



ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2008- 102 ⁰²	:	HEARING DATE: February 4, 2009
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APPLICATION OF: Irshad J. Mir	:	
	:	DECISION DATE: March 18, 2009
	:	
PROPERTY: 591 Keebler Road	:	
	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Irshad J. Mir, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-2128.B in order to operate a child day care center in their home. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on February 4, 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 Irshad J. Mir, 591 Keebler Road, King of Prussia, PA 19406.
2. The Applicant is the owner of the subject property
3. The property is located at 591 Keebler Road, 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 16,786 sq. ft.

7. The subject parcel currently has a single family detached dwelling.
8. The Applicant is proposing a day care at their current residence.
9. The Applicant has experience working at a local day care for the past four (4) years.
10. The Applicant has a fully enclosed yard for a play area.
11. The Applicant will be open Monday through Friday from 6:00 am to 6:00 pm.
12. The Applicant wants to open the day care at her house to provide a stable source of income to help make the mortgage payments.
13. The Applicant introduced a narrative of her testimony and marked it as Exhibit "A-1".
14. The Applicant introduced a copy of a mortgage and marked it as Exhibit "A-2".
15. The Applicant introduced five (5) pictures and marked them collectively as Exhibit "A-3".
16. The Applicant agreed to obtain the necessary licensing for the day care facility.
17. Jeanette Nazaryk is a neighbor that testified against the project because of concerns for debris.
18. The Applicant agreed to a condition of approval that would limit the number of children to six (6).
19. The Applicant agreed as a condition of approval that the only play area will be in the rear yard that will be entirely enclosed with fencing.
20. The Applicant agreed as a condition of approval to move the debris and car from the fenced area.
21. The Applicant agreed as a condition of approval to obtain all necessary licensing before a Use &Occupancy Permit is issued.

- 22. The Applicant agreed as a condition of approval that there will be no signage.
- 23. Frank Pallidino testified against the project.
- 24. There were no residents who testified in support of the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Irshad J. Mir, (hereinafter referred to as the “Applicant”), filed an application requesting a special exception under Section 165-2128.B in order to operate a child day care center in their home.

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 proposing a day care facility to be operated out of the Applicant's current residence. The Applicant will obtain all the necessary licensing before the day care is open to the public. There will be an entirely enclosed play area to the rear of the property. The Applicant agreed to remove all debris and a car from the fenced in area. The Applicant further agreed to limit the number of children to a maximum of six (6). The Applicant also agreed to have no signage for the proposed day care use.

With the imposition of the conditions offered by the Applicant, the Applicant's proposal would have no detrimental impact on the neighborhood. It is the burden of the Applicant to prove that the proposal falls within the criteria of a special exception as delineated in the code. There are very little criteria to prove to establish a day care use by special exception and the Applicant has satisfied all of the specific enumerated criteria. Once the Applicant satisfies the

specific criteria under the code, the burden then shifts to the protestants to prove that the application is injurious to the public safety, health and welfare of the community. In this case, there was no testimony presented that would satisfy that burden, therefore, the special exception should be granted.

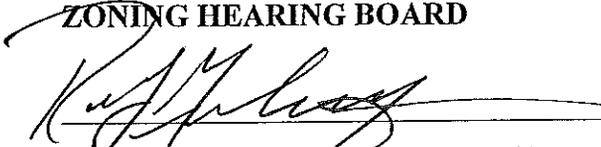
ORDER OF THE UPPER MERION TOWNSHIP
ZONING HEARING BOARD

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 center from their home with the following conditions:

1. There will never be more than six (6) children at the facility at one time.
2. The play area will be located to the rear of the parcel and it will be entirely enclosed with fencing.
3. The Applicant will remove the debris and the car from the fenced area before a Use & Occupancy Permit is issued.
4. All state licenses and other approvals necessary for a day care use must be obtained before a Use & Occupancy permit is issued.
5. The Applicant shall have no signage
6. The Applicant must comply with the testimony presented by the Applicant at the public hearing on February 4, 2009.

Decision Dated: March 18, 2009

UPPER MERION TOWNSHIP
ZONING HEARING BOARD



Robert J. Montemayor – Chairman (Approve)

Mark S. DePillis, Esq. – Vice Chairman (Approve)



William C. Whitmore, Sr. – Secretary (Deny)

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.