

STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.
NORTHERN DISTRICT**

SUPERIOR COURT

New Hope Christian Fellowship

v.

Town of Bedford

Docket No. 216-2021-CV-00551

ORDER

The petitioner brought this action appealing a decision by the defendant denying its application for exemption of taxes under RSA 72:23 and alleging violations of Part 1, Article 5 of the New Hampshire Constitution; the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(II)(b)(1); the First Amendment of the United States Constitution, and RSA 676:17-a(I). The tax issue has been resolved. The petitioner seeks a preliminary injunction to permit it and its members to use a pre-existing building for religious services. The defendant objects. The Court held a hearing on December 9, 2021. For the following reasons, the petitioner's request for a preliminary injunctive relief is DENIED.

Factual Background

The petitioner purchased a pre-existing residential building at 445 Route 101 in Bedford, New Hampshire on March 18, 2020. Prior to the purchase of this building, the petitioner held its meetings at Bedford Martial Arts. The petitioner began to hold religious meetings in the new building on March 18 and 19, but, due to the COVID-19 pandemic, began streaming its services from the building online on March 20. Thereafter, the

petitioner applied for a tax exemption, which the defendant denied. The petitioner also applied for tax exempt status in 2021 and was again denied.

At some point—the record is not clear when—the petitioner submitted a site plan application to the defendant seeking final approval “[t]o change the use of the existing residential home to a place of worship sized to hold 50 patrons [and] [c]onstruct the associated necessary site improvements for the change of use and the building addition.” (Def.’s Ex. B.) Broadly, the petitioner sought to add an approximately 480 square foot addition near the garage, a parking lot, extended driveway, and a storm water management system to the structure/lot. (Def.’s Ex. E. at 8.) Though the building is in a zoning district that permits both residences and churches, according to the Town of Bedford Planning Director, Rebecca Hebert, the fact that the petitioner sought to change the use of the property from residential to something else—in this case, religious—required the approval from the Planning Board. Ms. Hebert informed the Court that, with or without the new construction and modifications to the property, a change in use from residential to another permitted use the zone in which the church property falls, including multi-family, would require approval of the town through the issuance of a certificate of occupancy.

On October 26, 2020, the Planning Board granted conditional approval of the site plan. (Def.’s Ex. F at 2.) The conditional approval stated that, before a certificate of occupancy was to issue, “all site improvements depicted on the plan shall be completed.” (Id. at 3.) Construction on the building began sometime thereafter. A photograph of the property taken sometime in October reflects that work on the exterior was underway and being done at some point during that month. (Def.’s Ex. G.) Though the petitioner

disputes that the building is under “active construction,” no party contends that construction on the building was completely finished as of the date of the hearing.

At some point, the petitioner began occupying the building at least on Sundays for religious services and/or bible study. On May 10, 2021, the petitioner submitted an Application for Plan Examination and Building Permit and wrote under “Description of Work”: “To get occupancy permit for an existing residential [building] while new driveway, parking and addition are being constructed.” (Pl.’s Ex. 6.) No action by the defendant has been taken on the application, and the parties dispute whether it constitutes an application for a temporary certificate of occupancy. On October 15, 2021, the defendant issued a letter to the petitioner, demanding it cease and desist from occupying the building until a certificate of occupancy is issued. (Pl.’s Ex. 5.) The petitioner’s request for an injunction followed.

Analysis

The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” ATV Watch v. N.H. Dep’t of Res. and Econ. Dev., 155 N.H. 434, 437 (2007). In order to obtain preliminary injunctive relief, the moving party must generally demonstrate: (1) a likelihood of success on the merits; (2) that “there is an immediate danger of irreparable harm to the party seeking injunctive relief”; (3) that “there is no adequate remedy at law,” N.H. Dep’t of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007), and; (4) “the public interest would not be adversely affected if the court granted the preliminary injunction,” Thompson v. N.H. Bd. of Med., 143 N.H. 107, 108 (1998).

I. Likelihood of Success on the Merits

The petitioner raises free exercise claims under both the federal and state constitutions and federal statute. With respect to the free exercise clause, the New Hampshire Supreme Court concluded in State v. Mack that the State Constitution provided more protection than the Federal Constitution. 173 N.H. 793, 814-15 (2020). Thus, the Court considers the petitioner's claims under the State Constitution, citing to federal cases for guidance only. See State v. Ball, 124 N.H. 226, 231-33 (1983).

"[U]nder Part 1, Article 5, once an individual establishes that the government action substantially burdens his or her sincere religious practice, the burden shifts to the State to show both that the government action is necessary to achieve a compelling government interest, and is narrowly tailored to meet that end." Mack, 173 N.H. at 815. To "substantially burden" one's religion, a regulation "must significantly inhibit or constrain conduct or expression that manifests some central tenant of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008).

In this case, the petitioner has not made a showing that its religious practice is substantially burdened by the defendant's refusal to allow its members to occupy the building without an occupancy permit. The regulation does not relate to the actual religious opinions or practices of the petitioner, but effects only the location where the practices may presently take place. The petitioner has not argued that the building is sacred or in some way mandatory for it to engage in its religious practice—quite the opposite, in fact, as previously it had been using Bedford Martial Arts and streaming its

services online throughout the pandemic. Nor does the petitioner allege that it has no other possible location from which it can engage in worship or conduct meetings. The group is not a large one nor one that requires a location with unique or costly fit up. There was no showing that the church could not lease a location on a temporary basis, an economic burden that would not likely constitute a substantial one, or continue with virtual services for the short time required to complete its project. The Court notes that the project is not a terribly large undertaking, but has been delayed due to supply issues, particularly with windows that were expected to arrive within an eight week or so timeframe. The windows apparently could arrive within the next weeks, but with no guarantee of a particular date. Significantly, the petitioner will not be permanently prohibited from using the building; once the defendant grants an occupancy permit, which will occur once the construction is completed consistent with the plan, the petitioner may occupy the building and hold its religious services. Accordingly, the Court finds that on a preliminary basis the petitioner has not shown the application of the town law has substantially burdened its right. See, e.g., Corp. of Presiding Bishop of Church of Jesus-Christ of Latter-Day Saints v. City of West Linn, 86 P.3d 1140, 1156-57 (Or. Ct. App. 2004) (holding that the city's zoning ordinances did not impose a burden on the church as "the ability of current members to reasonably conveniently engage in worship" had not "been rendered effectively impracticable" in another location or with a different design).

Because the Court finds no substantial burden, it need not reach the issue of whether the defendant's action was necessary to achieve a compelling interest and whether it was narrowly tailored. See Mack, 173 N.H. at 816 (citing cases that involved statutes that "prohibited certain disruptive conduct . . . if those participating in the conduct

did not first obtain a license, permit, or other lawful permission,” but could have under those statutes, and, thus, it was “far from clear that either statute substantially burdened religious practices. Therefore, neither case would have triggered the application of the compelling interest balancing test pursuant to . . . Part 1, Article 5.”).

The Court evaluates the defendant’s action in issuing a cease and desist letter under a rational basis review. See, e.g., Cmty. Res. For Justice, Inc. v. City of Manchester, 154 N.H. 748, 758 (2007) (“[A]bsent some infringement of a fundamental right, an important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality.”); accord Cent. Rabbinical Cong. of U.S. & Canada v. NYC Dep’t of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014) (“[T]he free exercise clause does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). Such laws are subject to rational basis review.” (quotation omitted)). Under the rationality standard, the action must “merely be rationally related to a legitimate government interest.” Cmty. Res. For Justice, Inc., 154 N.H. at 759. The Court does not “independently examine the factual basis” for the action, but “inquire[s] only as to whether the [town] could reasonably conceive to be true the facts upon which it is based.” Id. at 757 (quotation omitted). Under this test, the challenged action is presumed valid, with the burden to prove otherwise on the petitioner. Id. at 762. The petitioner has not met his burden.

The defendants have articulated a safety interest in prohibiting the petitioner from occupying the building without an occupancy permit. Specifically, Ms. Hebert articulated

concerns with the site undergoing construction, the septic load, traffic, water and other utility usage, and parking. The photograph introduced shows that conditions caused by the construction activities could present safety issues for invitees. The process of obtaining a permit to occupy a structure, rooted in these noted safety concerns, is equally applicable to any individual or group seeking to change the type of use of a building or property in this area. The Court agrees that the defendants have, at this stage, articulated a reasonable basis to issue a cease and desist to the petitioners regarding their occupation of the building. Cf. Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 751 (Mich. 2007) (“The compelling state interest and, hence, the municipal concern served by zoning regulation of land use is promotion of health, safety, morals[,] or general welfare.”). Furthermore, the petitioner has presented no evidence to suggest it is being treated differently from other similarly situated landowners because it is a church, or that its desired use would impact public safety in any lesser way than would any other permitted use requiring a permit. Accordingly, the Court finds that, at this stage, the petitioner has not demonstrated a reasonable likelihood of success on the merits of its claims under the Federal or State Constitutions, or RLUIPA.

As for the petitioner’s claim that the cease and desist letter violated RSA 676:17-a, the Court likewise finds that it is not likely to succeed on the merits. The petitioner takes specific issue with the fact that the cease and desist did not contain “[t]he facts constituting the violation” and “[t]he corrective action required.” RSA 676:17-a, I(b)-(c). However, the cease and desist clearly notified the petitioner that it was violating provisions of the Town’s construction ordinance and building code by using/occupying the residence without a certificate of occupancy. The petitioner does not assert any other

occupation it was making of the property beyond religious services, and further, it acknowledges it was engaging in that use. Moreover, the letter clearly states that use/occupation of the building may not be done without a certificate of occupancy. In other words, the cease and desist letter does state the corrective action needed: obtain a certificate of occupancy. Accordingly, the Court finds that the petitioner is not likely to succeed on the merits of this claim.

II. The Remaining Factors

The petitioner contends that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373 (1976). It further contends that granting it a preliminary injunction is in the public interest as it would protect the freedom to practice one’s religion.

The Court acknowledges the strong public interest in practicing one’s religion, particularly in a place of one’s choosing. However, no action by the defendants has resulted in the petitioner’s inability to practice its religion. As noted, the petitioner has not established its members are unable to worship at another location or virtually. Nor has the petitioner demonstrated that the building is essential in a way that its members’ inability to congregate in that specific structure hinders their ability to practice their religion. Allowing the petitioner to occupy the property when a certificate of occupancy for non-residential purposes has not been granted poses safety concerns, as articulated above. Though the petitioner argues that its religious use would effectively be no different than a residential use, the Court disagrees. Residential uses do not contemplate gatherings of dozens of people on a regular basis.

Furthermore, though the petitioner claims its site plan application was limited to only changing the use of the garage and the addition, and thus, it should be allowed to occupy the residential part of the building, the Court again disagrees. The application did not distinguish between the parts of the building and the petitioner has not presented any facts to support such a distinction. Nor does the petitioner intend to use the structure for a residence, it never has. Speculating about whether its pastor might live there in the future as an accessory use does not further the petitioner's goal, and at that point would have to comply with the town regulations. The record supports that petitioner's clear and only intent is to change the use of the entire building from residential to religious and to conduct religious services therein.

In order for the petitioner to use the building for religious purposes, however, it must finish the site plan approval process that it started. The remedy for the petitioner has been clear from the beginning, ever since its site plan application was approved: to occupy the property, it must receive a certificate of occupancy, which may only issue upon completion of construction.

Conclusion

Based on the foregoing, the petitioner's request for preliminary injunctive relief is DENIED.

The Court notes that the Application for Plan Examination and Building Permit, although perhaps not absolutely perfect in its form, requested a temporary occupancy permit. It has been ignored since May by the defendant. As it is duty bound, the defendant shall assist the petitioner in its application for a temporary occupancy permit by helping it engage in the proper process. It shall thereafter consider whether the existing building

could be safely used with the limitations of use proposed by the petitioner relating to the number of persons and timing of services to see whether the petitioner's interest can be safely accommodated on a temporary basis. The defendant shall make its best efforts to timely engage in this process and review the application, including inspection of the property, understanding that this cannot be accomplished before the holidays.

SO ORDERED.

December 22, 2021



Diane M. Nicolosi, Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 12/22/2021