

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS

SUPERIOR COURT

AIDS SERVICES FOR THE MONADNOCK REGION,

Plaintiff

v.

TOWN OF GILSUM,

Defendant

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DOCKET NO. 08-E-

**PETITION**

**INTRODUCTION**

Now comes the Petitioner, AIDS Services for the Monadnock Region (ASMR), a New Hampshire nonprofit corporation located at 16 High St., Gilsum, New Hampshire, 03448, and complains against Respondent Town of Gilsum, a municipal corporation with a mailing address of P.O. 67, Gilsum, New Hampshire, 03448, as follows:

ASMR owns and operates a group home in Gilsum, New Hampshire, the Cleve Jones Wellness House, that provides intensive support, monitoring and services for up to seven people with HIV/AIDS or hepatitis C virus who are unable to live on their own. ASMR brings this action for declaratory and injunctive relief challenging restrictions on the client population ASMR can serve which were imposed by the Town of Gilsum in a Variance granted to ASMR on October 6, 2005 (attached as Exhibit A). Specifically, ASMR seeks to enjoin the enforcement of conditions in the Variance that require ASMR

to bar residency in its group home to “persons who have been released from prison within the last 12 months” (Exhibit A, ¶ 4(B)), “persons with a history of drug or alcohol abuse who have not been drug or alcohol free for 12 months immediately prior to admission to Wellness House” (Exhibit A, ¶¶ 4 (C) and 3(C)), and to persons convicted of certain types of criminal offenses (Exhibit A, ¶ 18). As set forth herein, these conditions are: (1) ultra vires because they exceed the authority delegated to the Town by the Zoning and Enabling Act, RSA 674:16; and (2) violate the equal protection guarantees of the New Hampshire Constitution, including Pt. I, articles 2 and 12.

### **PARTIES**

1. Petitioner ASMR is a nonprofit corporation organized under the laws of New Hampshire with a principal place of business at 16 High Street, Gilsum, New Hampshire and a mailing address of P.O. Box 396, Gilsum, New Hampshire, 03448.

2. Respondent Town of Gilsum is a municipal corporation organized under the laws of New Hampshire with a mailing address of P.O. Box 67, Gilsum, New Hampshire, 03448.

### **JURISDICTION**

3. This Court has jurisdiction to grant declaratory relief pursuant to RSA 491:22 and injunctive relief pursuant to RSA 498:1.

### **FACTS**

#### **A. The Steps Leading To The Variance.**

4. Founded in 1988, ASMR is the sole agency in Southwestern New Hampshire providing services, support and housing to people with human immunodeficiency virus (HIV), Acquired Immune Deficiency Syndrome (AIDS) (which is the advanced stage of

HIV disease), and hepatitis C virus (HCV) in Cheshire, Sullivan and Hillsborough Counties.

5. Many of ASMR's clients are poor and unable to live on their own due to illness, financial problems, or the paralyzing effects of social stigma, isolation, loss of family, or depression or other psychiatric issues. In November 2004, ASMR undertook plans to open a residence for people with HIV/AIDS and HCV. The residence would both fill a need for housing and provide intensive support, intervention, and life skill building in a family setting to help people rebuild shattered lives and facilitate accelerated progress leading to the ability to live independently. The residence became known as the Cleve Jones Wellness House (Wellness House) (named after the founder of the AIDS Memorial Quilt).

6. In November 2004, ASMR located a property at 16 High Street in Gilsum, New Hampshire which was well-situated for its housing needs. The property previously had been used for 13 years as the Country Acres of New England Group Home, a residential social services program for girls who had been removed from their homes by the state due to abuse, neglect or stresses that the family could not manage. As such, the property already had proper systems in place for use as a group residence (e.g., a sprinkler and fire alarm system, an adequate number of bathrooms and washer/dryer hookups, single room occupancy spaces, and a commercial kitchen) as well as office space, sizeable common areas, and a beautiful and spacious yard ideal for creating a peaceful and stabilizing environment for ASMR's clients. The owner of the property accepted ASMR's offer to purchase it on December 24, 2004.

7. At the time ASMR entered into an agreement to purchase the property in December 2004, the property was zoned under the Gilsum Zoning Ordinance such that ASMR could operate Wellness House as a permitted use.

8. After ASMR announced its plans to house people with HIV/AIDS and HCV at the property, a Gilsum resident began a petition campaign to keep out ASMR's clientele. The petition stated: "We the residents of Gilsum, N.H. do not want AIDS Counseling Services to locate to High Street in Gilsum, N.H. High St. is a family neighborhood with children and a facility like that is not wanted here." (emphasis in original language). The petition was spearheaded by Ray and Allison Britton. Ray Britton subsequently became a Selectman in the town of Gilsum.

9. Subsequent to the time that ASMR announced its plans to house people with HIV/AIDS at the property, the Town amended the Gilsum Zoning Ordinance to exclude its use of the property as a boarding house

10. ASMR's Executive Director and Board Treasurer attended the Gilsum Planning Board meeting on January 4, 2005 to discuss ASMR's plans and indicate its intention to file an Application for Site Plan Review, which was the only approval necessary for its proposed operations at Wellness House. At that meeting, town officials moved immediately to place an article on the town meeting warrant (scheduled for March 8, 2005) excluding boarding houses as permitted uses in the Village District.

11. At the Gilsum Town Meeting in the previous year (2004), the residents of Gilsum defeated by a vote of 102 to 60 a measure to eliminate boarding houses as a permitted use in the Village Residential District.

12. At the Gilsum Town Meeting on March 8, 2005, a measure to eliminate boarding houses as a permitted use in the Village Residential District passed by a vote of 135 to 42.

13. Subsequent to the March 8, 2005 vote, ASMR sought a Variance from the town to open Wellness House at the property. There were a series of hearings and meetings between March, 2005 and October, 2005. Much of the discussion at these hearings and with Town officials centered on the Town's obligations under RSA § 674:33 (V), the provision of the Zoning Enabling Act providing for variances when "reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises." In addition, ASMR's lawyers made the Zoning Board aware of federal cases under the National Fair Housing Act Amendments and the Americans with Disabilities Act regarding discrimination against people with disabilities in group housing.

14. Paragraph 4(B) of the Variance prohibits from residing at Wellness House "persons who have been released from prison within the last 12 months."

15. Paragraph 4 (C) of the Variance prohibits from residing at Wellness House "persons with a history of drug or alcohol abuse who have not been drug or alcohol free for 12 months immediately prior to admission to Wellness House." Paragraph 3(C) contains the identical exclusion.

16. Paragraph 18 of the Variance requires ASMR to conduct criminal record checks to insure that clients have not been convicted of "the manufacture of controlled substances or for sexual assault or sexually related crimes, or convicted within the last five years for violent crimes (more serious than simple assault) or for theft crimes

involving trespass or unlawful entry.” Plaintiffs acknowledge that the provisions of paragraph 18 do not include sexually related crimes that require registration under the New Hampshire sex offender registration statute, as those crimes are referenced in paragraph 4(A) of the Variance which the plaintiffs are not challenging.

**B. The Wellness House Program.**

17. Wellness House opened in July, 2006. It houses a maximum of seven residents at any time. Wellness House has strict rules of conduct set forth in the Resident Handbook, including a zero-tolerance prohibition on drug or alcohol use that mandates immediate dismissal for a single violation.

18. Wellness House follows a model for unusually comprehensive and intensive monitoring and support services for residents known as “No Place Like H.O.M.E.,” which stands for housing, oversight, medical management, and education.

19. Wellness House provides housing to clients who are not able to live on their own. A structured, consistent and supportive home environment is critical for clients to achieve medical and mental health stabilization and improvement. Wellness House provides for basic daily needs – such as consistent meals – so that clients can focus on key issues, such as substance abuse recovery or emotional development. In addition, the dependable family setting allows clients who have lost a sense of home or connection to others to work on interpersonal skills and receive peer support in a healthy setting, an element which many clients have never had and which is especially important for clients who have experienced significant stigma, isolation, and disenfranchisement due to HIV/AIDS or HCV.

20. Oversight consists of intensive case management and daily support and monitoring of clients. It focuses on life skill building and goal setting. Because of histories of illness, substance abuse, or emotional problems, many clients lack the most fundamental life skills that most people take for granted -- e.g., setting an alarm clock and getting up on time, keeping a calendar and getting to medical appointments, arranging for a ride, remembering to take medications, managing basic interpersonal relationships, or finding a job. The H.O.M.E. model allows ASMR to closely monitor a client so that problems (such as not taking medications or emotional deterioration) are addressed and corrected immediately rather than in a week or a month. In addition, Wellness House helps clients address past issues that are impeding their ability to live independently, such as helping clients clear up past legal problems, obtain a driver's license, address ongoing substance abuse recovery issues, understand how to prevent HIV or HCV transmission to others, and reestablish relationships with family members.

21. Medical Management includes both physical and mental health. Wellness House obtains primary care doctors and infectious disease specialists for clients. It works with Monadnock Family Services and private providers to ensure that clients are in psychotherapy. It provides transportation to medical appointments or AA meetings. And, critically, it ensures that clients stay adherent to complex medication regimens.

22. Education refers to teaching the residents vocational skills as well as how to advocate for themselves and others. Wellness House helps clients explore and set goals around jobs or education and helps them access classes at Keene State College or vocational rehabilitation services. It also facilitates self-discovery by helping clients

identify interests and become engaged in activities that build self-esteem, such as music lessons, sports, or other recreational activities.

23. Nonresidents who are clients of ASMR receive their case management services at Wellness House. ASMR assists these clients and helps them access medical, mental health, and other services, but these clients need less intensive oversight and services than Wellness House residents. Nonresident clients come to the house for a variety of reasons. They meet with their case manager, visit the food pantry, visit and interact with house residents, take clothing that has been donated, borrow items from the lending library, access the computer, and relax in the common space or yard areas.

24. The general welfare of the New Hampshire community requires that group homes and intensive in-house support and services be available to persons who need help transitioning to independent living in the community as a result of illness, incarceration, criminal histories, substance abuse recovery, or other past problems.

### **CLAIMS FOR RELIEF**

#### **COUNT I: ULTRA VIRES AND STATE PREEMPTION**

25. Petitioner incorporates paragraphs 1-24 of the petition herein.

26. The Variance was enacted by the Town of Gilsum pursuant to authority granted to it by the State in the Zoning and Enabling Act, RSA 674:16.

27. The grant of police powers from the State to the Town in the Zoning and Enabling Act is limited to actions that are “[f]or the purpose of promoting the health, safety, or general welfare of the community.” RSA 674:16.

28. Paragraphs 3 (C ), 4(B), 4(C) and 18 of the Variance are ultra vires, void ab initio, and unenforceable because they conflict with RSA 674:16 and exceed the powers



delegated to the Town in the Zoning Enabling Act (including because they are not in furtherance of the general welfare provision of RSA 674:16), or are preempted by state regulation.

**COUNT II: VIOLATION OF EQUAL PROTECTION**

29. Petitioner incorporates paragraphs 1-24 of the petition herein.

30. Paragraphs 3 (C ), 4(B), 4(C) and 18 of the Variance violate plaintiff's rights to equal protection under the New Hampshire Constitution, Pt. I, articles 2 and 12.

**PRAYERS FOR RELIEF**

WHEREFORE, for the foregoing reasons, the Petitioner seeks the following relief:

1. A declaratory judgment that paragraphs 3(C), 4(B), 4(C) and 18 of the Variance granted by the Town of Gilsum to AIDS Services of the Monadnock Region on October 6, 2005 are: (1) ultra vires, void ab initio, and unenforceable because they conflict with RSA 674:16 and exceed the powers delegated to the Town in the Zoning Enabling Act; and (2) unconstitutional because they violate the plaintiff's equal protection rights under the New Hampshire Constitution, Pt. I, articles 2 and 12.

2. An injunction enjoining the Town of Gilsum from enforcing paragraphs 3 (C), 4 (B), 4(C) and 18 of the Variance.

3. And for such other relief a may be just..

Respectfully submitted,

AIDS SERVICES FOR THE MONADNOCK REGION

By its attorneys,

Date: September 24, 2008

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