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999). All factors support the entry of a stay here, and the Fifth District's refusal to enter one was in error.

ARGUMENT

I. This Court is likely to accept jurisdiction.

This Court has discretionary jurisdiction to review this case, and it is likely to accept jurisdiction. Jurisdiction is well-founded because this Court can "review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980); *see also* Fla. Const. art. V, § 3(b)(3), Fla. R. App. P. 9.030(a)(2)(A)(iv).

The Panel that considered this case on the merits refused to consider additional evidence that Planned Parenthood had submitted in support of its Post-Hearing Motion. The Panel did so, in accordance with Fifth District precedent, because it found, *inter alia*, no changed circumstances following the entry of the temporary injunction. *See, e.g.*, *Thomas v. Osler Med., Inc.*, 963 So. 2d 896, 899

(Fla. 5th DCA 2007) (holding that when a party moves for a motion to modify or dissolve an injunction after notice and hearing, it must establish a change in circumstances). The Panel nevertheless explicitly acknowledged that this Fifth District precedent is in conflict with case law in the Third and Fourth District Courts of Appeal. Those districts do not require changed circumstances before evidence may be considered in support of a motion to modify or dissolve an injunction. App. Op. at 4 n.3; *see Minty v. Meister Fin. Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014) (noting the conflict between the Third and Fourth Districts on one hand, and the First, Second, and Fifth Districts on the other, on this issue). This direct conflict between the district courts of appeal on an important question of law, as explicitly acknowledged in the opinion of the Fifth District's Panel now being appealed, fully satisfies the jurisdictional requirements as stated in the Florida Constitution, art. V, § 3(b)(3).

Not only does this Court have discretionary jurisdiction, but actual review is likely for at least three reasons. *First*, as is explained in Planned Parenthood's jurisdiction brief, all five of the district courts of appeal have now ruled on this issue. Several (including three in the past year and a half alone) have acknowledged this split of opinion among the districts. Three of the appellate districts require changed circumstances; two do not. This split is, therefore, deep, well-established, and unlikely to be resolved without this Court's review. *Second*,

as can be seen from the frequency with which this issue has already arisen, it is likely to recur in many more temporary injunction cases. Those will probably involve a host of issues beyond that of a restrictive covenant being selectively enforced against an unpopular landowner.

Third, and perhaps most importantly, this issue involves an important question of law regarding the equitable powers of Florida courts. Indeed, the striking degree to which this issue implicates fundamental fairness is on full display here. The Stay Panel unanimously stayed the trial court's Temporary Injunction after reviewing all of the evidence, including that submitted with Planned Parenthood's Post-Hearing Motion. The divided Panel, on the other hand, refrained from considering this additional evidence and ruled against Planned Parenthood on the surgical abortion issue. The issue on which there is a clear and deep circuit split is thus outcome determinative in this case, making review exceedingly likely.

II. Planned Parenthood is likely to ultimately succeed on the merits.

Should this Court accept jurisdiction, it is likely to find that changed circumstances are not required to reconsider an order granting a temporary injunction. It is also likely to rule that temporary injunction barring Planned Parenthood from performing surgical abortions at the Kissimmee health center was wrongly entered. *See State v. T.G.*, 800 So. 2d 204, 210 n.4 (Fla. 2001) ("Although

this issue was not the basis of conflict jurisdiction, once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court." (citing *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982)).

A. This Court will likely resolve the appellate court split by ruling that changed circumstances are not required.

As this Court has oft recognized, the "granting *and continuing* of injunctions rests in the sound discretion" of the trial court. *Davis v. Wilson*, 190 So. 716, 718 (Fla. 1939) (emphasis added). Moreover, a trial court "has the inherent authority to reconsider a non-final order and modify or retract it." *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So. 2d 744, 745 (Fla. 4th DCA 1999) (holding that bright line rule limiting the trial court's ability to grant a motion to dissolve is inconsistent with these two "well-established principles" about the trial court's powers).

Limitations placed on a trial court's ability to modify or dissolve an injunction can frequently result in injustice. In fact, this case offers a clear example of such injustice. Both the Stay Panel and the Panel agreed that in certain respects the trial court's Temporary Injunction unquestionably went too far by ordering relief that was never sought by MMB and by including non-specific, vague language. *See, e.g.*, App. Op. at 2-3. As a result of these errors, women were improperly barred from accessing needed medical services and Planned Parenthood lost revenue while it awaited the Stay Panel's decision. Planned Parenthood should not have been required to brief issues before an appellate panel

and wait to secure a stay on appeal. Had Planned Parenthood's evidence offered in support of its Post-Hearing motion been considered, without also having to show changed circumstances, the trial court could have corrected these clear errors. *Cf. Riverside Bank v. Maxa*, 45 So. 2d 678, 680-81 (Fla. 1950) (citing *Seaboard Air Line R. Co. v. Tampa So. R. Co.*, 134 So. 529, 533 (1931), which explicitly encouraged parties faced with vague injunction orders to move for modification of those orders).[4] If a properly informed trial court judge had been empowered to act expeditiously and efficiently, considerable harm and expense could have been avoided. To protect against these harms and preserve the discretion of the trial courts to recognize and correct their own errors, this Court ought to side with the Third and Fourth Districts and hold that changed circumstances are not required.

B. This Court will likely hold that the temporary injunction barring surgical abortions was wrongly entered.

Planned Parenthood should succeed on the merits. This Court, like the unanimous Stay Panel, is likely to find both that the Kissimmee health center is not an outpatient surgical center and that surgical abortions are ancillary and incidental to a physician's practice of medicine.

In Florida, "a reasonable, unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary

[4] On other grounds, this Court declined in *Warren Fin., Inc. v. Barnett Bank of Jacksonville*, 552 So. 2d 194 (Fla. 1989) to follow *Riverside Bank.*

meaning of its terms." *Barrett v. Leiher*, 355 So. 2d 222, 225 (Fla. 2d DCA 1978). Any ordinary meaning of the term "outpatient surgical center" does not reasonably describe the Kissimmee health center. The overwhelming majority of the services that the center offers – contraception, breast and cervical cancer screening, HIV testing and counseling, screening and treatment for other STDs, and blood pressure screening – have nothing whatsoever to do with surgery.

Florida has a statutory definition that was in effect when the Declarations were drafted. The statute makes clear that the Kissimmee health center is not an outpatient surgical center. *See Barrett*, 355 So. 2d at 225 (when relevant terms are not defined within restrictive covenants, courts may turn to outside sources to determine their meanings); *Winn-Dixie Stores, Inc. v. 99 Cent Stuff- Trail Plaza, LLC*, 811 So. 2d 719, 722 (Fla. 3d DCA 2002) (same); *see also Reform Party of Fla. v. Black*, 885 So. 2d 303, 312 (Fla. 2004) (turning first to Florida legal authority, including statutes, to define a term, before referencing dictionary definitions); *State v. Debaun*, 129 So. 3d 1089, 1092 (Fla. DCA 3d 2013).

In particular, Section 395.002(3), Fla. Stat. (2013), defines ambulatory or outpatient surgical center as "a facility the primary purpose of which is to provide elective surgical care." The Kissimmee health center clearly does not have a "primary purpose" of providing elective surgical care. In fact, Planned Parenthood provided uncontested evidence that surgical abortions and other procedures that

might arguably be characterized as outpatient surgeries constitute a very small percentage of the total number of medical services that it provides. Even if provision of surgical abortions were the primary purpose for which Planned Parenthood opened the Kissimmee health center, it still would not be an ambulatory surgical center under Florida law because abortion clinics are expressly excluded from that definition. *See* § 395.002(3), Fla. Stat. (2013) ("However, a facility existing for the primary purpose of performing terminations of pregnancy . . . shall not be construed to be an ambulatory surgical center . . . ."). This Court is therefore likely to conclude that the Kissimmee health center simply is not an outpatient surgical center.

Even if this Court holds otherwise, Planned Parenthood will nevertheless succeed on the merits. This is because, alternatively, the Court will likely hold that all outpatient surgeries performed at the Kissimmee health center are ancillary and incidental to the medical services otherwise provided by Planned Parenthood's physicians. Under the Declarations, provision of ancillary and incidental procedures cannot result in a violation. Indeed, the record in this case provides uncontested evidence that outpatient surgeries constitute a very small percentage of the medical services provided. Planned Parenthood is thus likely to ultimately succeed on the merits.

III. Planned Parenthood is likely to, and already has, suffered irremediable harm in the absence of a stay of the mandate.

Planned Parenthood and the Florida women who rely on its medical services have already suffered harm from the mandate going into effect. They will quite likely suffer more harm the longer the Kissimmee health center is unable to provide surgical abortions. Not only will Planned Parenthood's patients be denied access to constitutionally protected medical procedures, but Planned Parenthood will also suffer harm to its reputation, monetary loss, and be precluded from fulfilling its mission to provide comprehensive reproductive healthcare.

Planned Parenthood will suffer reputational harm if it is unable to provide surgical abortions. These procedures, albeit comparatively small in number, are an important part of the comprehensive healthcare services that women in Florida and across the country routinely rely on Planned Parenthood health centers to provide. Medication abortions are effective only in the first nine weeks of pregnancy. For virtually all women who are beyond that initial nine weeks, yet desire to exercise their constitutional right to choose abortion, surgical abortion is their only available option. Precluding the Kissimmee health center from providing these procedures precludes it from properly serving patients who seek its care. It thus impairs Planned Parenthood's ability to maintain its reputation for providing comprehensive and competent care. Indeed, the Kissimmee health center has been providing surgical abortions since the Stay Panel issued its order in September

2014. Planned Parenthood's patients have come to rely on being able to seek these procedures, if necessary, at this health center. The Kissimmee health center's sudden inability to provide these services will gravely harm those patients. Planned Parenthood's reputation will suffer as well, along with the reputations of other affiliated Planned Parenthood health centers across the state and the country.

Planned Parenthood will also suffer monetary harm without a stay. While surgical abortions comprise only a small percentage of the total medical services provided at the Kissimmee health center, the inability to offer these procedures whenever necessary will nevertheless result in Planned Parenthood losing patients to other providers. Revenue from any follow up visits and other associated services that may be requested from these patients will also be lost. Planned Parenthood may eventually have to seek another site for its Kissimmee health center in order to fulfill its mission of providing comprehensive health care. The significant time and money spent to locate, purchase, prepare, and open the current Kissimmee health center will be lost. These are all harms that cannot be later remediated.

In contrast, MMB Properties and the other owners and tenants in Oak Commons have experienced no harm as a result of the medical care rendered at Planned Parenthood's Kissimmee health center during the past year while the Stay Panel's order remained in effect.

CONCLUSION

Planned Parenthood accordingly asks that this Court hold that the appellate court erred in denying Planned Parenthood's Emergency Motion to Stay Issuance of the Mandate and that this Court enter a stay for the pendency of Planned Parenthood's appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 14, 2015 a true and correct copy of the foregoing Motion To Review Order Denying Motion To Stay has been e-filed with the Florida Courts E-Filing Portal which will serve a copy via electronic mail to:

Dennis R. O'Connor, Esq.
O'Connor & O'Connor, LLC
840 S. Denning Drive, Suite 200
Winter Park, FL 32789
doconnor@oconlaw.com

Maureen A. Arago, Esq.
The Arago Law Office
P.O. Box 452275
Kissimmee, FL 34745-2275
maureenarago@aragolaw.com

/s/ Donald E. Christopher
Donald E. Christopher

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of Fla. R. App. P. 9.210.

/s/ Donald E. Christopher
Donald E. Christopher

Composite Exhibit "A"

DECLARATION OF RESTRICTIONS

KNOW ALL MEN BY THESE PRESENTS, that AMERICAN MEDICORP DEVELOPMENT CO., a Delaware corporation, being the owner of real property located in Osceola County, Florida, and more particularly described as follows, to-wit:

SEE ATTACHED

makes the following Declaration of Restrictions covering the above described real property, specifying that this Declaration shall constitute a covenant running with the land and that this Declaration shall be binding upon the undersigned and upon all persons deraigning title through the undersigned. These restrictions, during their lifetime, shall be for the benefit of and limitation upon all present and future owners of the real property.

The property described herein shall not be used for the following activities without the prior written permission of AMERICAN MEDICORP DEVELOPMENT CO., a Delaware corporation, which shall be granted only in its sole and unfettered discretion, unless ancillary and incidental to a physician's practice of medicine:

1. An OutPatient Surgical Center.
2. An Emergency Medical Center.
3. A Diagnostic Imaging Center which includes the following radiographic testing: Fluoroscopy, Plane Film Radiography, Computerized Tomography (CT), Ultrasound, Radiation Therapy, Mamography and Breast Disgnostics, Nuclear Medicine Testing and Magnetic Resonance Imaging (MRI).

These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of thirty (30) years from the date these covenants are recorded, after which time they shall be extended automatically for successive periods of ten (10) years.

Invalidation of any one of these covenants by judgment or Court order in no wise shall affect any of the other provisions, which shall remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and

This instrument was prepared by:
DANIEL J. LEFEVRE, LAWYER
P.O. Box 70, Winter Park, Fla. 32790

COPY

seals on this the 7th day of October, 1986.

AMERICAN MEDICORP DEVELOPMENT CO.,
a Delaware corporation

ATTEST:

BY: Joan O. Kroger
Assistant Secretary

BY: Michael A. Hendricks
Michael A. Hendricks
Vice President

STATE OF KENTUCKY)
)
COUNTY OF JEFFERSON)

I HEREBY CERTIFY that on this day before me personally appeared Michael A. Hendricks and Joan O. Kroger respectively Vice President and Assistant Secretary of AMERICAN MEDICORP DEVELOPMENT CO., a Delaware corporation, to me known to be the individuals and officers described in and who executed the foregoing instrument and severally acknowledged its execution to be their free act and deed as such duly authorized officers; and that the official seal of the corporation is duly affixed and the instrument is the act and deed of the corporation.

WITNESS my signature and official seal at Louisville, County of Jefferson, State of Kentucky, on this the 7th day of October, 1986.

Dora A. Adwell
Notary Public, State of Kentucky

My Commission Expires:

DORA A. ADWELL
Notary Public, State at Large, KY
My commission expires June 25, 1990

COPY

LEGAL DESCRIPTIONS

PARCEL A:

Lots 29 and 30, according to the Plat of the Florida Land and Improvement Company's Addition to Kissimmee City, Osceola County, Florida, as recorded in Plat Book A, Page 24 of the Public Records of Osceola County, Florida.

PARCEL B:

From the Northeast corner of Lot 32, according to the Plat of the Florida Land and Improvement Company's Addition to Kissimmee City, Osceola County, Florida, as recorded in Plat Book A, Page 24 of the Public Records of Osceola County, Florida, run West along the North line of said Lot 32, 140.0 ft. to the Point of Beginning; run thence South, parallel to the East line of said Lot 32, 135.0 ft.; run thence East, parallel to the North line of said Lot 32, 130.0 ft; run thence South, parallel to the East line of said Lot 32, 425.13 ft. to a point 20.0 ft. North of the South line of said Lot 32; run thence Southwesterly, to a point on said South line lying 30.0 ft. West of the Southeast corner of said Lot 32; run thence West, along said South line, 600.20 ft. to the Southwest corner of Lot 31 of said Florida Land and Improvement Company's Addition; run thence North, 630.0 ft. to the Northwest corner of said Lot 31; run thence East, 489.37 ft. to the Point of Beginning.

FILED, RECORDED AND
RECORD VERIFIED
MEL WILLS, JR. CLK CIR CT
OSCEOLA COUNTY
BY _____ D.C.

COPY

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DEC OCT 21 PM 2:37

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

THE STATE OF FLORIDA
COUNTY OF OSCEOLA

KNOW ALL MEN BY THESE PRESENTS: THAT

This Declaration ("Declaration"), made this 3rd day of November, 1988, by AMERICAN MEDICORP DEVELOPMENT COMPANY, a Delaware corporation ("Declarant").

W I T N E S S E T H:

WHEREAS, Declarant is the developer and (along with those certain Owners who have joined in the execution of this Declaration) owner of approximately 11.367 acres of real property described in Exhibit "A" attached hereto, such real property being hereinafter called and referred to as the ("Property"); and

WHEREAS, the Property has previously been submitted by Declarant to that certain Declaration of Restrictions ("Use Restrictions") dated October 7, 1986, and recorded in O.R. Book 819, Page 016, Public Records of Osceola County, Florida, to which this instrument is intended to be supplemental and complementary, and with which this instrument shall be construed in concordance; and

WHEREAS, Declarant desires to sell and/or develop the Property for medical office, commercial and other medically-related uses approved by Declarant and consistent with the Use Restrictions, and to provide and adopt a uniform plan of covenants, easements, restrictions, conditions, reservations, charges and liens designed to govern, control and preserve the values and amenities of the Property for the better development, improvement, sale and enjoyment of the Property for medical office, commercial and other medically-related uses approved by Declarant; and

WHEREAS, Declarant desires to provide for the maintenance of drainage works, retention/detention ponds, and entryway gates, and to this end desires to subject the Property to the covenants, easements, conditions, restrictions, reservations, charges and liens hereinafter set forth, each and all of which is and are for the benefit of the Property and each Owner (hereinafter defined) of any part thereof; and

WHEREAS, Declarant has deemed it desirable, for the efficient preservation of the values and amenities in the Property, to create an Association (hereinafter defined) to which shall be delegated and assigned the powers of maintaining, administering and enforcing these covenants and restrictions, and levying,

collecting and disbursing the assessments and charges hereinafter created; and

WHEREAS, Declarant will incorporate the Oak Commons Medical Park Property Owners' Association, Inc., a non-profit organization created under the laws of the State of Florida, and will establish the By-Laws by which said Association shall be governed through its Board of Directors, for the purpose of exercising the functions aforesaid;

NOW, THEREFORE, Declarant hereby declares that the Property shall be developed, improved, held, used, sold, leased and conveyed in accordance with and subject to the following plan of development, easements, restrictions, reservations, covenants, conditions and stipulations, all of which are hereby adopted for and placed upon the Property and shall run with the Property and be binding on all persons now and at any time hereafter, having or claiming any right, title or interest in the Property (including a lessee's interest) or any part thereof, their heirs, executors, administrators, successors and assigns, regardless of the source of or the manner in which any such right, title or interest is or may be acquired, and shall inure to the benefit of each Owner of any part of the Property.

ARTICLE I

DEFINITIONS

Section 1 Wherever used in this Declaration, the following terms shall have the following meanings:

"ARC" shall mean and refer to the Architectural Review Committee.

"Association" shall mean and refer to Oak Commons Medical Park Property Owners' Association, Inc., its successors and assigns.

"Board" shall mean and refer to the four (4) member Board of Directors of the Association.

"Common Area" shall mean and refer to Tract "A" of the Property, together with the entryway gate areas at each end of Oak Commons Boulevard, as set forth on the plat of the Property filed in the Public Records of Osceola County, Florida.

"Declarant" shall mean American Medicorp Development Company and its designated successors and assigns. No successor or assignee of Declarant shall have any of the rights or obligations of Declarant hereunder unless such rights and obligations are specifically set forth in the instrument of succession or assignment or unless such rights pass by operation of law.

"Landscaping Activities" shall mean and refer to the planting of trees, shrubs and small scale foliage or the laying of turf or grass.

"Lot" shall mean a platted lot or a defined parcel within the Property owned by an Owner.

"Owner" shall mean and refer to the legal title holder of record of any Lot in the Property, whether one or more persons or entities, and any person or entity holding legal title as trustee, but excluding those having such interest merely as security for the performance of an obligation. The term "Owner" as used in this Declaration is further defined to include and refer to the heirs, executors, personal representatives, administrators, devisees and assigns of any Owner, and all other persons, firms or corporations acquiring or succeeding to the title of the Owner by sale, grant, will, foreclosure, execution, or by any legal process, or by operation of law or in any other legal manner. The term Owner does not include the Declarant.

"Plans" shall mean the Plans as described in Section 1 of Article IV hereof.

"Property" shall mean the property described in Exhibit "A" together with any additional property hereafter subjected to this Declaration by Declarant by the recording of an amendment to such effect to this Declaration.

"Public Roadway" shall mean a paved roadway constructed to provide vehicular access to more than one Lot that is constructed on a right-of-way dedicated or to be dedicated to public use.

"Restrictions" shall mean and refer to those certain covenants, conditions, reservations and restrictions hereinafter set forth.

"Signs" shall mean any structure, component, surface, fabric, flag, banner, pennant, device or display exposed to public view which bears lettered, pictorial or sculptured matter (including forms shaped to resemble any human, animal or products) designed to convey information or images visually. The term signs shall include and consist of all structural members. A sign shall be construed to be a display surface or device containing organized and related elements composed to form a single unit. In circumstances where matter is displayed in a random or unconnected manner without organized relationship of the components, each component shall be considered a single sign.

"Use Restrictions" shall mean those restrictions upon the use of the Property set forth in that certain Declaration of Restrictions dated October 7, 1986, and recorded in O.R. Book 819, Page 016, Public Records of Osceola County, Florida, to

which this Declaration of Covenants, Conditions and Restrictions is supplemental, complementary, and concordant.

ARTICLE II

OAK COMMONS MEDICAL PARK PROPERTY OWNERS' ASSOCIATION, INC.

At such time as one hundred percent (100%) of the Property (exclusive of those portions of the Property dedicated, reserved or conveyed for streets, boulevards, drainage areas, and other public purposes) has been conveyed to parties other than Declarant (or any subsidiary or affiliated corporations of Declarant), or at such earlier date as Declarant may elect, Declarant shall establish the Association. Declarant shall have the right to assign all of its right, duties and obligations hereunder to the Association and the Association shall in such event accept such title to any and all portions of the Common Area together with other reserved or public areas and easements. Upon such establishment of the Association, the terms and provisions of this Article II shall be applicable.

Section 1. Membership. Every Owner shall be a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of a Lot.

Section 2. Voting Rights. The Association shall have two classes of voting membership:

(a) Class A members shall be all Owners, with the exception of the Declarant, and shall be entitled to one vote for each Lot owned. When more than one person holds an interest in any Lot, the vote for such Lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any single Lot. Any Owner who is delinquent in the payment of any assessment as hereinafter set forth shall not be entitled to vote during any period in which such assessments are delinquent.

(b) The Class B member shall be the Declarant and shall be entitled to a number of votes equal to the number of Class A members plus one. The Declarant's Class B membership shall continue until the Declarant no longer owns any Lots, and at such time its Class B membership shall terminate.

ARTICLE III

COVENANT FOR MAINTENANCE ASSESSMENTS

Section 1. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the

purpose of the improvement and maintenance of the Common Area, and for services and facilities devoted to this purpose, including, but not limited to, maintenance of entryway gates, entry markers, retention/detention ponds, and landscape areas related thereto, and the enforcement of restrictions upon the use of land within the Property.

Section 2. **Creation of the Lien and Personal Obligation of Assessments.** Each Owner of any Lot or any part thereof, by acceptance of a deed therefor, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association annual assessments or charges, such assessments to be established and collected as hereinafter provided.

Section 3. **Annual Assessments.** In order to provide a fund to be applied for the purposes herein specified, Declarant does hereby subject the Property to an annual assessment, which assessment shall not commence until the establishment of the Association and shall be allocated among the Lots comprising the Property in the following manner: (i) a determination shall be made as to whether all Lots comprising the Property are at the time of the assessment deriving a benefit from each Common Area facility whose maintenance and upkeep is funded by the assessments, and if any Lot or Lots are not so deriving a benefit from any Common Area facility, such Lot or Lots shall not be assessed for the maintenance and upkeep of such Common Area facility; (ii) all Lots deriving benefits from the Common Area facilities shall be assessed their pro rata portion on a per-square-foot basis. For instance, a Lot that does not at the time of the assessment derive a benefit from the stormwater drainage and retention system of the Property shall not be assessed for the maintenance and upkeep of the stormwater drainage and retention system, but shall be assessed for its pro rata share of the costs of maintenance and upkeep for all other Common Area facilities from which it derives a benefit. The amount and timing for payment of such annual assessment shall be fixed by the affirmative vote of members of the Association having votes in the Association, it being intended that the Association will for each year fix the annual assessment at an amount estimated by the Association to be required in order that the funds produced thereby will approximate the costs and expenditures of such funds for the purposes herein specified.

Section 4. **Special Assessments.** In addition to the annual assessments authorized above, the Association may levy, in any assessment year, a special assessment applicable to that year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of capital improvements upon the Common Area, including fixtures and personal property related thereto, provided that any such assessment shall have the assent of 2/3 of votes of each class of members who are voting in person or by proxy at a meeting duly called for this purpose. Special assessments levied pursuant to

this Section shall be levied and assessed only upon Lots that at the time of the special assessment are deriving a benefit from the Common Area facilities for which the special assessment is levied.

Section 5. Effect of Non-Payment of Assessments--The Personal Obligation of the Owner; the Lien; Remedies of Association. If the assessments are not paid on the date when due and payable as specified in Section 3 hereof, then such assessment shall be delinquent and shall, together with interest thereon, attorney's fees, court costs and other costs of collection thereof, become a continuing lien on the Lot as well as the personal obligation of the then Owner. If the assessment is not paid within thirty (30) days after the due date, the assessment shall bear interest from the due date at the maximum rate permitted by Florida law, and the Association may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien against the Lot in the manner of foreclosing materialmen's liens under applicable Florida Law. No Owner may waive or otherwise avoid liability for the assessments provided for herein.

Section 6. Liens to Secure Assessments--Subordination of Lien to Mortgages. The annual and special assessments shall each constitute and be secured by a separate and valid and subsisting lien, hereby created and fixed, and shall exist upon and against each Lot and all improvements thereon, for the benefit of the Association and all Owners and shall be prior and superior to all other liens, except that the same shall be subordinate and inferior to (a) all liens for taxes or special assessments levied by County and State Governments or any political subdivision or special district thereon and (b) all liens, including but not limited to mortgages and other security instruments, that secure any loan for any part of the purchase price of the Lot and/or improvements placed thereon filed for record prior to the date when such charges or assessments become due and payable. No foreclosure shall free any Lot from the liens securing assessments thereafter becoming due and payable, nor shall the personal obligations of the Owner foreclosed be extinguished by any foreclosure.

ARTICLE IV

GENERAL USE RESTRICTIONS

Section 1. ARC Approval Required. Prior to the commencement of any construction, reconstruction, alteration or addition to or of any building, improvement or other structure upon or to any Lot (whether initially or by way of addition to another building or structure), two complete sets of final drawings and specifications for the building or other structure or improvement, as hereinafter set forth (the "Plans"), shall be submitted to the ARC for its written approval; the Plans shall be

delivered to the ARC, c/o American Medicorp Development Company, 500 West Main Street, P. O. Box 1438, Louisville, Kentucky 40201-1438, Attn: Michael A. Hendricks. In reviewing the submitted Plans the ARC may consider and take into account the amount of gross leaseable building area proposed to be built by the Owner on the Lot, and may reject the Plans because the ARC considers the amount proposed to be excessive for the Lot. In addition to final drawings and specifications, the Plans shall consist of: (1) site plan showing the location of all contemplated buildings or other structures, parking areas, driveways, pedestrian walkways, service areas, loading docks (if any), drainage system, and grading plans, if necessary, as required by the ARC, (2) exterior elevations and building sections showing the design, including front, rear and side elevations together with a complete description of materials (outside walls of all buildings shall be of materials approved by the ARC and shall be selected from the following list: (i) stone, (ii) brick, (iii) pre-finished metal panels, (iv) glass, (v) concrete-precast or cast-in-place, or (vi) such other materials as the ARC may find acceptable), colors, antennas and micro-wave dishes, (3) clearing, landscaping and sprinkler system plans, (4) an exterior lighting plan, graphics and sign specifications and (5) a calculation of the gross leaseable area contained within the improvement to be constructed. For purposes of this calculation gross leaseable area shall mean gross building square footage less common areas, elevator cores, restrooms, stairwells, utility areas, and similar non-leaseable areas. The Plans shall be submitted in writing over the signature of the Owner or tenant (or his authorized agent) of the Lot and shall be accompanied by the request of such Owner, tenant or agent specifying for which part of such Plans approval is sought. Nothing herein shall be construed to require the submission of Plans for the alteration of the interior of an existing building unless such planned interior alteration will substantially change the primary use of the Lot or any portion thereof or create a greater demand for parking. The ARC shall within thirty (30) days after receipt of the Plans advise the submitting party of its approval or disapproval. In the event the ARC does not advise the party submitting the Plans by written notice given within such 30-day period of the disapproval or objection to certain features of the Plans as submitted, the approval of the ARC shall be conclusively presumed to have been given, subject, however, to the Restrictions contained herein. The aforesaid 30-day period for the ARC's review of the Plans shall not commence to run until two complete sets of all the above-described drawings, plans and specifications comprising the Plans have been received by the ARC in final form. In the event the ARC shall object to or disapprove all or any portion of the Plans, the party submitting the Plans shall cause the Plans to be modified to the extent required by the ARC and resubmit revised Plans to the ARC for approval. No construction of any kind (including clearing or grading) shall be commenced upon any Lot without the ARC's prior written approval of the Plans as set forth above. All buildings or other structures built on the

Property shall be constructed in accordance with the Plans as the same shall be finally approved by the ARC. The decision of the ARC shall be conclusive in the absence of bad faith. The ARC shall not be liable to any person under any theory or under any circumstances including, without limitation, any liability based on soundness of construction, adequacy of drawings and specifications, or otherwise by reason of mistake in judgment, negligence or nonfeasance arising out of or in connection with the approval or disapproval or failure to approve any such Plans. Every person who submits Plans to Declarant or the ARC for approval agrees, by submission of such Plans, and every Owner and tenant of any Lot agrees, by acquiring title thereto or interest therein, that it will not bring any action, proceeding or suit against Declarant or the ARC to recover any such damages. In case of conflict between the review of the Plans and the Restrictions herein contained, these Restrictions shall govern the rights and obligations of the parties. Declarant's or the ARC's approval of any building plans, specifications, Lot or landscape plans or elevations, or any other approvals or consents given by Declarant or the ARC pursuant hereto or otherwise, is given solely to protect the aesthetics of the Property and shall not be deemed a warranty, representation or covenant that such building, improvements, landscaping or other action taken pursuant thereto or in reliance thereon complies with, or is not in violation of any applicable laws, rules or regulations, and Declarant and the ARC are hereby expressly released and relieved of any and all liability in connection therewith. In the event construction does not commence on a project for which Plans have been approved within one (1) year of such approval, it shall be necessary for the Owner to submit the Plans to the ARC for a renewal of this approval.

Section 2. Completion of Construction. After commencement of Construction of any improvements upon a Lot, the Owner or tenant shall diligently prosecute the work thereon, to the end that the improvements shall not remain in a partly finished condition any longer than reasonably necessary for completion thereof. The Owner or tenant of the Lot on which improvements are being constructed shall at all times keep public and private streets contiguous to said Lot free from any dirt, garbage, trash or other debris that might be occasioned by construction of the improvement.

Section 3. Excavation. No clearing or excavation shall be made except in connection with the construction, maintenance or repair of any improvements located on a Lot and in accordance with an approved site plan. Upon completion thereof, exposed openings shall be leveled, graded and seeded, as provided in the Plans for landscaping required by Section 13 of this Article IV.

Section 4. Subdivision of Property. No Lot shall be subdivided or replatted without the prior written consent of

Declarant. If subdivided, said subparcels shall be governed by these Restrictions.

Section 5. Minimum Building Setback Lines, Buffers and Standards.

(a) General:

No part of any structure of any kind constructed upon the Property shall be placed within any right-of-way, easement or setback line other than as herein provided. The following structures and improvements are specifically excluded from these setback provisions:

(1) Roof overhang subject to the specific approval of ARC in writing;

(2) Steps and walks;

(3) Paving and associated curbing, except that vehicle parking areas shall not be permitted within five (5) feet of any Lot property line abutting any street right-of-way;

(4) Landscaping;

(5) Planters, not to exceed two and one-half (2.5) feet in height.

(6) Signs subject to the specific written approval of the ARC.

(b) Side and Rear Set Backs:

Setback from interior (side) and rear property lines - the setback line is established as ten (10) feet from the rear property line of the Lot and from an interior property line of a Lot, except as otherwise provided in Sub-section (d) hereof.

(c) Street Set Backs:

The setback from street right-of-way is established as twenty (20) feet from all street right-of-way lines or proposed street right-of-way lines, whether such street right-of-way lines run along front, rear or side.

(d) Other:

(i) In the case of a Lot that is subject to governmental restrictions that are less stringent than the restrictions set forth in this Section, the ARC shall determine the required building setback lines with respect thereto in a

manner that the ARC deems to be consistent with the intentions and purposes of this Declaration, and the decision of the ARC shall be final.

(e) Minimum Open Space:

(1) Each Lot shall have no more than sixty (60%) percent of the total land area covered with buildings, storage areas, driveways and parking surface.

(2) The following minimum open areas surrounding the building, between facade and drives, parking or other paved areas apply:

(A) Front areas along the primary building entrance facade: 20 feet.

(B) Side areas along secondary building facades: 16 feet.

These open areas shall be landscaped subject to the approval of the ARC.

Section 6. Use Restrictions.

a. The Property is intended to be a medical office park and for uses compatible therewith and consistent with the Use Restrictions. All other land uses permitted under the City of Kissimmee zoning classifications for the Property are allowed provided the uses do not detract from the primary purpose of the Property as a medical office park, and further provided that, so long as Declarant holds title to any Lot in the Property, such other land use shall require (and can only occur with) the prior written approval of Declarant.

b No use shall be permitted that is offensive, noxious or illegal by reason of light emissions, vibrations, odor, fumes or gas, dust, dirt or flying ash, smoke, noise or sound that is objectionable because of its volume, duration, intermittent beat, frequency or shrillness or pollution, or that is hazardous by reason of excessive danger of fire or explosion, or that violates any law or ordinance. In addition, no activity or use shall be permitted on or with respect to any part of the Property that is obnoxious to or out of harmony with other developments on the Property.

Section 7. Parking. Adequate automobile parking spaces including spaces for employee and customer/visitor parking, shall, consistent with City of Kissimmee approvals and code, be provided on-Lot and all parking areas shall be internally drained, curbed, and paved with a hard dust-free surface. All

paving materials other than asphalt shall be subject to the prior written approval of Declarant.

Section 8. Loading/Unloading. Delivery vehicle loading and unloading shall occur on-Lot only; on-street delivery vehicle loading and unloading is not permitted.

Section 9. Outside Storage or Operations. No outside storage or operations of any kind shall be permitted (except during the period of construction of improvements but subject to Section 2 of this Article) unless such activity is visually screened from public view in a manner that is architecturally compatible and is approved by the ARC by its approval of the Plans. No boats, trailers, campers, horse trailers, buses, inoperative vehicles or associated equipment of a recreational or commercial nature shall be parked or stored permanently or semi-permanently on any Lot unless properly screened from public view in a manner approved by the ARC by its approval of the Plans. Water towers, cooling towers, communication towers, storage tanks (including, but not limited to, those used for storage of water or propane gas), and other structures or equipment shall be architecturally compatible or effectively shielded from public view. All utility service system components, air conditioning equipment and trash pick-up stations shall be integrated with the building or screened by a fence, wall of compatible materials or landscaping and shall not be visible above such screening from any street. The method of garbage and refuse storage must be depicted on the Plans submitted to Declarant for approval. No mail boxes shall be permitted on any Lot except within the building.

Section 10. Mechanical Equipment. All roof-top mechanical equipment shall be screened from the view of adjacent streets and buildings with material compatible with the building architecture or by the use of a parapet wall. Ground-mounted equipment such as power transformers and air conditioning equipment shall be screened from public view by fencing or landscaping, all of which must be approved in writing by the ARC with its approval of the Plans.

Section 11. Grading and Drainage. Declarant has established a master drainage plan for the Property approved by the City of Kissimmee. Construction upon any Lot shall be performed in a manner not to alter, modify, or diminish the effectiveness of the master drainage plan for such Lot or any other Lots in the Property. Care shall be taken not to cause damage to adjacent properties during construction or after completion of improvements on any Lot. Grading of the Lot shall be done with minimum damage to existing trees on such Lot. It shall be the responsibility of the Owner or tenant to provide for the maintenance of all on Lot drainage facilities and structures, except as otherwise expressly provided for herein. The Owner or tenant agrees to indemnify, defend and hold harmless Declarant

and the Association from and against any liabilities, claims, damages, costs (including court costs and attorneys' fees) or loss occasioned by injury arising from, relating to or because of the drainage facilities.

Section 12. Underground Utilities. Except as hereinafter specified, no pipe, conduit, cable, or line for water, gas, sewage, drainage, steam, electricity or any other energy or service shall be installed or maintained (outside of any building) by any Owner above the surface of the ground within any Lots. Notwithstanding the foregoing, Declarant, but no other Owner, may grant easements for and cause temporary and permanent overhead electricity lines and supporting structures to be installed on the Property solely for the purpose of providing service to same.

Section 13. Landscaping Activities.

a. The entire area of every Lot containing a building shall be landscaped in accordance with the unrecorded Master Landscape Plan prepared by Declarant, except for areas covered by such buildings and for paved areas. The natural beauty of the Property will be enhanced by the preservation of as many native trees as reasonably possible, especially along Lot boundaries, parking and landscaped areas. The landscape plan submitted to Declarant for approval as part of the Plans shall indicate such things as the preservation of native trees, the planting of trees, shrubs and grass and installation of earth berms and screens. Any changes in the landscaping must have the prior written approval of Declarant.

b. The Owner or tenant of any Lot or any portion thereof shall at all times keep on-Lot landscaping in a neat and orderly condition and shall mow lawns and trim hedges, water when needed, and remove weeds from planted areas. Should any Owner or tenant fail to remedy any deficiency in the maintenance of landscaping within thirty (30) days after written notice thereof, Declarant or the Association hereby expressly reserves the right, privilege and license to make any and all corrections or improvements in landscape maintenance at the sole cost and expense of such Owner or tenant. Such cost and expense together with interest accrued thereon at the highest rate allowed by law from the date of disbursement to the date of payment shall be paid to Declarant or the Association upon written demand. If not paid within fifteen (15) days after demand, then such cost, interest and expense shall become a lien upon the Lot upon the recordation by Declarant or the Association or its agent of a claim of lien setting forth the amount due, the description of the Lot intended to be encumbered and referring to the terms of this Section. Said lien shall secure all cost of collection, including, without limitation, court costs and fees upon appeal. Said lien may be foreclosed in the same manner as a mortgage upon real estate, or Declarant, without waiving the right of

foreclosure, may pursue collection directly against the affected Owner or tenant. Notwithstanding the foregoing, said lien shall be prior and superior to all other liens, except that the same shall be subordinate and inferior to (a) all liens for taxes or special assessments levied by County and State Governments or any political subdivision or special district thereof and (b) all liens, including but not limited to, mortgages and other security instruments that secure any loan for any part of the purchase price of the Lot and/or improvements placed thereon filed for record prior to the date when such charges or assessments become due and payable. No foreclosure shall free any Lot form the liens securing assessments thereafter becoming due and payable, nor shall the personal obligation of the Owner foreclosed by extinguished by any foreclosure.

c. The Owner or tenant of the Lot or any portion thereof shall be responsible for the installation of all landscaping and irrigation in accordance with Section 13. This landscaping shall conform to the Plans submitted to and approved by Declarant (or the ARC).

d. Landscaping shall comply with the requirements of the Master Landscape, Signage, and Lighting Plan established by Declarant.

Section 14. Exterior Illumination. All exterior illumination shall comply with the requirements of the Master Landscape, Signage, and Lighting Plan established by Declarant.

Section 15. Signage. All signage shall comply with the requirements of the Master Landscape, Signage, and Lighting Plan established by Declarant.

Section 16. Temporary Structures. No temporary building or structure other than construction offices and structures for related purposes during the construction period shall be installed or maintained on any Lot without the prior written approval of the ARC. All temporary structures used for construction purposes must receive approval by the ARC with regard to location and appearance and must be removed promptly upon completion of construction. In no event may any such temporary structures be located or stored on any Public Roadway.

Section 17. ARC Deviations. The ARC or its assignee, at its sole discretion, is hereby authorized and empowered to grant reasonable waivers and variances from the provisions of the Restrictions (including set back and floor area ratio limitations) and the Master Landscape, Signage, and Lighting Plan or any portion thereof; provided, however, that said waivers and variances shall not materially injure any of the Property. Such approvals must be granted in writing and no variance shall constitute a waiver of any provision of the Restrictions or Plan as applied to any other person or property, nor shall the

granting of a waiver or variance to one Owner entitle another Owner to receive a similar waiver or variance.

Section 18. Access. Access to each Lot shall be limited to not more than two (2) points unless the Owner receives the prior written approval of the ARC.

Section 19. Replats and Rezoning. No Owner shall plat or replat any portion of the Property, or petition for consent to or request rezoning of any portion of the Property unless agreed to in writing by the Declarant.

Section 20. Sidewalks. Concurrent with the construction of facilities of a given Lot, the Owner shall construct paved sidewalks within the roadside pedestrian easement or adjoining dedicated road rights-of-way throughout the full length of the Owner's frontage abutting the roadways. Sidewalks shall be constructed of concrete (non-colored) and given a broom finish with tooled control joints. Sidewalks shall be four (4) feet in width. The Owner's architect or engineer may determine the alignment of sidewalks within the Owner's area of responsibility so long as the sidewalk does not encroach any closer than four (4) feet from the back of public roadway, curbing, and proper alignment connections are made at the Owner's side property lines to insure alignment continuity with adjoining Lots. Suggested sidewalk layout will be provided by the Declarant prior to the start of the Owner's preliminary site planning efforts. The Declarant will assist in the coordination of sidewalk-layout continuity with adjoining Lots. The Owner shall maintain and repair all sidewalks at all times.

Section 21. Antennas. No antennas for receipt or transmission of television signals or any other form of electromagnetic radiation shall be erected, used or maintained on any Lot without the prior written approval of Declarant.

ARTICLE V

ARCHITECTURAL REVIEW COMMITTEE

The ARC shall be composed of three (3) individuals designated by Declarant. The members of the ARC shall be appointed by Declarant for a one-year term; Declarant may reappoint an individual for any number of one-year terms. One member of the ARC shall be an Owner of a Lot (other than Declarant). Declarant shall have the right to remove the members appointed by it any time and to appoint new members to the ARC in the event of removal, death, incapacity or resignation of a member appointed to it. Declarant may assign its right to appoint the ARC to the members of the Board of Directors of the Association, and the ARC shall have the right to assign all of its duties and rights hereunder to the Board of the Association at any time. Any

action by the ARC shall require the approval of at least two members of same. Until another address for the ARC is placed upon public record in Osceola County, Florida, by Declarant or the ARC, all Plans, notices or other materials to be sent to Declarant shall be addressed to American Medicorp Development Company, 500 West Main Street, P. O. Box 1438, Louisville, Kentucky 40201-1438, Attn: Michael A. Hendricks.

ARTICLE VI

GENERAL PROVISIONS

Section 1. Maintenance. The Owner or tenant of any Lot shall have the duty of and responsibility for keeping the Lot, premises, building, improvements, appurtenances and landscaping in a well-maintained, safe, clean and attractive condition at all times and comply in all respects with all government, health, fire and police requirements and regulations and shall remove at its own expense any rubbish that may accumulate on its Lot or any part thereof. Without limiting the generality of the foregoing, in the event of damage to any improvements on any Lot or any Lot itself as a result of condemnation, casualty or other occurrence, the Owner and tenant, if any, of such Lot shall immediately clean such Lot and, if appropriate, raze the improvements on such Lot damaged by such occurrence. If, in the opinion of Declarant, or the ARC on behalf of the Association, any such Owner or tenant is failing in this duty and responsibility, then Declarant or the ARC on behalf of the Association may elect to give notice of such fact to such Owner or tenant which shall, within ten (10) days of such notice, undertake the care and maintenance required to restore said Owner's or tenant's Lot to a well-maintained, safe, clean and attractive condition. Should any such Owner or tenant fail to fulfill this duty and responsibility or any other of the aforesaid specifications and requirements after such notice, Declarant or the ARC on behalf of the Association shall have the right and power to enter upon the Lot and perform such care and maintenance or perform such acts necessary to cause compliance with the aforesaid specifications and requirements, and the Owner or tenant shall be liable for the cost thereof. Said cost shall bear interest from date of disbursement until paid at the highest rate allowed by law and shall be paid by such Owner or tenant to Declarant within fifteen (15) days after receipt of notice of the amount due. If such Owner or tenant shall fail to reimburse the entity performing the work or Declarant, the amount of such charge and interest thereon shall constitute a lien upon the Lot enforceable as any other lien upon the recordation by Declarant or its agent of a claim of lien setting forth the amount due, a description of the Lot intended to be encumbered and referring to the terms of this Section. Said lien shall also secure all cost of collection, including, without limitation, court costs and attorneys' fees (including costs and fees upon appeal). Said lien may be foreclosed in the same manner as a mortgage upon real

estate, or Declarant, without waiving the right of foreclosure, may pursue collection directly against the affected Owner or tenant. Notwithstanding the foregoing, said lien shall be prior and superior to all other liens, except that the same shall be subordinate and inferior to (a) all liens for taxes or special assessments levied by County or State Governments or any political subdivision or special district thereof and (b) all liens, including but not limited to mortgages and other security instruments, that secure any loan for any part of the purchase price of the Lot and/or improvements placed thereon filed for record prior to the date when such charges or assessments become due and payable. No foreclosure shall free any Lot from the liens securing assessments thereafter becoming due and payable, nor shall the personal obligation of the Owner foreclosed be extinguished by any foreclosure.

Section 2. **Duration.** These Restrictions shall remain in full force and effect until January 1, 2009, and thereafter shall, as then in force, be extended automatically and without further notice, and without limitation, for successive periods of five (5) years each, unless modified or terminated in the manner set forth in Article VII, Section 2 hereof.

Section 3. **Modification or Termination.**

a. These Restrictions may be modified at any time in any particular or terminated in their entirety by the recording in the Public Records of Osceola County, Florida, of an instrument modifying or terminating these Restrictions, signed by Owners representing two-thirds (2/3) of the total number of Lots in the property; provided, however, that so long as Declarant owns any part of the Property, no such modification or termination shall be effective without the written approval of Declarant. The proposed amendment may be instituted by Declarant, the Association once activated, or by petition signed by fifteen (15%) per cent of the Owners then encompassed by this Declaration. A written copy of the proposed amendment shall be furnished to each Owner at least thirty (30) days but not more than one hundred twenty (120) days prior to the designated meeting to discuss such particular amendment. Such notification shall contain the time and place of said meeting. The recorded amendment shall contain a recitation that sufficient notice was given as above set forth and said recitation shall be conclusive as to all parties and all parties of any nature whatsoever shall have the full right to rely upon said recitation in such recorded amendment.

b. Declarant reserves and shall have the sole right (i) to amend these Restrictions for the purpose of curing any ambiguity in or any inconsistency between the provisions contained herein; (ii) to include in any contract or deed or other instrument hereafter made any additional covenants and restrictions applicable to the affected land or Lot that do not

lower standards of these Restrictions; and (iii) to release any Lots from any part of these Restrictions that have been violated (including, without limitation, violations of the building restriction lines and provisions hereof related thereto) if Declarant, in its sole judgment, determines such violation to be a minor or unsubstantial violation.

c. At its sole discretion, Declarant may add additional property of similar intended use and lying in the general areas of the Property to the encumbrance of this Declaration at any time after the date this Declaration is recorded. Such annexation shall be effective on the recordation by Declarant of an amendment to this Declaration describing the property to be annexed, specifically referring to the Declaration and providing for such annexation. Said amendment may contain such additional covenants and restrictions as to the property annexed as shall be appropriate in the sole discretion of Declarant to reflect the differing character of the property to be annexed and the plan of development for that property; provided, however, that such amendment shall not act to amend these Restrictions except in conformity with the terms hereof. No Owner or Association need execute said Amendment for it to be effective. Once annexed, the annexed land should be subject to and governed by these Restrictions; provided, however, nothing contained herein shall be construed as requiring Declarant to annex any additional property or develop any adjacent properties owned by Declarant in any particular manner.

Section 4. Notices. Any and all notices, elections, demands, requests and responses thereto permitted or required to be given under this Declaration shall be in writing, signed by or on behalf of the party giving the same, and shall be deemed to have been properly given or served and shall be effective upon being personally delivered or upon being deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, to the other party at the known address of such other party or at such other address as such other party may designate by notice specifically designated as a notice of change of address and given in accordance herewith; provided, however, that the time period in which a response to any such notice, election, demand or request must be given shall commence on the date of receipt thereof; and provided further that no notice of change of address shall be effective until the date of receipt thereof. Personal delivery to a party or to any officer, partner, agent or employee of such party at said address shall constitute receipt. Rejection or other refusal to accept or inability to deliver because of changed address of which no notice has been received shall also constitute receipt.

Section 5. Right of Entry. During reasonable hours and subject to reasonable security requirements, Declarant, the ARC, the Association, and their authorized representatives shall have the right to enter any Lot, but not the inside of buildings, for

the purpose of ascertaining whether the Restrictions have been or are being complied with. Authorized personnel of the Association performing outside lawn and landscape maintenance shall also have such right of entry. Any such entry shall constitute an authorized entry and Declarant, the Association or their agents and representatives shall not be deemed guilty of trespass by reason thereof.

Section 6. Violation of Restrictions. These restrictions shall be construed as covenants running with the land and shall inure to the benefit of, be binding upon, and enforceable by Declarant, the Association or any Owner. Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenants, either to restrain or prevent such violation or proposed violation by an injunction, either prohibitive or mandatory, or to obtain any other relief authorized by law. Such enforcement may be by the Owner of any Lot or by Declarant or by the Association. If Declarant, the Association or any owner shall seek to remedy a violation of these Restrictions through obtaining an order from a court of competent jurisdiction enabling it to enter upon the portion of the Lot upon or as to which such violation exists, and shall summarily abate or remove the same, then in such event the Owner committing such violation shall pay on demand the cost and expense of such abatement or removal, which shall include attorneys' fees and other costs (including fees and costs upon appeal) in connection with seeking the court order, together with interest thereon at the highest rate allowed by law from date of disbursement to date of recovery. Payment not made within fifteen (15) days after demand shall become a lien upon the Lot upon which the violation had occurred upon the recordation by Declarant or its agent of a claim of lien setting forth the amount due, the description of the Lot intended to be encumbered and referring to the terms of this section. Said lien shall also secure all costs of collection including without limitation, court costs and attorneys' fees (including costs and fees upon appeal). Said lien may be foreclosed in the same manner as a mortgage upon real estate, or Declarant, without waiving the right of foreclosure, may pursue collection directly against the affected Owner. Notwithstanding the foregoing, said lien shall be prior and superior to all other liens, except that the same shall be subordinate and inferior to (a) all liens for taxes or special assessments levied by County and State Governments or any political subdivision or special district thereof and (b) all liens, including but not limited to mortgages and other security instruments, that secure any loan for any part of the purchase price of the Lot and/or improvements placed thereon filed for record prior to the date when such charges or assessments become due and payable. No foreclosure shall free any Lot from the liens securing assessments thereafter becoming due and payable, nor shall the personal obligation of the Owner foreclosed be extinguished by any foreclosure. The failure of any person entitled to enforce any of these Restrictions to enforce the same

shall in no event be deemed a waiver of the right to enforce these Restrictions thereafter nor shall any liability attach to Declarant or any other organization or individual for failure to enforce the Restrictions.

Section 7. Validity of Declaration. Invalidation of one or more of the covenants, conditions, reservations, or restrictions herein contained by judgment or court order or otherwise, shall in no way affect any other of the covenants, conditions, reservations or restrictions which shall continue and remain in full force and effect.

Section 8. Good Faith Lenders Clause. Any violation of these Restrictions shall not affect any lien, mortgage or security deed of record held in good faith, upon any Lot or any part thereof, which lien may be enforced in due course, subject to the covenants, conditions, reservation, and restrictions contained herein.

Section 9. Conflict with Deeds of Conveyance. If any part of these Restrictions shall be in conflict with any covenant, condition or restriction within a previously recorded deed of conveyance to any portion of the Property, the covenants, conditions or restrictions within the prior deed of conveyance shall control to the extent of such conflict.

Section 10. Paragraph Headings. Paragraph headings, where used herein, are inserted for convenience only and are not intended to be a part of this Declaration or in any way define, limit or describe the scope and intent of the particular paragraph to which they refer.

Section 11. Assignment of Declarant's Rights and Duties. Any and all rights, powers, duties and reservations of Declarant herein contained may be assigned to any person, corporation, partnership or association including, without limitation, the Association, which will assume the duties of Declarant pertaining to the particular rights, powers and reservations assigned, and upon any such person, corporation, partnership or association's evidencing its consent in writing to accept such assignment and assume such duties, he or its shall, to the extent of such assignment, have the same rights, powers, duties and reservations and be subject to the same obligations as are given and assumed by Declarant herein.

Section 12. Constructive Notice and Acceptance. Every person, corporation, partnership or organization, who now or hereafter owns or acquires any right, title or interest in or to any Lot, any portion of a Lot or the property is and shall be conclusively deemed to have consented and agreed to every covenant, condition and restriction contained herein, whether or not any reference to this Declaration is contained in the instrument by which such person, corporation, partnership or

organization acquires such right, title or interest in and to said Lot, the Property or any portion of either.

Section 13. **Withdrawal of Land from the Restriction.** The Declarant may, but shall have no obligation to, withdraw at any time and from time to time portions of land that have not been sold to an Owner from the effect of these Restrictions by filing in the Public Records of Osceola County, Florida, a supplementary declaration with respect to the lands withdrawn, without the consent or joinder of the Owners and/or mortgagees of land in the subdivision.

IN WITNESS WHEREOF, the undersigned, being the Declarant herein, has hereunto set its hand and seal this 3rd day of November, 1988.

AMERICAN MEDICORP DEVELOPMENT COMPANY

By: Michael A. Hendrick
President

FILED, RECORDED AND RECORD VERIFIED
MEL WILLS, JR. CLK CIR CT
OSCEOLA COUNTY
BY _____ D.C.

(CORPORATE SEAL)

Attest: Joan O. Kroger
Asst. Secretary

STATE OF KENTUCKY
COUNTY OF JEFFERSON

The foregoing instrument was acknowledged before me this 3rd day of November, 1988, by MICHAEL A. HENDRICK and JOAN O. KROGER, as VICE President and ASST. Secretary, respectively, of American Medicorp Development Company, a Delaware corporation, on behalf of the corporation.

(NOTARIAL SEAL)

Diane A. Miller
Notary Public
My commission expires:
Notary Public, State at Large, KY.
My commission expires Jan. 4, 1992

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Exhibit "B"

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, FLORIDA

MMB PROPERTIES, a Florida general partnership,
Plaintiff,

vs.

PLANNED PARENTHOOD OF GREATER ORLANDO, Inc., a Florida not-for-profit corporation,
Defendant.

Case No. 2014-CA-1636

_____/

ORDER GRANTING PLAINTIFF MMB PROPERTIES'S
MOTION FOR TEMPORARY INJUNCTION

Before the Court is Plaintiff MMB PROPERTIES ("MMB")'s Motion for Temporary Injunction filed June 23, 2014. Defendant PLANNED PARENTHOOD OF GREATER ORLANDO, INC. ("PLANNED") filed a Memorandum of Law in Opposition on July 9, 2014. A hearing was held on July 14, 2014.

The Court, having received evidence, considered the argument of counsel, and being otherwise fully advised in the premises, hereby ORDERS and ADJUDGES that Plaintiff's motion is GRANTED. In support of this ruling, the Court further enters the following Findings of Fact and Conclusions of Law.

THE EVIDENCE

1. Two affidavits were provided by the parties. MMB proffered the affidavit of Dr. Johnston Massey, one of its partners, and PLANNED proffered the affidavit of Jenna Tosh, its president and CEO.
2. Dr. Massey and Ms. Tosh testified at hearing. The Court also received testimonial evidence from Dr. Jose Fernandez and Ms. Martha Haynie, PLANNED's Secretary and a member of its Board of Directors.

FINDINGS OF FACT

1. MMB is a Florida general partnership and has owned property located at 601 Oak Commons, Kissimmee, Florida for approximately 18 years (the "MMB Property").
2. PLANNED is an affiliate of Planned Parenthood Federation of America Inc.
3. PLANNED owns or leases three facilities where it offers services to its patients. The facility at issue in this case is located at 610 Oak Commons, Kissimmee, FL (the "PLANNED Property"). PLANNED purchased the PLANNED Property on approximately December 16, 2013.
4. Both the PLANNED Property and the MMB Property are in the Oak Commons Medical Park ("Oak Commons"). Oak Commons properties are subject to community restrictions that are covenants running with the land and are contained in the Declaration of Restrictions found in Osceola County Public Records (the "Declarations"). Oak Commons is located across the street from Osceola Regional Medical Center. PLANNED had constructive and actual notice of those restrictions prior to its purchase of the PLANNED Property.
5. The Declarations contain the following restrictive covenant:

> The property described herein shall not be used for the following activities without the prior written permission of AMERICAN MEDICORP DEVELOPMENT CO., a Delaware corporation, which shall be granted only in its sole and unfettered discretion, unless ancillary and incidental to a physician's practice of medicine:
>
> 1. An Out Patient Surgical Center.
> 2. An Emergency Medical Center.
> 3. A Diagnostic Imaging Center which includes the following radiographic testing: Fluroscopy [sic], Plane Film Radiography, Computerized Tomography (CT), Ultrasound, Radiation Therapy, Mamography [sic] and

Breast Diagnostics, Nuclear Medicine Testing and Magnetic Reasonance [sic] Imagine (MRI).

6. The Declarations also state, "In addition, no activity or use shall be permitted on or with respect to any part of the Property that is obnoxious to or out of harmony with other developments on the Property."

7. The parties stipulated that MMB, as an owner of property within Oak Commons, has standing to enforce the Declaration of Restrictions. This stipulation is due to Article V, § 6 of the Declarations, which provides that any violation(s) of the Declarations are enforceable against any person by any owner.

8. The Court further notes that enforcement is expressly permitted "by proceedings at law or in equity ... either to restrain or prevent such violation or proposed violation by an injunction, either prohibitive or mandatory."

9. PLANNED is a well-known entity that provides abortion services. Ms. Tosh testified that PLANNED intends to begin providing surgical abortions at the PLANNED Property by August 2014.

10. Ms. Tosh also testified that PLANNED intends to provide certain diagnostic procedures, such as sonograms, at the PLANNED Property.

11. In furtherance of these intentions, PLANNED inquired of the local zoning authority whether zoning was proper for both a medical clinic and outpatient surgical services. In fact, the application specifically states that PLANNED intends to operate an "Out Patient Surgical Center," which is the identical language used prohibitively in the Declarations.

12. PLANNED has also applied for and obtained an abortion clinic license to perform abortions at the PLANNED Property.

13. Dr. Massey and Dr. Fernandez credibly testified that surgical abortions are indeed surgical procedures. They testified that surgical abortions include preoperative care, anesthesia, invasive modalities, the removal of human fluids and tissue, and postoperative recovery.

14. In contrast, Ms. Tosh testified that surgical abortions are not "surgical" apparently because they do not involve *incisions*. Specifically, her affidavit states:

> Despite widespread use of the label "surgical," surgical abortion does not also involve what is typically thought of as surgery. Instead, surgical abortion uses instruments to evacuate the contents of the uterus. No incision is made into the woman's skin or other bodily membrane. Surgical abortions are almost always performed in an outpatient setting, most often at a clinic.

Ms. Tosh's live testimony was similar. The Court notes that Ms. Tosh's education does not include any formal medical training and cannot escape the fact that Ms. Tosh's own words repeatedly employ the phrase "surgical abortions."

15. The Court finds that MMB has a substantial likelihood of proving that the abortions PLANNED intends to perform at the PLANNED Property are outpatient surgical procedures.

16. PLANNED offered no evidence refuting MMB's evidence that sonograms are a form of diagnostic imaging. The Court finds that MMB has a substantial likelihood of proving that the sonograms PLANNED intends to perform at the PLANNED Property are diagnostic imaging.

17. PLANNED has also expressed an intent to provide the "Morning After Pill," which was described at hearing as "emergency contraception." All witnesses who testified regarding the Morning After Pill, including Ms. Tosh, agreed that its efficacy is limited to 48 hours after a woman engages in unprotected intercourse.

18. The Court does not find that MMB has a substantial likelihood of proving that administration of the Morning After Pill constitutes an emergency medical procedure, for the purpose of this Injunction.

19. MMB became aware of PLANNED's intent to perform abortions because protestors began appearing in Oak Commons in approximately March 2014. Dr. Massey's patients have expressed that they are upset by the commotion and sometimes have difficulty accessing his property, in part because the protestors have used MMB's parking lot. In one instance, because of a bomb threat, the street leading to the MMB Property was blocked for several hours. Protestors have continued to appear as of the date of the hearing.

20. The Court does not find that MMB has a substantial likelihood of proving that the abortions PLANNED intends to perform at the PLANNED Property are "obnoxious to or out of harmony with other developments" in Oak Commons, for the purpose of this injunction.

21. The Court finds that PLANNED is not a "physician's practice" as that term is defined in the Declarations. It is instead a § 501(c)(3) tax-exempt nonprofit organization.

22. In support of this finding, Ms. Tosh testified that PLANNED has just recently hired a physician as a medical director. The medical director currently works one day a week in Jacksonville for another affiliate of Planned Parenthood Federation of America and spends some time each week at PLANNED's other two Orlando-area locations. PLANNED also contracts with three other physicians to provide services as needed.

23. Additionally, many of PLANNED's services fall well beyond the traditional ambit of a "physician's practice of medicine." PLANNED is heavily involved with various

educational, advocacy, and community outreach activities in furtherance of its mission as a non-profit corporation.

24. Therefore, the Declarations' exception of use that is "ancillary and incidental to a physician's practice of medicine" does not apply because PLANNED's services do not qualify as a "physician's practice of medicine."

25. Furthermore, even if the uses contemplated at the PLANNED Property were part a physician's practice of medicine, which this Court does not find, PLANNED's intended violative uses are neither "ancillary" nor "incidental" sufficient to bring them within the exception. Instead, Ms. Tosh testified that abortions are a "substantial" service provided by PLANNED. Ms. Haynie accordingly testified that abortions were "central" to PLANNED's services. Certainly, a "substantial" and "central" service can never be considered "ancillary" and "incidental" to an entity's activities. This is despite Ms. Tosh's affidavit that surgical abortions are expected to comprise less than 1% of PLANNED's services. The Court finds that this asserted statistic is offered out of context in light of the totality of the evidence.

26. PLANNED offered testimony that other entities in Oak Commons have performed what might be considered outpatient surgical procedures in the past. However, as will be explained in the Conclusions of Law below, the Court finds this evidence is legally irrelevant.

27. The Court finds that MMB has a substantial likelihood of succeeding on the merits of the underlying Complaint.

28. Concerning the bond, Ms. Haynie was the only witness that testified as to PLANNED's financial data. The only relevant figure was Ms. Haynie's testimony that PLANNED

would be expected to generate $720,000 in revenue over an 18 month period. She testified that 18 months was chosen because that is how long she estimated it would take to find, purchase, and build-out a new facility. On cross-examination, Ms. Haynie was not able to provide any figures relating to operating expenses or revenues derived from surgical abortions.

CONCLUSIONS OF LAW

1. The Court first notes that PLANNED has argued that MMB must prove its right to a temporary injunction by a "clear and convincing" evidentiary standard. The Court instead holds, from law identified by PLANNED no less, that MMB must only "demonstrate a prima facie, clear legal right to the relief requested." *Colonial Bank, N.A. v. Taylor Morrison Servs., Inc.*, 10 So. 3d 653, 656 (Fla. 5th DCA 2009).
2. Generally, in order to obtain a temporary injunction, a party must "establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief." *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784, 786 (Fla. 4th DCA 2010).
3. However, it is well established that injunctive relief is available to remedy the violation of a restrictive covenant running with the land "without a showing that the violation has caused an irreparable injury – that is, an injury for which there is no adequate remedy at law." *Autozone Stores, Inc. v. Ne. Plaza Venture, LLC*, 934 So. 2d 670, 673-74 (Fla. 2d DCA 2006); *see also Chick-fil-A, Inc. v. CFT Dev., LLC*, 652 F.Supp.2d 1252, 1263 (M.D. Fla. 2009) ("Chick-fil-A has appropriately alleged and proved that the proposed Panda Express restaurant would violate the Mt. Dora Covenant. Therefore, Chick-fil-A need not provide independent proof of irreparable harm and the absence of a remedy at

law.").

4. MMB has met the *Autozone* test. As stipulated by the parties, The Declarations establish MMB's clear legal right to enforcement. Because the Motion for Temporary Injunction concerns the violations of a restrictive covenant running with the land, MMB does not need to show either irreparable injury or that it has no adequate remedy at law.
5. The Court finds that the Declarations are unambiguous. The Court will therefore give them their "plain and ordinary meaning. *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC*, 811 So. 2d 719, 722 (Fla. 3d DCA 2002).
6. PLANNED has testified that it intends to engage in activities that would unambiguously violate the restrictive covenants. Its intended violations are not ancillary and incidental to a physician's practice of medicine – they are a central component of PLANNED's corporate activity.
7. Moreover, "[r]estrictive covenants serve a valid public purpose in enabling purchases of property to control the development and use of property in the surrounding environment." *Wood v. Dozier*, 464 So. 2d 1168, 1170 (Fla. 1985). That public purpose is served in this case by limiting the sort of medical services that can be offered in facilities which are located directly across the street from a hospital.
8. *Wood* also specifically holds that the purchasers of property "subject to restrictive covenants cannot expect to have the covenants invalidated simply because the covenants have been previously violated and not enforced against others." *Id.* It is for this reason the Court finds PLANNED's evidence of other possible violations in Oak Commons irrelevant.
9. Instead, PLANNED should have sought "to have the deed restriction removed before

purchasing the property." *Id.* PLANNED purchased the PLANNED Property with knowledge of the restrictions and proceeded at its own peril. *See also Chick-fil-A*, 652 F.Supp.2d at 1263 ("Whatever hardship may accrue to Defendants by virtue of a permanent injunction could easily have been avoided.").

10. The Court must also address the various constitutional challenges raised by PLANNED due to the abortive services it intends to provide. But it is elementary constitutional law that "the protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights." *NCAA v. Tarkanian*, 488 U.S. 179, 190 (1988) (citations omitted). No state action has been alleged, and the Court finds that no state action is at issue. The constitutional right to abortion, whatever its limits may be, simply does not apply to this dispute. And to be sure, "although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, <u>it need not remove those not of its own creation</u>." *Harris v. McRae*, 448 U.S. 297, 316 (1980) (emphasis added).

11. To the point, all of PLANNED's decisional authorities dealing with abortions examined what was unequivocally state action. *See, e.g., Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. Unit B 1981); *W. Side Women's Servs., Inc. v. City of Cleveland, Ohio*, 573 F.Supp. 504 (N.D. Ohio 1983).

12. In an attempt to circumvent this problem, PLANNED offers *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Barrows v. Jackson*, 346 U.S. 249 (1953). *Barrows* is itself a *Shelley* progeny case. The Court is not persuaded.

13. *Shelley* is a seminal Civil Rights Era case which held that a <u>court's enforcement</u> of a private restrictive covenant that was racially discriminatory constituted state action under the Fourteenth Amendment. *Shelley*, 334 U.S. at 18-19. The Eleventh Circuit has

expressly and narrowly limited the reach of *Shelley* to the racial context. *See Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995) ("The holding of *Shelley*, however, has not been extended beyond the context of race discrimination."); *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995) (declining to extend *Shelley* to the First Amendment and observing that "if, for constitutional purposes, every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated" (citation omitted)).

14. One federal district court stated well when considering a zoning case, which therefore *did* involve state action, "A commercial enterprise cannot disregard the land use regulations of a valid zoning ordinance merely because its customers may be exercising a fundamental right. Plaintiffs do not contend that [the intended abortion clinic] is free to locate wherever it may please." *Bossier City Medical Suite, Inc., v. City of Bossier City*, 483 F. Supp 633, 648 (W.D. La 1980).

15. Similarly, without implicating state action, PLANNED cannot use real property in a manner violative of valid restrictive covenants merely because its customers may be exercising a fundamental right.

16. As a result of the foregoing, the Court will therefore enjoin PLANNED from violating the Declarations at the PLANNED Property pending a full trial of this matter on the merits, including without limitation the enjoinment of the performance of surgical abortions, and the provision of sonographic or other diagnostic imaging services.

THE BOND

1. Rule 1.610(b) requires that a bond be posted that would pay PLANNED for the "costs and damages sustained by [PLANNED] if [PLANNED] is wrongfully enjoined."
2. The appropriate measure of a bond is generally linked to the lost profits resulting from the injunction. *E.g.*, *MetalMax Cutting Tools, Inc. v. Mil-Tec USA, Inc.*, 794 So. 2d 609, 611 (Fla. 2d DCA 2001).
3. PLANNED is a § 501(c)(3) entity and therefore does not generate "profits" in the traditional sense. The Court therefore finds that the appropriate measure of damages here would be expected revenue generated by PLANNED less operating expenses during the expected life of the lawsuit.
4. The only relevant evidence that would bear on the amount is Ms. Haynie's estimation that PLANNED would generate $720,000 in revenue over an 18 month period. The Court estimates that only 10% of this amount would reasonably be expected to be surplus "profit," or $72,000. However, the Court anticipates that this case will be fully resolved within 12 months, thus lowering the bond amount by 1/3, to $48,000.
5. Finally, the Court notes that Ms. Tosh has testified that surgical abortions will amount to less than 1% of PLANNED's services despite their centrality to PLANNED's mission. The injunction issued herein enjoins more than just surgical abortions; however, the Court finds that PLANNED can continue offering many (if not most) of its other services during the injunction, including screening for sexually transmitted diseases, education, community outreach activities, etc. In light of this reality, the lost "profits" directly arising out of the injunction can reasonably be expected to be roughly half of the total "profits" otherwise expected to be generated without the injunction. The Court will

therefore set the bond at $24,000.

IT IS THEREFORE ORDERED that, from the date and time of the entry of this Order and until further order of this Court, PLANNED PARENTHOOD OF GREATER ORLANDO, INC., and any officers, agents, servants, employees, agents, servants, successors and assigns, and attorneys of PLANNED PARENTHOOD OF GREATER ORLANDO, INC. are prohibited from directly or indirectly violating the Declaration of Restrictions at 610 Oak Commons, Kissimmee, Florida, including but not limited to the performance of surgical abortions and the provision of sonographic or other diagnostic imaging services.

IT IS FURTHER ORDERED that this order shall not be effective until Plaintiff has filed with the Clerk of the above-entitled Court, a bond in the amount of $24,000 in conformity with the law, conditioned for the payment of costs and damages sustained by PLANNED PARENTHOOD OF GREATER ORLANDO, INC. if wrongfully enjoined.

Upon the filing of the bond required by this Order, the Clerk shall certify a copy of this Order for service on PLANNED PARENTHOOD OF GREATER ORLANDO, INC.

Jurisdiction is retained to enter further Orders as necessary.

DONE AND ORDERED in chambers, in Kissimmee, OSCEOLA County, Florida, this 23 day of July, 2014.

Circuit Judge

COPIES FURNISHED TO:

Dennis R. O'Connor
Maureen A. Arago
Donald E. Christopher

Exhibit "C"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

INTERIM NON-DISPOSITIVE OPINION
NO MANDATE WILL BE ISSUED AT THIS TIME

PLANNED PARENTHOOD OF GREATER ORLANDO, ETC.,

Appellant,

v. Case No. 5D14-2920

MMB PROPERTIES, ETC.,

Appellee.

_____/

Opinion filed September 24, 2014

Non-Final Appeal from the Circuit Court for Osceola County,
John E. Jordan, Judge.

Donald E. Christopher and Kyle A. Diamantas of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, for Appellant.

Dennis R. O'Connor and Derek J. Angell of O'Connor & O'Connor, LLC, Winter Park, and Maureen A. Arago and Keith P. Arago of The Arago Law Office, Kissimmee, for Appellee.

ON EMERGENCY MOTION FOR STAY OF INJUNCTION

PER CURIAM.

Appellant, Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood"), has filed an emergency motion seeking to stay a temporary injunction entered by the trial court. The underlying case involves the interpretation of a restrictive covenant.

Because Planned Parenthood has demonstrated a likelihood of success on the merits and that it will be harmed absent a stay, we grant the motion.

Planned Parenthood is a nonprofit organization that operates three health centers in Central Florida. Recently, Planned Parenthood purchased property at 610 Oak Commons Boulevard in the Oak Commons Medical Park in Kissimmee, Florida. That property is subject to a Declaration of Restrictions containing a covenant that prohibits the property from being used as an "Outpatient Surgical Center" or a "Diagnostic Imaging Center," unless such uses are "ancillary and incidental to a physician's practice of medicine." Appellee, MMB Properties ("MMB"), also owns property in the Oak Commons Medical Park.

Upon MMB's request, the trial court entered an order temporarily enjoining Planned Parenthood from "directly or indirectly violating the Declaration of Restrictions at 610 Oak Commons, Kissimmee, Florida." Specifically, the trial court stated that the violations included "but [were] not limited to the performance of surgical abortions and the provision of sonographic or other diagnostic imaging services."

We review a trial court's decision on a motion to stay for an abuse of discretion. See Sunbeam Television Corp. v. Clear Channel Metroplex, Inc., 117 So. 3d 772, 772 (Fla. 3d DCA 2012). To obtain a stay, the moving party must establish "(1) a likelihood of success on the merits, and (2) a likelihood of harm absent the entry of a stay." Id. (citing Campbell v. Chitty, 131 So. 3d 9 (Fla. 1st DCA 2012); Perez v. Perez, 769 So. 2d 389, 391 (Fla. 3d DCA 1999)). We believe that Planned Parenthood has proved both.

First, it is apparent that the trial court erred as a matter of law when it enjoined Planned Parenthood from providing sonographic and other diagnostic imaging services

because MMB never requested this relief in its pleadings or in its motion for temporary injunction. See, e.g., Cortina v. Cortina, 98 So. 2d 334, 337 (Fla. 1957) (holding that an order that adjudicates issues not raised in the pleadings is voidable on appeal); Cardinal Inv. Grp., Inc. v. Giles, 813 So. 2d 262, 263 (Fla. 4th DCA 2002) (holding that trial court erred in granting injunctive relief that was not requested by the parties).

Likewise, Planned Parenthood is likely to succeed on the merits regarding the portion of the injunction that prevents it from providing surgical procedures. The Declaration of Rights allows surgery to occur in the Oak Commons Medical Center so long as it is "ancillary and incidental to a physician's practice of medicine." The trial court found that Planned Parenthood is not a "physician's practice" because it is a § 501(c)(3) tax-exempt nonprofit organization. Simply because an organization chooses to obtain nonprofit status does not mean that it is not a physician's practice. The trial court's other findings with respect to this issue are similarly unsupported by the record. When examining the record as a whole, including the affidavits Planned Parenthood filed in support of its motion for rehearing, there is a likelihood that Planned Parenthood will prevail on appeal, either because it is not an Outpatient Surgical Center or, even if it is, the surgeries it performs are ancillary to a "physician's practice."[1]

Lastly, we note that Planned Parenthood has sufficiently proved that it will suffer harm absent a stay.

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[1] We also agree with Planned Parenthood that the "including but not limited to" language renders the order vague; thus, the order does not adequately put Planned Parenthood on notice of what is prohibited. See, e.g., 4UOrtho, LLC v. Practice Partners, Inc., 18 So. 3d 41, 43 (Fla. 4th DCA 2009) ("[O]ne against whom [an injunction] is directed should not be left in doubt about what he is to do." (quoting Pizio v. Babcock, 76 So. 2d 654, 655 (Fla. 1954))).

MOTION GRANTED.

EVANDER, COHEN, and LAMBERT, JJ., concur.

Exhibit "D"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

PLANNED PARENTHOOD
OF GREATER ORLANDO, ETC.,

Appellant,

v. Case No. 5D14-2920

MMB PROPERTIES, ETC.,

Appellee.

_____/

Opinion filed May 22, 2015.

Non-Final Appeal from the Circuit Court
for Osceola County,
John E. Jordan, Judge.

Donald E. Christopher and Kyle A. Diamantas, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC., Orlando, for Appellant.

Derek J. Angell and Dennis R. O'Connor, of O'Connor & O'Connor, LLC, Winter Park and Maureen A. Arago and Keith P. Arago, of Arago Law Firm, Kissimmee, for Appellee.

LAWSON, J.

Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood") appeals a nonfinal order granting a temporary injunction to MMB Properties ("MMB"), a cardiology practice, prohibiting Planned Parenthood from performing abortions or sonograms in

violation of a restrictive covenant in the medical park where both parties own property.[1] The restriction at issue prohibits Planned Parenthood's property from being used as an "Out Patient Surgical Center" or a "Diagnostic Imaging Center" "unless ancillary and incidental to a physician's practice of medicine." We reverse that part of the order temporarily enjoining Planned Parenthood from performing sonograms because that relief was not sought by MMB in its pleadings and was not, in our view, tried by consent. *See Cortina v. Cortina*, 98 So. 2d 334, 337 (Fla. 1957) ("It is fundamental that a judgment upon a matter entirely outside of the issues made by the pleadings cannot stand; and where, as here, an issue was not presented by the pleadings nor litigated by the parties during the hearing on the pleadings as made, a decree adjudicating such issue is, at least, voidable on appeal."); *We're Assoc. VI, Ltd. P'ship v. Curzon Dev. Corp.*, 738 So. 2d 440, 441 (Fla. 4th DCA 1999) (noting that relief granted in injunction must be specifically requested). On remand, we also order the trial court to strike the vague language prohibiting Planned Parenthood from performing other unspecified procedures. *See* Fla. R. Civ. P. 1.610(c) ("Every injunction . . . shall describe in reasonable detail the act or acts restrained without reference to a pleading or another

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[1] We have jurisdiction to review an order granting a temporary injunction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B). Planned Parenthood also appeals an order denying its Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction. This motion was actually two motions. *See Anesthesia Grp. of Miami, Inc. v. Hyams*, 693 So. 2d 673, 674 (Fla. 3d DCA 1997) (noting that motion to dissolve temporary injunction was, in part, a motion to reconsider). To the extent this second order simply denied a motion to reconsider a previous non-final order, it was not appealable. *Agere Sys. Inc. v. All Am. Crating, Inc.*, 931 So. 2d 244, 245 (Fla. 5th DCA 2006). To the extent the second order denied the motion to dissolve or modify the injunction, it was appealable under the above rule. None of Planned Parenthood's appellate arguments, however, relate to the second order.

document . . . ."); *Pizio v. Babcock*, 76 So. 2d 654, 655 (Fla. 1954) ("Injunctive orders like this should be confined within reasonable limitations and cast in such terms as they can, with certainty, be complied with. The one against whom it is directed should not be left in doubt about what he is to do."). We affirm that part of the order temporarily enjoining Planned Parenthood from performing abortions at the property, and write further to expressly address several points relating to our affirmance.

"Generally, a trial court is afforded 'wide discretion to either grant, deny, dissolve, or modify a temporary injunction, and an appellate court will not intercede unless the aggrieved party clearly shows an abuse of discretion.'" *Avalon Legal Info. Servs., Inc. v. Keating*, 110 So. 3d 75, 80 (Fla. 5th DCA 2013) (quoting *Meyers v. Club at Crystal Beach Club, Inc.,* 826 So. 2d 1086, 1089 (Fla. 5th DCA 2002)). The trial court's factual determinations must be accepted if supported by competent, substantial evidence. *Charlotte Cnty. v. Vetter*, 863 So. 2d 465, 469 (Fla. 2d DCA 2004). However, when its rulings pertain to purely legal matters, review is de novo. *Avalon Legal*, 110 So. 3d at 80 (citing *Suggs v. Sw. Fla. Water Mgmt. Dist.,* 953 So. 2d 699, 699 (Fla. 5th DCA 2007)).

Four elements are generally required for a temporary injunction: (1) a substantial likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) the unavailability of an adequate remedy at law; and (4) that a temporary injunction will serve the public interest. *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 938 (Fla. 1st DCA 2012). Before addressing Planned Parenthood's challenges to the trial court's findings on these elements, we will first discuss the evidence properly

considered under our scope of review. We will address each of these elements after briefly discussing the evidence properly considered on appeal and our scope of review.

This court previously, by order, granted a stay of the injunction pending appeal, and expressly considered "the record as a whole, *including the affidavits Planned Parenthood filed in support of its motion for rehearing.*" (emphasis added).[2] MMB also notes that Planned Parenthood relies heavily on these affidavits to support its arguments for reversing the temporary injunction. However, we find that the affidavits filed in connection with the motion to reconsider should not be considered in our review of the injunction order for the basic reason that they were not presented to the court until after issuance of the order and therefore could not have been considered by the court when it made its ruling. Additionally, although trial courts have inherent authority to reconsider nonfinal rulings, they are not required to do so—meaning that a trial court's decision not to reconsider a nonfinal ruling is generally not reviewable. *Hunter v. Dennies Contracting Co.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997). Thus, to the extent that the affidavits were submitted in support of the motion to reconsider, the trial court's decision not to revisit its original order is beyond this court's scope of review. Finally, to the extent that the affidavits were submitted in support of Planned Parenthood's motion to dissolve or modify the injunction, it needed to establish changed circumstances, *id.*, which it did not do.[3] In its initial brief, Planned Parenthood does not challenge the

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[2] Preliminary orders entered by an appellate court in the same appeal are not binding on the court. *Clevens v. Omni Healthcare, Inc.*, 83 So. 3d 1011, 1011 n.1 (Fla. 5th DCA 2012); *Hialeah Hotel, Inc. v. Woods*, 778 So. 2d 314, 315 (Fla. 3d DCA 2000).

[3] We acknowledge conflict with the Third and Fourth District Courts of Appeal, as noted in *Minty v. Meister Financial Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014).

denial of its motion to dissolve or modify the injunction, much less argue that it established changed circumstances. Thus, while Planned Parenthood timely appealed the injunction order and can therefore challenge the sufficiency of the evidence presented at the injunction hearing, it cannot rely on evidence submitted after the injunction hearing in support of that challenge.

With respect to the "substantial likelihood of success" element, Planned Parenthood first argues that the trial court erred by enjoining it from performing abortions because the restriction at issue does not prohibit the *activities* of performing abortions; rather, it prevents the operation of outpatient surgical *centers*. The restriction states:

> The property described herein shall not be used for the following *activities* without the prior written permission [of the developer in its sole and unfettered discretion], *unless ancillary and incidental to a physician's practice of medicine:*
>
> 1. *An Outpatient Surgical Center.*
> 2. An Emergency Medical Center.
> 3. *A Diagnostic Imaging Center which includes the following radiographic testing:* Fluroscopy [sic], Plane Film Radiography, Computerized Tomography (CT), *Ultrasound*, Radiation Therapy, Mamography [sic] and Breast Diagnostics, Nuclear Medicine Testing and Magnetic Resonance Imaging (MRI).

(Emphasis added). Interestingly, the trial court did not find that performing abortions would transform Planned Parenthood's facility into an outpatient surgical *center*. Instead, it found that MMB had a substantial likelihood of success in proving that abortions are outpatient surgical *procedures*.[4] This distinction highlights a rather poorly

[4] Although Planned Parenthood argued below that abortions were not surgical procedures, it has abandoned that argument on appeal. There was also ample evidence to support the trial court's conclusion that a "surgical abortion" is a surgical procedure. Nor does Planned Parenthood challenge the trial court's finding that abortions are

worded restrictive covenant that prohibits the property from being "used" for the "following *activities*" but then lists three "*centers*" as prohibited *activities*. In short, it uses names of locations where activities occur rather than naming the activities themselves. It does not define the terms "outpatient surgical center."

Both parties argue that the term "outpatient surgical center" is clear and unambiguous, but offer differing definitions. MMB relies on a dictionary definition of "center" as "a facility providing a place for a particular activity or service." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/center (last visited April 6, 2015). Thus, an "outpatient surgical center" would be a facility providing a place for performing outpatient surgical procedures. Planned Parenthood relies on the statutory definition of "ambulatory surgical center," in section 395.002(3), Florida Statutes (2013), which is defined as follows:

> (3) "Ambulatory surgical center" or "mobile surgical facility" means *a facility the primary purpose of which is to provide elective surgical care*, in which the patient is admitted to and discharged from such facility within the same working day and is not permitted to stay overnight, and which is not part of a hospital. *However, a facility existing for the primary purpose of performing terminations of pregnancy, an office maintained by a physician for the practice of medicine*, or an office maintained for the practice of dentistry *shall not be construed to be an ambulatory surgical center*, provided that any facility or office which is certified or seeks certification as a Medicare ambulatory surgical center shall be licensed as an ambulatory surgical center pursuant to s. 395.003. Any structure or vehicle in which a physician maintains an office and practices surgery, and which can appear to the public to be a mobile office because the structure or vehicle operates at more than one address, shall be construed to be a mobile surgical facility.[5]

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conducted on an outpatient basis.

[5] Planned Parenthood correctly notes that a substantially similar definition was in

Id. (emphasis added). Assuming that the terms "ambulatory" and "outpatient" are synonymous, this definition requires that the "primary purpose" of such a facility is to provide elective surgical care.

"Florida adheres to the general rule that a reasonable, unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms." *Barrett v. Leiher*, 355 So. 2d 222, 225 (Fla. 2d DCA 1978). "If it is necessary to construe a somewhat ambiguous term, the intent of the parties as to the evil sought to be avoided expressed by the covenants as a whole will be determinative." *Id.*; *see also Killearn Homes Ass'n v. Visconti Family Ltd. P'ship,* 21 So. 3d 51, 53 (Fla. 1st DCA 2009) ("It was improper for the court to look to an outside source to determine the meaning of the word 'building' as used in the restriction, rather than first considering the language of the deed restriction as a whole." (citations omitted)).

The restriction in question prohibits certain "activities," namely outpatient surgical centers, emergency medical centers, and diagnostic imaging centers. Although it does not further specify the activities included in the first two categories, it does in the third category, stating that such activities included "the following radiographic testing," with a list of specific imaging procedures. Thus, the focus of this restriction is on prohibited activities. In this light, the use of the word "center" does not necessarily suggest a quantitative requirement that such activities be the "primary purpose" of the location. Rather, it is merely a location where such activities occur.

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effect when this restrictive covenant was executed in 1986. *See* § 395.002(2), Fla. Stat. (1986).

In addition, the restriction provides an exception for such activities when they are "ancillary and incidental to a physician's practice of medicine." MMB is correct that adopting Planned Parenthood's statutory definition would render this exception meaningless because if an outpatient surgical center is defined as a facility the *primary purpose* of which is to provide outpatient surgical procedures, then such procedures could not be "ancillary and incidental" to a physician's practice of medicine. However, if it is merely a facility where outpatient surgical procedures are performed along with other procedures, then it would not prohibit abortions if they were ancillary and incidental to a physician's practice of medicine. Thus, the exception strongly suggests that any outpatient surgical procedures beyond those that are "ancillary and incidental" to a physician's medical practice are prohibited, even if the primary purpose of the location is not to provide outpatient surgical procedures.

We conclude that, while the restriction is rather poorly drafted, it is not unclear. It prohibits the property from being used as an outpatient surgical center, the common and ordinary meaning of which is a facility or place for, or for the purpose of, performing outpatient surgical procedures. Having construed, de novo, the restrictive covenant, we readily find that the trial court's factual findings as to this issue are supported by competent, substantial evidence. The trial court's findings were that abortions are outpatient surgical procedures; that Planned Parenthood's facility is not a physician's practice of medicine; and, that even if the facility is operated as a physician's practice of medicine, its performance of abortions was not ancillary or incidental to that practice. Accepting these findings, we affirm the trial court's ultimate finding that MMB had a

substantial likelihood of success in proving that Planned Parenthood's performance of abortions at the facility would violate the restrictive covenant.

Next, Planned Parenthood argues that MMB failed to prove irreparable harm, which is normally required to obtain an injunction. However, MMB correctly argues that when injunctions enforce restrictive covenants on real property, irreparable harm is not required. *See, e.g.*, *Stephl v. Moore*, 114 So. 455 (Fla. 1927) (holding complainant not required to allege irreparable harm in seeking injunction to prevent violation of restrictive covenant restraining free use of land; complainant only needed to allege violation of covenant); *Autozone Stores, Inc. v. Ne. Plaza Venture, LLC*, 934 So. 2d 670, 673 (Fla. 2d DCA 2006) ("Florida law has long recognized that injunctive relief is available to remedy the violation of a restrictive covenant without a showing that the violation has caused an irreparable injury—that is, an injury for which there is no adequate remedy at law."); *Jack Eckerd Corp. v. 17070 Collins Ave. Shopping Ctr., Ltd.,* 563 So. 2d 103, 105 (Fla. 3d DCA 1990) ("Where an injunction is sought to prevent the violation of a restrictive covenant, appropriate allegations showing the violation are sufficient and it is not necessary to allege, or show, that the violation amounts to an irreparable injury."); *Coffman v. James*, 177 So. 2d 25, 31 (Fla. 1st DCA 1965) ("It is well established in this jurisdiction that even in the absence of a showing of irreparable [sic] injury injunctive relief is grantable as a matter of right, subject only to sound judicial discretion, to restrain the violation of a restrictive covenant affecting real estate.").

Planned Parenthood argues that the trial court erred in relying on *Autozone* and in failing to follow a case that *Autozone* distinguished: *Liza Danielle, Inc. v. Jamko, Inc.,* 408 So. 2d 735 (Fla. 3d DCA 1982). In *Liza Danielle*, a shoe store leasing space

in a shopping center had an exclusivity provision in its lease prohibiting the lessor from leasing any other space in the shopping center to another shoe store. When the lessor violated this provision, the first shoe store sued and obtained an injunction barring the second shoe store from operating. The appellate court reversed the injunction in part because of the availability of an adequate legal remedy and the failure to prove irreparable harm. However, as *Autozone* and *Jack Eckerd* both point out, *Liza Danielle* did not involve a restrictive covenant running with the land. It involved an exclusivity provision in a lease for which damages were available. Accordingly, Planned Parenthood's reliance on it in this case is misplaced. MMB was not required to establish irreparable harm.

Moreover, the trial court properly rejected Planned Parenthood's argument that it would suffer irreparable harm if the injunction were granted. As the court correctly noted, Planned Parenthood was aware of the restrictions and proceeded forward at its own peril. *See Daniel v. May*, 143 So. 2d 536, 538 (Fla. 2d DCA 1962) (noting that courts do not ordinarily consider amount of injury suffered if injunction granted except where violation of covenant is minute); *Chick-Fil-A, Inc. v. CFT Dev., LLC*, 652 F. Supp. 2d 1252, 1263 (M.D. Fla. 2009) (noting that defendants were aware of restrictive covenant when they purchased property and thus, "[w]hatever hardship may accrue to Defendants by virtue of a permanent injunction could easily have been avoided"), *aff'd,* 370 F. App'x 55 (11th Cir. 2010). "Where a purchaser of land intends to use it for a purpose not allowed by a restrictive covenant, he should seek to have the deed restriction removed before purchasing the property." *Wood v. Dozier*, 464 So. 2d 1168, 1170 (Fla. 1985).

Similarly, Planned Parenthood argues that no evidence supported the trial court's finding that an injunction would serve the public interest "by limiting the sort of medical services that can be offered in facilities which are located directly across from a hospital." Specifically, it argues that MMB failed to show that Planned Parenthood's services would duplicate those provided by the hospital, and even if they did, it is not in the public interest to limit such services. However, testimony was elicited from one of the witnesses that the purpose of the restrictive covenants at issue was to protect the hospital from certain types of development and uses being conducted nearby, and the *Wood* case, 464 So. 2d at 1170, states that this purpose serves the public interest.

Both parties seek appellate attorneys' fees under an attorneys' fee provision in the 1988 Covenants. Neither party fully quotes that provision. It states:

> These restrictions shall be construed as covenants running with the land and shall inure to the benefit of, be binding upon and enforceable by Declarant, the Association or any Owner. *Enforcement shall be by proceedings at law or in equity* against any person or persons violating or attempting to violate any covenants, *either to restrain or prevent such violation or proposed violation by an injunction*, either prohibitive or mandatory, or to obtain any other relief authorized by law. Such enforcement may be by the owner of any Lot or by Declarant or by the Association. *If Declarant, the Association or any owner shall seek to remedy a violation of these Restrictions through obtaining an order from a court of competent jurisdiction enabling it to enter upon the portion of the Lot upon or as to which such violation exists, and shall summarily abate or remove the same, then in such event the*
> *Owner committing such violation shall pay on demand the cost and expense of such abatement or removal, which shall include attorneys' fees and other costs (including fees and costs upon appeal)* in connection with seeking the court order, together with interest thereon at the highest rate allowed by law from date of disbursement to date to date of recovery. . .

(Emphasis added).

"Contractual provisions concerning attorney's fees are to be strictly construed." *Williams v. Williams*, 892 So. 2d 1154, 1155 (Fla. 3d DCA 2005) (citations omitted). The above provision does not authorize attorneys' fees in this case. Although the first part of the provision permits enforcement by injunction, the attorneys' fee provision is more narrowly worded. It authorizes fees for "obtaining an order from a court of competent jurisdiction enabling it to enter upon the portion of the Lot upon or as to which such violation exists, and shall summarily abate or remove the same." The injunction in this case does not enable MMB to enter upon Planned Parenthood's Property. As such, we find that neither party is entitled to attorneys' fees.

AFFIRMED IN PART; REVERSED IN PART; REMANDED; ATTORNEYS' FEES MOTIONS DENIED.

PALMER, J., concurs.
EVANDER, J., concurs in part, dissents in part with opinion.

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EVANDER, J., concurring in part, dissenting in part.

I concur in the majority's opinion to the extent it: (1) reverses the trial court's decision to temporarily enjoin Planned Parenthood from performing sonograms; (2) strikes the vague language in the trial court's order prohibiting Planned Parenthood from performing other unspecified procedures; and (3) denies attorney's fees to both parties. However, based on the limited evidence presented at the temporary hearing, I cannot agree that MMB met its burden of showing a substantial likelihood of success on the merits. Accordingly, I dissent from that aspect of the majority's opinion.