



**Division of Development Administration and Review**

City of Pittsburgh, Department of City Planning

200 Ross Street, Third Floor

Pittsburgh, Pennsylvania 15219

**ZONING BOARD OF ADJUSTMENT**

**Date of Hearing:** August 4, 2016  
**Date of Decision:** January 19, 2017

**Zone Case:** 204 of 2016  
**Address:** 5601 (5603) Stanton Ave  
**Zoning District:** RM-M  
**Ward:** 11  
**Neighborhood:** Highland Park

**Owner/Applicant:** Meyer & Evelyn Simon

**Request:** To occupy the premises as general practice medical office use.

<b>Protest Appeal</b>	923.02.B.1/923.02.D	Appeal to the Zoning Board of Adjustment
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**Appearances:**

**Protestants/Owners:** Alan Dunn, Steven Simon, W. Riva Casselberry, Meyer Simon, Christine Getto, Amanda de Geus, William R. Sittig, Jr. (Attorney)

**Respondents:** Corey Layman (Zoning Administrator), Monica Watt, Francisco Escelante

**Findings of Fact:**

1. At issue in this protest appeal is a parcel identified as Parcel No. 83-B-363, which is located near the corner of North Negley Avenue and Stanton Avenue, in an RM-M (Multi-Unit Residential) District in the Highland Park neighborhood. The street address for the parcel has been identified both as 5603 Stanton Avenue and as 5601 Stanton Avenue ("Stanton Avenue Parcel") but has been consistently identified by parcel number.

2. The Stanton Avenue Parcel abuts Parcel No. 83-B-364, which is identified with the street address of 802 North Negley ("North Negley Parcel").

3. Located on the parcels are a 2 ½-story structure, which extends across the property line between the parcels and has an entrance on Stanton Avenue, and a single story structure which extends along the North Negley Avenue frontage of the North Negley Parcel and has its entrance on North Negley Avenue. Because of the configuration of the buildings on the parcels, no area for on-site parking is available.

4. Meyer and Evelyn Simon own both parcels ("Owners"). Although the buildings share common ownership and extend across the property line, apparently the lots have never been formally consolidated.

5. A valid January 3, 1984 Certificate of Occupancy permitted use of "5601-03 Stanton Avenue & 802 N. Negley Ave." for "Six dwelling units, drug store and two outdoor parking stalls (new drug store ext)." (Ex. P-4).

6. The drug store use is located on the North Negley Parcel.

7. In 2014, the Owners sought approval from the City of Pittsburgh for a building permit to renovate interior and exterior of the second and third floor apartments and the first floor space in the 2 ½-story building.

8. On March 19, 2014, Zoning Voucher No. 14-B-00633 was issued for the address of 5603 Stanton Avenue, describing the work as "interior renovations to 2nd and 3rd floors of 2 ½ story structure." (Ex. P-4).

9. On May 1, 2014, a Commercial Occupancy Only Permit Application Voucher No. 14-OCC-00214 was issued for the address of 5603 Stanton Avenue. That voucher included, as the work description, "occupancy only for general practice medical office at 5601 next to pharmacy;" and, as the occupancy, "six dwelling units, drug store and two outdoor parking stalls, and general practice medical facility." (Ex. P-4).

10. With a May 12, 2014 email, a City building inspector, Nicholas J. Ciarimboli, advised the Owners' contractor that "[t]he project is now a partial change of use with a doctor's office on the first floor. Due to this change, you will have to return to zoning for review and add a certificate of occupancy to the permit." (Ex. P-5).

11. On June 9, 2014, the Zoning Office issued a revised Zoning Voucher No. 14-B-00633. The original March 19, 2014 date of issuance remained on that document and "REVISED 6-9-14" was hand-printed on the top. The address on the reissued form was changed to 5601 Stanton Avenue and the work description was also revised to "interior renovations & exterior renovations to existing 2nd and 3rd floor apartments and first floor tenant space of 2 ½ story structure." (Ex. P-4). Handwritten at the bottom of the document is "NJC 6/10/14," apparently indicating Mr. Ciarimboli's review of the zoning voucher on June 10, 2014.

12. As of June 9, 2014, construction drawings, which depict a first floor medical office, were stamped as approved for construction by PLI. (Ex. P-8).

13. The June 9, 2014 version of Zoning Voucher No. 14-B-00633 did not further describe the nature or use of the "first floor tenant space."

14. However, the May 1, 2014 Commercial Occupancy Only Permit Application Voucher No. 14-OCC-00214 was also initialed as of June 9, 2014. That revised document included the language "occupancy only for general practice medical office at 5601 next to pharmacy," with a hand-written change of the address from 5601 to 5603 Stanton Avenue. (Ex. A-1).

15. It is unclear from the evidence presented whether any construction drawings depicting the medical office use, as provided to the building inspector, were provided to the zoning personnel when the revised March 19/June 9, 2014 voucher was obtained or whether the distinction between the different addresses, different parcels and different uses on the combined Stanton Avenue and North Negley Avenue Parcels were clarified in relation to the actual location of the medical office use, as identified in the revised May 1/June 19, 2014 occupancy voucher.

16. A signature on the Owners' revised June 9, 2014 building permit application indicates that they were represented by legal counsel in the permitting process. (Ex. P-4).

17. The Owners proceeded with the improved interior renovations to the 2 ½-story building, including the construction of the improvements to the first floor tenant space as a general medical office.

18. The Owners entered a lease for the medical office space as of August 2015. (Ex. P-6).

19. PLI conducted a final inspection of the property on December 10, 2015 and on December 29, 2015 issued a Certificate of Occupancy for "Six Dwelling Units, Drug Store and Two Outdoor Parking Stalls with One Handicap Accessible Space, and General Practice Medical Facility with Basement to Remain Vacant."

20. On February 1, 2016, the Zoning Administrator issued a Notice of Violation and Order to the Owners, citing the use of the first floor of the Property as a physician's office, in violation of Section 922.02 of the Code.

21. At issue in the hearing before the Board was the Owners' appeal of the February 1, 2016 Notice of Violation and their assertion of a vested right to the medical office use.

22. The Owners presented evidence relating to the procedural history of the permitting with a collective exhibit P-4, which included the various zoning voucher and revisions. They also submitted an exhibit describing the costs of renovations, asserting that the total cost of renovations for the 2 ½-story building was approximately \$273,000.00 and estimating that the cost of renovations for the first floor medical office space was approximately \$150,000.00. They offered testimony that it would cost thousands of dollars to convert the medical office space into a residential unit. (Tr. 22).

23. Mr. Meyer Simon variously testified that one of the six units in the 2 ½-story building had been used as a medical or dentist office as early as the 1940s but that use had not continued after a fire a number of years ago. He acknowledged that the 1984 Certificate of Occupancy permitted 6 dwelling units and the drug store collectively between the Stanton Avenue Parcel and the North Negley Avenue Parcel, without reference to any approval or permission to use any portion of either property as a medical or dentist office. (Tr. 35-38).

24. No evidence of any prior certificate of occupancy for a medical/dentist office use for the Stanton Avenue Parcel was provided. Despite the testimony that the medical office use had been in place as early as the 1940s, no evidence was presented with regard to that use ever being permitted as a legal nonconforming use in the RM District.

25. Monica Watt, a representative of the Highland Park Community Council, and Fran Escalante, a board member of Highland Park Community Development Corporation, voiced concerns regarding the use of the first floor of the property for a medical office in the residential district. They noted particularly concerns related to the operational aspects of the medical office use, including individuals queuing in front of the building and the volume of patients visiting the office. (Tr. 30).

### **Conclusions of Law:**

1. Pursuant to Section 923.02.B of the Code, the Board has authority to hear and decide appeals of decisions of the Zoning Administrator. At issue here is the appeal of the Zoning Administrator's February 1, 2016 revocation of the December 29, 2015 Certificate of Occupancy for the medical office use within the 2 ½-story building. Although the medical office use is not permitted in the RM District, the Owners assert a vested right to that use.

2. The doctrine of vested rights is intended to protect landowners in situations where a municipality or governmental entity may have erroneously issued a permit and the landowner has proceeded in reliance upon that permit. *Highland Park Community Club v. Zoning Bd. of Adj.*, 475 A.2d 925, 927 (Pa. Commw. Ct. 1984), *aff'd* 506 A.2d 887 (Pa. 1986), citing *Commonwealth Department of Environmental Resources v. Flynn*, 344 A.2d 720 (Pa. Commw. Ct. 1975). In *Flynn*, the Commonwealth Court articulated five factors which are to be considered in determining the doctrine of vested rights should apply: 1) due diligence in attempting to comply with the law; 2) good faith throughout the proceeding; 3) the expenditure of substantial and unrecoverable funds; 4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of a permit; and 5) the insufficiency of the evidence to prove that individual property rights or the public health, safety, or welfare would be adversely affected by the use of the permit. *Flynn*, 344 A.2d at 725. The Pennsylvania Supreme Court adopted this vested rights analysis in *Petrosky v. Zoning Hearing Bd. of Upper Chichester Township*, 402 A.2d 1385 (Pa. 1979). The factors set forth in *Flynn* and *Petrosky* establish a logical framework that allows a fact-finding body to evaluate the circumstances and relative equities associated with the issuance of a permit and the reasonableness of the landowner's reliance on receipt of the permit.

3. Pursuant to both *Flynn* and *Petrosky*, the Applicant has the burden of proof in establishing the five factors. However, Pennsylvania law does not require the applicant to establish that all five factors are present to be entitled to a vested right. *Mirkovic v. Zoning Hearing Board*, 613 A.2d 662, 667 n.2 91 (Pa. Commw. Ct. 1992). See also *Lamar Advantage GP Company v. Zoning Hearing Board of Adjustment of the City of Pittsburgh*, 991 A.2d 423 (Pa. Commw. Ct. 2010).

4. The City's building permit/zoning review process involves review of building permit application vouchers related to the work to be completed and commercial occupancy vouchers related to the use proposed.

5. Here, the revised March 19/June 9, 2014 Zoning Voucher No. 14-B-00633 (building permit voucher) work description was for "interior renovations & exterior renovations to existing 2nd and 3rd floor apartments and first floor tenant space of 2 ½ story structure," without specific reference to a medical office. The revised May 1/June 9, 2014 Commercial Occupancy Only Permit Application Voucher No. 14-OCC-00214 (use voucher) identified the general medical office use but also reflected a lack of clarity as to the address and property involved.

6. The confusion surrounding what was actually submitted for review and what was approved by both the zoning office and PLI, based on which documents and for which property, was compounded by the fact that the 1984 Certificate of Occupancy involved not only the Stanton Avenue Parcel but the North Negley Parcel, where the drug store use is located.

7. Further, the preexisting medical/dentist office use that the Owners offered as a basis for seeking approval for a renovated medical office space is not permitted in the RM District and was never the subject of any permit or approval. The Owners do not assert that the medical/dentist office use was ever legally a nonconforming use on the Stanton Avenue Parcel. Because they were represented by legal counsel in the permitting process, they should have been aware that the medical office use was not permitted in the RM District and was not permissible without Board review. The Board is thus not persuaded that the Owners proceeded with all due diligence and good faith.

8. However, despite the lack of clarity as to what was actually presented and provided, to which City department and when, the Owners did demonstrate that the City issued permits and approvals, that they relied on the City's approvals and proceeded to renovate the first floor space of the building on the Stanton Avenue for a general medical office, with unrecoverable costs of approximately \$150,000.

9. Under the controlling legal standards for considering an assertion of a vested right, the applicant has the burden of proof but is not required to establish that all five factors are present to be entitled to a vested right.

10. The Board concludes that the Zoning Administrator properly issued the Notice of Violation for the unpermitted medical office use but that the Owners did establish a vested right with respect to the general medical office use renovations. Because the Board is not persuaded that the applications, as revised and described, were obtained with the requisite obligations of due diligence and good faith, it finds the imposition of the following conditions on the medical office use in the RM District to be appropriate to address the detrimental impacts of the medical office use in the RM District.

**Decision: The general medical office use of the 5303 Stanton Avenue property (Parcel No. 83-B-363) may continue subject to the following conditions:**

1. Office hours shall be limited to 8 a.m. to 6 p.m., Monday through Friday;
2. The Owners shall secure at least 3 off-site parking spaces for medical office staff or provide a comparable parking plan;
3. Only signage as permitted for a home occupation pursuant to Section 919.03.L shall be permitted; and
4. The medical office waiting room shall be of sufficient size to accommodate the anticipated volume of patients to be seen, during the permitted office hours, and the office staff shall be responsible for ensuring that patients do not queue outside the building.

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Alice B. Mitinger, *Chair*

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LaShawn Burton-Faulk

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John J. Richardson