

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-17 : HEARING DATE: September 2, 2009
: :
APPLICATION OF: Maura Bowe : :
: DECISION DATE: October 7, 2009
: :
PROPERTY: 317 Matsonford Road : :
: :
Upper Merion Township :

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Maura Bowe, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-218.B in order to operate a child day care home from her residence. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on September 2, 2009 at the Upper Merion Township Building. All members of the Zoning Hearing Board were present as well as the Solicitor, Zoning Officer, and Court Reporter.

FINDINGS OF FACT

1. The Applicant is Maura Bowe, 317 Matsonford Road, Gulph Mills, PA 19428.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 317 Matsonford Road, Gulph Mills, PA 19428, Upper Merion Township.
4. The Applicant was not represented by an attorney.
5. The property is zoned "R-2" Residential.

6. The Applicant testified that there will be a fenced play area so the children are secure.
7. The Applicant testified that there is a first floor bathroom in the play area inside the house.
8. The Applicant will have all the necessary state licenses and clearances before the operation of the day care home.
9. The Applicant does not have any day care experience, however, she is very active with girl scouts.
10. The Applicant agreed as a condition of approval to not let any of the day care children use the trampoline.
11. The Applicant agreed as a condition of approval to complete the fencing around the yard so that it is 100% secure.
12. There were no residents who testified against the project.
13. There were no residents who testified in support of the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Maura Bowe, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-218.B in order to operate a child day care home from her residence.

A special exception is a conditionally permitted use, allowed by the legislature if specifically listed standards are met. Appeal of Brickstone Realty Corp, 789 A.2d 333 (Pa. Cmwlth 2001). As such, a special exception is not an exception to the zoning ordinance, but a use permitted conditionally, the application for which is to be granted or denied by the Zoning Hearing Board pursuant to express standards and criteria. Id. As a matter of law, an applicant

has an absolute right to a special exception, *unless it is injurious to the public safety, health, and welfare of the community*. Manor Health Care v. Zoning Hearing Bd., 139 Pa. Commw. 206, 590 A.2d 65 (1991) (emphasis supplied).

An applicant for a special exception has the burden of proving that it has met the criteria for a special exception contained in the ordinance. Shamah v. Hellam Township Zoning Hearing Board, 167 Pa. Cmwlth. 610, 648 A.2d 1299 (1994). The applicant must prove not only that the proposed use is of a type permitted by special exception, but also that the proposed use complies with the other applicable requirements of the ordinance which expressly govern such a grant. Id. Once the applicant for a special exception shows compliance with the specific requirements of the ordinance, it is presumed that the use is consistent with the promotion of health, safety and general welfare. Brickstone, 789 A.2d at 340. At this point, the burden shifts to objectors to prove that the proposed use is not consistent with the health, safety and general welfare. Id.

In accordance with § 912.1 of the Municipalities Planning Code, 53 P.S. § 10912.1, the Zoning Hearing Board may attach reasonable safeguards and conditions on the grant of a special exception.

Pursuant to Section 165-250B(1) of the Upper Merion Zoning Code, the Board is required to consider the following criteria that is outlined in Section 165-250B of the Zoning Code.

- (a) The Applicant shall establish, by credible evidence, that the special exception complies with the statement of community development objectives as stated in Article I of this Chapter and with the declaration of legislative intent that may appear at the beginning of the applicable district under which approval is sought.

- (b) The Applicant shall establish, by credible evidence, compliance with all conditions on the special exception enumerated in the section which gives the Applicant the right to seek a special exception.
- (c) The Applicant shall establish, by credible evidence, that the proposed special exception will not adversely affect neighboring land uses in any way and will not impose upon its neighbors in any way but rather shall blend with them in a harmonious manner.
- (d) The Applicant shall establish, by credible evidence, that the proposed special exception shall be properly serviced by all existing public service systems. The peak traffic generated by the subject of the approval shall be accommodated in a safe and efficient manner, or improvements shall be made in order to effect the same. Similar responsibility shall be assumed with respect to other public service systems, including, but not limited to, police protection, fire protection, utilities, parks and recreation.
- (e) The Applicant shall establish, by credible evidence, that the proposed special exception shall be in and of itself properly designed with regard to internal circulation, parking, buffering and all other elements of proper design.
- (f) The Applicant shall provide the Board with sufficient plans, studies or other data to demonstrate compliance with all applicable regulations.
- (g) The Board shall impose such conditions as are necessary to ensure compliance with the purpose and intent of this chapter, which conditions may include plantings and buffers, harmonious design of buildings and the elimination of noxious, offensive or hazardous elements.

The Applicant is requesting a special exception to operate a day care home out of an existing single family dwelling. The Applicant has no day care experience, however, she has young children herself and she is active with girl scouts. The Applicant wants to supplement her income by running a day care out of her house. The application requested is for a special exception, therefore, the Applicant has the burden of proving that she fits within the parameters of the zoning code that permit a special exception. The only requirements in the code call for proper licensing from the Commonwealth and to limit the children to six (6) or less children. The Applicant testified that she will comply with those requirements before a use and occupancy permit is issued. The board had some concern regarding the use of a trampoline at the subject property. The Applicant agreed as a condition of approval to not let any of the children use the trampoline at any time. The board further had a concern about the fenced in area of the yard and that the fence was not complete at this time. The Applicant agreed as a condition of approval to have the fence totally complete before a use and occupancy permit is issued.

Based on the Applicant's willingness to agree to the above conditions, the board no longer had a concern regarding the use, therefore, the special exception should be granted.

ORDER OF THE UPPER MERION TOWNSHIP
ZONING HEARING BOARD

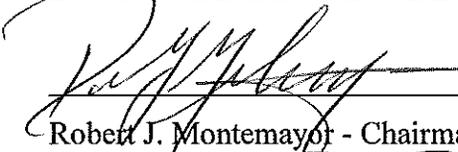
IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony to grant a special exception under Section 165-218.B in order to operate a child day care home from her residence.

This special exception is conditioned upon the following:

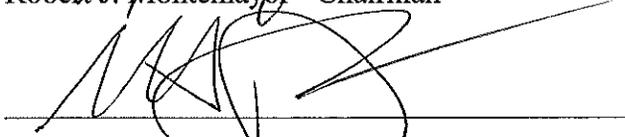
1. The Applicant must comply with the testimony of the Applicant at the public hearing on September 2, 2009.
2. The Applicant must complete the fence so it is totally enclosed before the issuance of a use and occupancy permit.
3. The Applicant will not let any children use the trampoline at any time.

Decision Dated: October 7, 2009

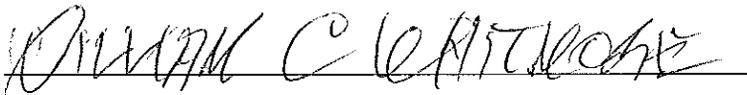
**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



Robert J. Montemayor - Chairman



Mark S. DePillis, Esq. - Vice Chairman



William C. Whitmore, Sr. - Secretary

NOTE TO APPLICANT:

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant has received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Upper Merion Township within one (1) year of the date of the approval or the decision granting approval.