

SERVICE COPY

THE STATE OF NEW HAMPSHIRE
Northern District of Hillsborough County
300 Chestnut Street
Manchester, NH 03101 2490
603 669-7410

ORDER OF NOTICE

24 Pennacook Street LLC v. City of Manchester
Planned Parenthood of Northern NE Zoning Board of Adjustment

NO. 01-E-0405

RETURN DAY: 11/06/2001

You have been sued and named as a party in a case filed with the Northern District of Hillsborough County. Attached is a copy of the pleading which began this case.

24 Pennacook Street LLC, Planned Parenthood of Northern NE shall notify each Defendant of the above action by serving the defendant(s) by October 22, 2001 with a copy of the pleading initiating the case, orders that the Court has already issued, and this Order in a manner allowed by law. Plaintiff shall file with the Clerk verification of the service process by November 06, 2001.

IMPORTANT NOTICE TO City of Manchester, Zoning Board of Adjustment:
You must file a written appearance form with the Clerk on or before November 06, 2001. You must also file by December 06, 2001 a plea, answer or demurrer. Send a copy of the appearance form and any other documents filed with the court to the attorney for the party filing the pleading or to the party if there is no attorney. The name and address of the attorney or the party filing the pleading is contained in the pleading. If you do not comply with these requirements you will be considered in default, you will not have an opportunity to dispute the claim(s) and the court may issue orders in this matter which may affect you without your input.

ORDER FOR RECORD: Defendant(s) shall file with this Court a Certified Record of all proceedings below on or before December 06, 2001.

BY ORDER OF THE SUPERIOR COURT

John M. Safford

John Safford
Clerk of Court

09/10/2001

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY
NORTHERN DISTRICT

SUPERIOR COURT

24 PENNACOOK STREET LLC and
PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND,

v.

THE CITY OF MANCHESTER AND
THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF MANCHESTER

PETITION

Pursuant to RSA 677:4, 24 Pennacook Street LLC (hereinafter the "Owner") of 730 Pine Street in Manchester, Hillsborough County, New Hampshire, 03104, and Planned Parenthood of Northern New England, Inc. (hereinafter individually referred to as "PPNNE" and collectively with the Owner as "Petitioners") of Williston, Vermont, complain against the City of Manchester (the "City") and the Zoning Board of Adjustment of the City of Manchester ("Board"), both of One City Hall Plaza, in Manchester, Hillsborough County, New Hampshire 03101, and state as follows:

this Appeal, Petitioners contend that the Board acted unlawfully and unreasonably in revoking the Building Permit, in violation of state law.

NOTICE OF FEDERAL SUIT

2. Petitioners are currently pursuing a challenge to the revocation of the Building Permit pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of New Hampshire in Planned Parenthood of Northern New England and 24 Pennacook Street, LLC. v. City of Manchester, New Hampshire Zoning Board of Adjustment, Docket No. C-01-64-M (filed on February 26, 2001). In that suit, Petitioners have claimed that Respondents' revocation of the Building Permit: (1) violated rights secured to Petitioners by the equal protection clause of the Fourteenth Amendment of the U.S. Constitution; (2) violated the rights of privacy secured to Petitioners and PPNNE's patients by the Fourteenth Amendment of the U.S. Constitution; and (3) deprived Petitioners of their rights to freedom of speech and association secured by the First Amendment of the U.S. Constitution. (See Complaint, attached as Exhibit A.)

3. The U.S. District Court, holding that Petitioners had established a likelihood of success on the merits of their federal constitutional claims and that Petitioners were suffering irreparable injury, issued a preliminary injunction on April 20, 2001 and reinstated the Building Permit. (See Order attached as Exhibit B.) Trial in the matter is scheduled to begin on October 15, 2001. (See Order attached as Exhibit C.)

4. Petitioners originally brought the state law claims asserted herein in the U.S. District Court action pursuant to the federal supplemental jurisdiction statute, 28 U.S.C. § 1367. On July 26, 2001, the U.S. District Court issued an Order declining to exercise supplemental jurisdiction over those claims. (See Order attached as Exhibit C.) Petitioners bring the state law claims in this Petition pursuant to the tolling provisions of 28 U.S.C. § 1367(d) and RSA 508:10.

5. Moreover, pursuant to the procedure outlined England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), Petitioners herewith reserve their right to litigate all of their federal claims in federal court. Petitioners further decline to litigate their federal claims in this Court, including any factual issues relevant thereto.

PARTIES

6. 24 Pennacook Street, LLC ("Owner") is a New Hampshire Limited Liability Company, having a principal address of 730 Pine Street, Manchester, New Hampshire. The Owner owns the premises at 24 Pennacook Street in Manchester, New Hampshire, which were the subject of Respondents' actions.

7. Petitioner Planned Parenthood of Northern New England, Inc. ("PPNNE") is a not-for-profit corporation organized under the laws of Vermont, with headquarters in Williston, Vermont. In the State of New Hampshire, PPNNE operates nine medical offices and provides high-quality, affordable, general and reproductive health care services to patients in the communities it serves. PPNNE is directly affected by the actions of the Respondents as it has leased the Property from the Owner to offer a full range of medical services to its patients on the premises.

FACTS

8. In 1999, the Owner purchased the property at 24 Pennacook Street ("Property") and decided to convert the existing building from a vacant, former auto parts supply store to medical offices. The Owner began to seek appropriate tenants.

9. Although the Property was zoned R-3 (residential, three-family) under the Manchester Zoning Ordinance effective at the time, the Property has been utilized for commercial purposes for over forty years. There are no residences on the same block as the

Property, and the Property is flanked by a Rite Aid pharmacy store and its parking lot on one side and an accounting firm and its parking lot on the other.

10. On March 15, 2000, the Owner applied to the Manchester Zoning Board of Adjustment (“Board”) for a variance to permit renovations to the Property. The application sought a variance pursuant to Section 4.03(28)b of the Manchester Zoning Ordinance for “medical office” use. Neither the application form, nor the rules and practices of the Board required the identification of potential or existing tenants.

11. Section 4.03(28) provided for the following uses: “Business, professional, and general offices, including but not limited to: Bank, broker, employment agency, insurance, lawyer, doctor, architect, engineer, and similar professional activities, credit and loan agency.” The Zoning Ordinance did not further define or limit this category, and said nothing specific about the nature of the services or professionals that were permitted in the use category.

12. On March 17, 2000, PPNNE and the Owner entered into a ten-year lease (“Lease”) for approximately three-quarters of the Property. The Owner intended to lease the remainder of the Property to other, as yet unidentified medical providers. The Lease provided that PPNNE could use the Property “only for the following purpose[]: Medical Office.”

13. The Board held a public hearing on the Owner’s request for a medical office variance on April 5, 2000. No abutters appeared, no objections were heard, and no inquiries were made as to the identity of the prospective tenants who would occupy the premises. Under the Manchester Zoning Ordinance, there is no requirement that the owner have a signed lease or identify the prospective tenant(s) at the time a variance is granted. The Board granted the variance for use of the Property for medical offices. There were no conditions placed on the variance.

14. The Owner was represented at the hearing by its engineer, who did not know the

identity of any particular tenant or that any lease had been signed. During the hearing, one member of the Board asked him what the offices would be used for. The Owner's engineer stated he "[thought] they are general practice. . . . General practitioners office . . . two, maybe three doctors practicing with their staff."

15. Pursuant to the version of RSA 677:2 then in effect and the Board's Rules, the Board would have entertained an application to rehear the grant of the variance only if it were filed within twenty days of the decision. Twenty days passed without an application for rehearing, and on April 25, 2000, the variance issued to the Owner became final.

16. On September 21, 2000, the Owner applied to the Manchester Building Commissioner for a building permit for the Property, submitting detailed building plans. The plans, which referenced PPNNE throughout, showed that the building would be renovated for medical office use by PPNNE. The plans show examination rooms, procedure rooms, a doctor's office, a recovery room, a counseling room, a nurse's area, and other improvements typically associated with medical offices. The Owner answered all of the questions the Building Commissioner's office had regarding the use of the space.

17. On October 4, 2000, the Building Commissioner concluded that the building plans were consistent with the medical office variance, and issued a Building Permit to the Owner. Construction commenced at the Property.

18. On October 11, 2000, PPNNE announced to the community that it was expanding access to its health care services by opening a new medical office at the Pennacook Street location in early 2001, and an article appeared in the Union Leader newspaper about PPNNE's plans on October 12. In addition, on October 10 and 11, PPNNE representatives canvassed the residents of the Pennacook Street neighborhood, leaving pamphlets for some residents and

discussing their plans in person with others. On October 25, 2000, PPNNE had a meeting with representatives of city agencies and community organizations to discuss the opening of the new office.

19. On November 3, 2000, two members and former officers of New Hampshire Right to Life, Barbara Hagan and Kathleen Souza ("Hagan and Souza"), filed an appeal with the Board challenging the issuance of the Building Permit. Hagan and Souza lacked standing to appeal: They neither own property that abuts the Property, nor possess any financial interest in the neighborhood, and were not, therefore, "aggrieved parties" under New Hampshire law. Hagan and Souza are members and former officers of New Hampshire Right to Life.

20. Hagan and Souza's Appeal was based on their animus toward PPNNE (whom they referred to as "an extremely high profile, controversial organization"), PPNNE's patients, and the services that PPNNE might provide, and their speculative fears about the effect on the neighborhood. The Appeal had no basis in Manchester's zoning or land use regulations.

21. Pursuant to RSA 676:5, I and the rules of the Board, the Board could entertain appeals from the issuance of the Building Permit only if filed within thirty days. The Building Permit became final and unappealable on November 3, 2000, because no party with standing to do so challenged the permit.

22. Nevertheless, the Building Commissioner issued a cease and desist order as required by RSA 676:6, pending the resolution of the Hagan and Souza Appeal. Work at the property ground to a halt.

23. A public hearing was held on December 6, 2000. At the hearing, the Board voted to refuse to hear the Hagan and Souza Appeal for lack of standing. However, after closing the matter and taking a recess, the Board *sua sponte* voted to reconsider. It tabled the matter until its

next meeting on January 3, 2001, for the stated purpose of allowing Hagan and Souza to invite an "attorney" to address the standing question. This decision further delayed, without any justification, re-commencing renovations on the Property.

24. On December 6, 2000, nearly two months after the Building Permit was issued, Howe, Riley & Howe ("HRH"), an accounting firm that abuts the Property, sent a letter to the Board complaining about PPNNE and the services that might be provided by PPNNE (including "controversial surgeries," and "controversial surgical procedures"), the disruptive effect on the neighborhood, and the supposed harm that PPNNE would cause real estate values. Another abutter, Paul Harvey ("Harvey"), who owns a warehouse-type building behind the Property, sent a similar letter to the Board on December 13. Both subsequently moved to intervene in the Hagan and Souza Appeal.

25. On December 19 and 20, 2000, respectively, HRH and Harvey attempted to file their own appeals of the decision to issue the Building Permit, more than forty-five days late.

26. On January 3, 2001, the Board held its public meeting. The Board initially granted HRH's and Harvey's motions to intervene in the Hagan and Souza Appeal, but then reaffirmed its initial decision that Hagan and Souza lacked standing to appeal, which had the effect of mooted its decision to allow intervention. Nevertheless, despite the fact that the HRH and Harvey direct Appeals were more than six weeks late, the Board, without explanation, voted to hear both these Appeals.

27. The Board then heard the untimely HRH and Harvey Appeals. The Building Commissioner testified first, and confirmed that based upon his review of the plans and his experience with regard to other uses in Manchester which have been categorized as "medical offices" under Section 4.03(28)b, the PPNNE occupancy could "only" be classified as a

professional medical office use. The Building Commissioner testified:

The permit in question was issued after review of all of the applicable documents, as is our standard practice. The variance granted was for a medical office, Use Group 4.03(28)b of the Zoning Ordinance. No conditions were placed on the variance as I had noted previously. Section 4.03(28)b defines a range of uses under the heading of business, professional and general offices. These uses include doctors and similar professional offices. No distinction is made on the nature of the procedures that can be provided in the doctor or similar professional office within the context of the Zoning Ordinance. **It was and is my opinion that the Planned Parenthood occupancy can only be classified as use group 4.03(28)b within the limits of the Zoning Ordinance, as has been adopted by the Board of Mayor and Alderman of the City.**

Minutes, Zoning Board of Adjustment, Public Hearing, January 3, 2001, at 28.

28. At the hearing, neither applicant – HRH or Harvey – offered any evidence to rebut the Building Commissioner’s testimony that the use contemplated by PPNNE is a medical office use within the meaning of the variance. Instead, the abutters offered speculative and irrelevant testimony about surrounding property values, and focused on their worries about what picketing or other disturbances might occur in the neighborhood with PPNNE present.

29. In contrast, the Petitioners presented evidence at the hearing that confirmed that PPNNE’s tenancy can only be classified as a professional medical office. PPNNE offered evidence that it provides high-quality, affordable health care to women, men, and teens each year at medical offices in separate communities in New Hampshire. The medical services provided by PPNNE include:

- annual gynecological exams;
- screening for cervical, breast, uterine, and colorectal cancer;
- examinations and counseling about birth control, including abstinence/postponement and natural family planning, as well as prescribing and dispensing of contraceptive drugs and devices;
- testing and treatment for sexually transmitted infections;
- vaginal and urinary tract infection screening and treatment;
- confidential HIV testing and counseling;
- routine immunizations;
- cholesterol screening, blood pressure checks, glucose and anemia screening;

- testicular cancer screening;
- employment, school, sports physicals;
- colposcopy and cryotherapy follow-up for abnormal Pap tests; and
- medical and surgical abortions in some locations.

Such services can only be categorized as medical services.

30. The Board also heard from members of the public. Many urged the Board to revoke the Permit. These individuals complained about Planned Parenthood and abortion services, and their speculative fears about picketing and more extreme disruptions in the neighborhood. For example, one member of the public complained that "Planned Parenthood is a high profiled, controversial organization steeped in abortion politics. . . . We urge you to protect Manchester from the encroachment of this controversial organization that seeks to help minorities and the poor by killing their offspring." Minutes at 45. Another stated that "This building will be killing; they will be shredding babies to pieces." Minutes at 45. A City Alderman who spoke in favor of revoking the permit stated: "While abortion is the law of the land, I don't believe that it is a good thing. We have been legally empowered to make abortions as restrictive as possible." Minutes at 44.

31. At the end of the hearing, the Board voted – without any explanation or justification whatsoever – to revoke the Owner's Building Permit. The Board failed even to give the Owner and thus, PPNNE, standards for determining what medical use it believed was consistent with the variance it had granted nine (9) months earlier.

32. Pursuant to RSA 677:2, the Petitioners timely moved for rehearing. The Petitioners informed the Board of the controlling law on the issue of accepting the late appeals and appended a copy of the Supreme Court's decision in Daniel v. Henniker, 134 N.H. 174 (1991), in which the New Hampshire Supreme Court ruled that a Zoning Board of Adjustment has no authority to waive the deadline in the case of an appeal from a decision of a building inspector. Petitioners

also listed a variety of professionals in, and services and procedures provided at, medical offices that have been granted variances in residential districts throughout Manchester. On February 7, 2001, the Board denied both motions – again, without any explanation or justification.

COUNT I

N.H. RSA 677:4 – Review of Unlawful and Unreasonable Actions of the Board

33. Petitioners hereby incorporate paragraphs 1 through 32 as if fully set forth herein.

34. The Board's decision to deny the Owner and PPNNE the Building Permit needed to renovate the Property for PPNNE was based on untimely appeals by HRH and Harvey, which missed the deadline mandated in RSA 676:5 and local zoning procedure by more than six weeks.

35. In revoking the Building Permit, the Board violated other state and local rules for considering appeals from zoning decisions.

36. The Board's decision to deny the Owner and PPNNE the Building Permit was in violation of its own rules and New Hampshire state law.

COUNT II

N.H. RSA 677:4 – Review of Unlawful and Unreasonable Actions of the Board

37. Plaintiffs hereby incorporate paragraphs 1 through 36 as if fully set forth herein.

38. The Building Permit was properly granted by the Building Commissioner because PPNNE plans to engage in the "medical office" use for which the variance was granted.

39. Any decision by the Board that PPNNE's proposed use was inconsistent with the variance was arbitrary and capricious and violated clearly established New Hampshire state zoning law.

WHEREFORE, the Petitioners pray the Court:

A. GRANT Certiorari directing the Manchester Zoning Board of Adjustment to

review its decision and produce a certified record of its proceedings to this Court by a date certain;

B. DECLARE that the Board acted unreasonably and unlawfully and vacate the Board's decision pursuant to RSA 677:11;

C. ORDER that the Building Permit is permanently reinstated;

D. ORDER that as a result of the Board's bad faith and gross negligence in ignoring established law governing its jurisdiction over untimely appeals, the Respondents be required to pay the Petitioners' costs and reasonable attorneys' fees pursuant to RSA 677:14; and

E. GRANT such other relief as may be just.

Respectfully submitted,

24 Pennacook Street, LLC

By: Dick Anagnost Manager
Dick Anagnost

DATED: _____

STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY, SS

Subscribed and sworn to before me, the undersigned officer, by Dick Anagnost as true to the best of his information and belief.

DATED: _____

Robert E. Murphy
Justice of the Peace/Notary Public

Counsel for Owner:

DATED: _____

By: Robert E. Murphy
Robert E. Murphy, Esquire
WADLEIGH, STARR & PETERS, PLLC
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and

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND

By its attorneys,

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