



**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

<b>APPLICATION NO.</b> 2009-13	:	<b>HEARING DATE:</b> June 17, 2009
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<b>APPLICATION OF:</b> Regina and Fernando Canete	:	<b>DECISION DATE:</b> July 15, 2009
	:	
<b>PROPERTY:</b> 420 Anthony Road	:	
	:	
Upper Merion Township	:	

**OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD**

The Applicant, Regina and Fernando Canete, (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 their residence. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on June 17, 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 Regina and Fernando Canete, 420 Anthony Rd., King of Prussia, PA 19406.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 420 Anthony Rd., King of Prussia, PA 19406, Upper Merion Township.
4. The Applicant was not represented by an attorney.
5. The property is zoned "R-2" Residential.

6. The lot is approximately .28 acres.
7. The Applicant is proposing a child day care home for up to six (6) children.
8. The Applicant is proposing the use in her existing single family dwelling.
9. The Applicant currently has three (3) children under the age of six, plus whatever children would utilize the day care home.
10. The Applicant introduced her resume and marked it as Exhibit "A-1".
11. The Applicant introduced five (5) photographs and marked them as Exhibit "A-2".
12. The Applicant did not testify to any of the elements outlined in Section 165-250.B as required by the code.
13. Mrs. Steiner testified against the application because she was concerned that the area would convert to a non-residential area.
14. Mrs. Edger testified against the application with similar concerns expressed by Mrs. Steiner.
15. Ms. Haines testified against the application because of concerns regarding traffic.
16. Mrs. Donnelly testified against the application because of her concerns regarding traffic and her belief that there were already enough day care homes in the immediate area.
17. The Applicant introduced Exhibit "A-3", which is a letter from a neighbor.
18. Mrs. Cottie testified against the application.
19. A letter was introduced to the board and marked as Protestant Exhibit "1", which is a letter from Gerald Haines. The letter from Mr. Haines indicated that he is an adjacent neighbor and he was concerned that the use would diminish the value of his property. He was also concerned about noise from the children and the extra traffic.

20. There were no residents who testified in support of the project.

### DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Regina and Fernando Canete, (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 their 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.

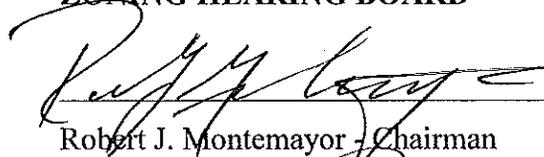
The Applicant has the burden of satisfying all the criteria outlined in Section 165-250.B. The Applicant was not represented by an attorney and the Applicant failed to address any of the items outlined in the above referenced section. The burden is upon the Applicant to satisfy the criteria outlined in the code and failure to do so warrants the denial of the special exception. In addition to the failure of the Applicant to satisfy the Applicant's burden, the board also specifically finds that the proposed use of the subject property would be injurious to the public safety, health and welfare of the community. The concerns regarding noise, traffic and property values were legitimate concerns raised by several neighbors in the area and warrant the denial of the application.

**ORDER OF THE UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant a special exception under Section 165-218.B in order to operate a child day care home from their residence, therefore, the application is denied.

Decision Dated: July 15, 2009

**UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

  
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Robert J. Montemayor - Chairman

  
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Mark S. DePillis, Esq. - Vice Chairman

  
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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.