# ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

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| **APPLICATION NO.** 2011-08 | : | **HEARING DATE:** May 4, 2011 |
| **APPLICATION OF:** Kenneth and Elizabeth Schofield | : | **DECISION DATE:** June 1, 2011 |
| **PROPERTY:** 1071 Radnor Road | : | |
| Upper Merion Township | : | |

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

The Applicant, Kenneth and Elizabeth Schofield, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-209.A(2)(e) in order to allow chickens on their property. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on May 4, 2011 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 Kenneth and Elizabeth Schofield, 45 Wehrli Road, Lang Valley, NJ 07853.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 1071 Radnor Road, Wayne, PA 19087, Upper Merion Township.
4. The Applicant was not represented by an attorney.
5. The property is zoned "R-1A" Residential.

6. The lot is approximately .604 acres.
7. The Applicant received a notice from the Township Zoning Officer indicating that they need zoning approval to keep and shelter chickens at the subject property.
8. The zoning code permits the keeping and sheltering of chickens on the property by special exception. The Applicant has kept chickens on the property on and off since 1948.
9. The keeping of chickens is not a business activity, but rather the Applicant describes it as a hobby to provide both eggs and poultry for personal consumption.
10. The Applicant introduced letters from two different neighbors indicating that they do not oppose the application. Each letter was marked respectively as Exhibit "A-1" and Exhibit "A-2".
11. The house two doors away from the subject property currently has chickens.
12. The Applicant agreed to limit the use to only fifteen (15) chickens and no more than one (1) rooster.
13. The Applicant will create a fenced area for the keeping of the chickens.
14. The Applicant also has three (3) ducks, a quail and some other miscellaneous animals.
15. Carol Meister testified against the project. Ms. Meister indicated that there is a noise problem.
16. Linda Grant testified against the project and indicated that there is a smell problem.
17. Steven Meister testified that property values will be effected if the application is approved.

18. The Applicant agreed as a condition of approval to plant evergreen trees to shield the use from the rear neighbor.

## DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Kenneth and Elizabeth Schofield, filed an application requesting a special exception under Section 165-209.A(2)(e) in order to allow chickens on their property.

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 to limit the keeping and raising of chickens to only fifteen (15) chickens and one (1) rooster. The Applicant will fence-in the area that the chickens are kept and will add evergreen trees to shield the view from the rear neighbor. The chickens have been at the property on and off since 1948. Up until recently, the land owner has not gotten any complaints regarding the chickens. Some of the protestants complained about smell, property values, noise and other related issues involving chickens. The Applicant agreed to a series of conditions that would mitigate these factors. The Applicant's relief is not a variance, but rather it is a special exception. A special exception is neither special nor an exception, but rather it is a by-right use unless protestants can prove that it is injurious to the public safety, health and welfare of the community. There was no credible evidence indicating that the limited use would pose any safety, health and welfare issues to the community. Through the use of testimony and

exhibits, the Applicant sufficiently satisfied the standards for a special exception, therefore, the application must 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 165-209.A(2)(e) in order to allow chickens on their property. This special exception is conditioned upon the following:

1. The Applicant must comply with the testimony of the Applicant at the public hearing on May 4, 2011.

2. The Applicant must limit the use of the property to no more than fifteen (15) chickens and one (1) rooster.

3. The area where the chickens are kept must be fenced in so the chickens can not wander in to other yards.

4. The Applicant must plant sufficient evergreens to shield the use from the view of the rear neighbor.

Decision Dated: June 15, 2011

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

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Robert J. Montemayor – Chairman – (Approve)

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

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Brad Murphy – Secretary – (Approve)

**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.