

✓

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

APPLICATION NO. 2009-11 : HEARING DATE: June 17, 2009  
: :  
APPLICATION OF: Thomas Quinn : DECISION DATE: July 15, 2009  
: :  
: :  
PROPERTY: 276 Holstein Road : :  
: :  
Upper Merion Township :

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

The Applicant, Thomas Quinn, (hereinafter referred to as the "Applicant"), filed an appeal of the Zoning Officer's Enforcement Notice dated April 6, 2009 regarding the following violations: 1) The property is being occupied as a multi-family dwelling in an area zoned for single family dwellings, which violates Section 165-27 of the code; 2) The property is being occupied by several unrelated individuals, which violates Section 165-5 of the code. 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 Thomas Quinn, 11 Buckwalter Circle, Royersford, PA 19468.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 276 Holstein Road, Upper Merion, PA.

4. The Applicant has been represented by Thomas P. Halfpenny, Esq., 678 S. Gulph Rd., King of Prussia, PA 19406 in other related legal proceedings, however, Mr. Halfpenny did not attend the hearing nor did he enter his appearance on behalf of the Applicant, therefore, the Applicant is unrepresented for this proceeding.
5. The property is zoned "R-1 " Residential.
6. The Township was represented by Paul Ylvisaker, Esq. from the firm of Pizonka, Reilley, Bello & McGrory, P.C., 144 E. DeKalb Pike, Suite 300, King of Prussia, PA 19406.
7. The Applicant did not attend the hearing nor did anyone on the Applicant's behalf attend the hearing.
8. The application was incorporated into the record and marked as Board Exhibit "1".
9. A proof of publication from the Times Herald was introduced into the record and marked as Board Exhibit "2".
10. A letter from Mr. Halfpenny purporting to be the attorney for the Appellant dated May 28, 2009, was incorporated into the record and marked as Board Exhibit "3". The letter indicated that Mr. Halfpenny was available for the hearing and knew of the date, time and place for the hearing.
11. Mark Zadroga, the zoning officer for Upper Merion Township testified at the hearing that his office notified the Appellant and Mr. Halfpenny.
12. Mark Zadroga further testified that he had a conversation with Mr. Halfpenny and confirmed the date, time and place of the hearing.
13. Mr. Zadroga testified that Mr. Halfpenny did not request a continuance for the hearing.

14. The Township is not in receipt of any oral or written request to have the hearing continued.
15. The hearing was opened and proceeded in the absence of the Appellant or any of the Appellant's representatives.
16. Ken Forman, 971 Natton Court, entered his appearance in opposition at the time of the hearing.
17. Mr. Forman is located approximately 75 ft. from the property line of the subject property.
18. Joe Abbruzzi, 931 Jones Road, entered his appearance in opposition at the time of the hearing.
19. Michael Dooley, 952 Mayberry Road, entered his appearance in opposition at the time of the hearing.
20. Michael Voris, 946 Mayberry Road, entered his appearance in opposition at the time of the hearing.
21. Janet Maier, 945 Mayberry Road, entered her appearance in opposition at the time of the hearing.
22. Roseann Sattacahn, 285 Swedeland Road, entered her appearance in opposition at the time of the hearing.
23. Sandra Davis, 949 Mayberry Road, entered her appearance in opposition at the time of the hearing.
24. Jackie Jakielaszek, 957 Mayberry Road, entered her appearance in opposition at the time of the hearing.

25. George Haverly attempted to enter his appearance in opposition, but because he was not sure whether he lived within 500 ft. of a property line to the subject property, he withdrew his request.
26. All of the parties that entered their appearance in opposition to the appeal live within 500 ft. of a property line to the subject property.
27. Robert Buswick testified at the hearing.
28. Mr. Buswick used to live at the subject property because he was very good friends with the owner.
29. Before he moved into the property, Mr. Buswick used to live in a house across the street from 1955 until 1969 when he moved into the subject property.
30. Mr. Buswick continued to live at the subject property from January, 1969 until approximately February, 1985.
31. After 1985, Mr. Buswick moved out of the house, but he continued to visit his family on a weekly basis at the property across the street from the subject property.
32. After Mr. Buswick moved out of the house, he continued to help the current owner of the house because she needed assistance.
33. Between the time Mr. Buswick moved out in 1985 until 1994 when the owner died, Mr. Buswick had frequent contact with the property and its owner.
34. In 1994, Mr. Buswick became the executor of Ms. Berry's estate, so he remained familiar with the property.
35. The Township offered the following exhibits at the time of the hearing:

"T-1" - Appraisal of personal property for the estate of Katherine A. Berry.

“T-2.1”, “T-2.2”, “T-2.3”, “T-2.4” – Pictures of the subject property from 1964, 1973 and 1974.

“T-3” – Notes of testimony from the deposition of Thomas A. Quinn dated June 16, 2009.

“T-4.1” – Loyalty oath of Mark Zadroga.

“T-4.2” - Ordinance provision regarding building officials.

“T-5” - Ordinance provision regarding use and occupancy permits.

“T-6” - Excerpt from the Upper Merion Township permit log.

“T-7” - Copy of a building permit.

“T-8.1” - Front picture of the property in 2009.

“T-8.2” - Garage picture of the property in 2009.

“T-9.1” - Zoning ordinance provisions.

“T-9.2” - Zoning ordinance provisions.

“T-10” - Zoning ordinance definitions.

“T-11” - Zoning ordinance regarding conversion of dwelling provisions.

“T-12.1” - Notice of violation issued to Thomas Quinn dated April 6, 2009.

“T-12.2” - Proof of mailing of notice of violation by certified mail.

“T-13.1”, “T-13.2”, “T-13.3”, “T-13.4”, “T-13.5” - Affidavits from residents of the house.

36. Through the use of the exhibits and the testimony from Mr. Buswick, the Township proved that the property was never used as a multi-family dwelling.

37. When the garage was originally built by Mr. Buswick’s father, it was impossible to use the attic portion of the garage as living area.

38. The upper area of the garage had no HVAC, electric or plumbing other than a light.
39. Access to the attic garage was only by a pull-down stairway.
40. Mr. Buswick never rented a room as Mr. Quinn indicated in his deposition.
41. Mr. Quinn further indicated that the house had a 3-car garage with an apartment above the garage. Mr. Buswick testified that in Mr. Quinn's testimony in the deposition is not correct and that it was only a 2-car garage with no living space above. When Mr. Buswick lived at the house, he was there in the capacity as a caretaker and not as a tenant.
42. Excerpts from Mr. Quinn's deposition were introduced into the record and indicated that Mr. Quinn thought the top of the garage had a kitchen with a sink, oven, refrigerator and other items indicating that it was living space. At the time of the hearing, Mr. Buswick indicated that no such thing ever existed.
43. Mr. Buswick was the co-executor of the estate that sold the house to Mr. Quinn, so he was intimately familiar with the layout of the house and garage before Mr. Quinn acquired the property.
44. At the time that Mr. Quinn acquired the property from the estate, there was no habitable space above the garage.
45. Mr. Quinn previously applied for a building permit and received a building permit to conduct alterations to the breezeway and to rebuild the garage as per the testimony of Mark Zadroga, the zoning officer.
46. The Township introduced into the record excerpts from a log indicating that a building permit was issued for alterations/rebuild garage/breezeway in February of 1997.

47. Mark Zadroga testified that Mr. Quinn indicated that he will not be using the top portion of the garage for an apartment at the time the building permit was issued.
48. Mark Zadroga testified that he specifically remembers placing a condition on the building permit that would prevent the area above the garage from being used as an apartment.
49. The Township was not able to locate a copy of the building permit.
50. Mr. Zadroga testified that at the time a use and occupancy permit was given to Mr. Quinn, there were no kitchen facilities or any plumbing above the garage.
51. The use and occupancy permit was conditioned on not using the area above the garage as an apartment.
52. The zoning officer issued the enforcement notice based on complaints from residents, police reports and personal observations.
53. The contractor admitted to Mr. Zadroga that he installed a kitchen in the area above the garage a few weeks after the final inspection for the use and occupancy permit.
54. The Township introduced portions of a deposition indicating that the main house had five (5) tenants in 2009, thereby violating the zoning code.
55. The Township introduced written affidavits indicating that there were five (5) tenants in the building.
56. The subject property was used for student housing for five (5) Villanova students in the main dwelling and it also violated the code because kitchen facilities were installed above the garage, thereby constituting a multi-family use.
57. Several neighbors testified that the use on the subject property is very disruptive to the use and enjoyment of their nearby properties.

58. There were no residents who testified in favor of the application.

### **DISCUSSION AND CONCLUSIONS OF LAW**

The Applicant, Thomas Quinn, (hereinafter referred to as the "Applicant"), filed an appeal of the Zoning Officer's Enforcement Notice dated April 6, 2009 regarding the following violations: 1) The property is being occupied as a multi-family dwelling in an area zoned for single family dwellings, which violates Section 165-27 of the code; 2) The property is being occupied by several unrelated individuals, which violates Section 165-5 of the code.

A zoning enforcement is commenced by the issuance of an enforcement notice by a municipality pursuant to the requirements of 53 P.S. § 10616.1, which states as follows:

53 P.S. § 10616.1, Enforcement notice:

(a) If it appears to the municipality that a violation of any zoning ordinance enacted under this act or prior enabling laws has occurred, the municipality shall initiate enforcement proceedings by sending an enforcement notice as provided in this section.

(b) The enforcement notice shall be sent to the owner of record of the parcel on which the violation has occurred, to any person who has filed a written request to receive enforcement notices regarding that parcel, and to any other person requested in writing by the owner of record.

(c) An enforcement notice shall state at least the following:

(1) The name of the owner of record and any other person against whom the municipality intends to take action.

(2) The location of the property in violation.

(3) The specific violation with a description of the requirements which have not been met, citing in each instance the applicable provisions of the ordinance.

(4) The date before which the steps for compliance must be commenced and the date before which the steps must be completed.

(5) That the recipient of the notice has the right to appeal to the zoning hearing board within a prescribed period of time in accordance with procedures set forth in the ordinance.

(6) That failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with possible sanctions clearly described.

(d) In any appeal of an enforcement notice to the zoning hearing board, the municipality shall have the responsibility of presenting its evidence first.

(e) Any filing fee paid by a party to appeal an enforcement notice to the zoning hearing board shall be returned to the appealing party by the municipality if the zoning hearing board or any court in a subsequent appeal rules in the appealing party's favor.

Although the Pennsylvania courts allow leniency in the interpretation of the provisions of Section 10616.1 and whether the municipality has adequately provided the information required in the enforcement notice, Borough of Latrobe v. Pohland, 702 A.2d 1089 (Pa.Cmwlt.1997); Three Rivers Aluminum Company, Inc. v. Zoning Hearing Board of Marshall Township, 618 A.2d 1165 (Pa.Cmwlt.1992), the courts strictly construe Section 10616.1(c)(3) with regards to citing the ordinance. Township of Maiden Creek v. Stutzman, 164 Pa. Cmwlt. 207, 642 A.2d 600 (1994).

In an enforcement notice proceeding, the burden of proof is on the municipality to prove that a violation of the zoning ordinance has occurred on a property and the municipality has the responsibility of presenting its evidence first. See, e.g., Hartner v. ZHB of Upper St. Clair Township, 840 A.2d 1068 (Pa.Cmwlt. 2004); Township of Maiden Creek v. Stutzman, 164 Pa. Cmwlt. 207, 642 A.2d 600 (1994). A municipality must present evidence that the cited provisions of the Zoning Ordinance in the enforcement notice were violated by the named

individuals in the enforcement notice. The municipality cannot meet its burden merely by setting forth a procedural history and stating the contents of the relevant zoning provisions. Hartner, 840 A.2d at 1070.

The purpose of the enactment of a zoning ordinance is to promote the health, safety, morals and general welfare of the community. Borough of Bradford Woods v. Platts, 799 A.2d 984 (Pa.CmwltH.2002). The purpose of the enforcement of that ordinance is to ensure that the health, safety, morals and general welfare of the community are protected. The goal of an enforcement proceeding initiated pursuant to 53 P.S. 10616.1 is to ensure compliance with a zoning ordinance such that the community is protected. Id. at 992.

The Township has the burden of proving that a zoning violation has occurred. The Township is alleging that two (2) zoning violations are taking place at the subject property. The first zoning violation is the number of unrelated people living at the property. The Township provided affidavits indicating that five (5) Villanova students were living at the property in 2009. The Applicant also introduced sworn testimony from the property owner indicating that five (5) people were living at the property in 2009. The second zoning violation deals with the installation of kitchen facilities above the garage, thereby converting the property into a multi-family dwelling. The testimony was clear and the ordinance is clear that any time a second kitchen is installed, that it constitutes a second dwelling unit. In this case, the kitchen was installed a few weeks after the final inspection for the use and occupancy permit for the garage. The original garage at the house had no living space whatsoever above the first floor area. There was exhaustive testimony from qualified witnesses explaining how the area above the garage was not habitable space and could not be habitable space with its configuration at that time. There was no HVAC, plumbing or kitchen facilities whatsoever from the time the garage was built until the time Mr. Quinn purchased the

property. After Mr. Quinn purchased the property, he applied for a building permit to enclose the breezeway and renovate the garage to a three-bay garage. The testimony of the zoning officer indicated that the landowner represented that the area above the garage would not be an apartment or habitable space. After the use and occupancy permit was issued, Mr. Quinn converted the area above the garage to a kitchen and other habitable space, thereby converting the property into a multi-family dwelling. The code calls for procedures to be used to convert a residence to a multi-family dwelling and those procedures in the code were not followed by the Applicant. The Township enforcement notice specifically lays out all the criteria as outlined above, therefore the enforcement notice is in a proper format. The Township sufficiently satisfied its burden of proof that two (2) zoning violations exist at the subject property by the introduction of live testimony, sworn testimony of the Applicant and other exhibits.

Because the Applicant offered no testimony to counter the testimony from the Township, the board must conclude that the zoning violations exist and that the enforcement notice contained the proper content and procedure as required by the Municipalities Planning Code.

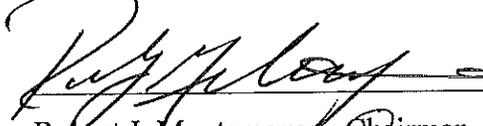
**ORDER OF THE UPPER MERION TOWNSHIP**

**ZONING HEARING BOARD**

**IT IS HEREBY ORDERED AND DECREED** that the Board finds that the Applicant's appeal of the Township's enforcement notice is dismissed because the Township proved its case and the Applicant offered no testimony to counter the Township's evidence.

Decision Dated: July 15, 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.