

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

**MONTGOMERY COUNTY, PENNSYLVANIA**

**APPLICATION OF MISTYANN SCHRAM-MILLER**

**APPLICATION NO. 2017-07**

**PROPERTY: 156 GYPSY LANE**

**OPINION AND ORDER**

This application concerns a request for a special exception to permit the keeping and sheltering of chickens/fowl in the R-1 *Single-Family Residential District*. Section 165-209.A(2)(e) *Accessory uses* of the Upper Merion Township Zoning Ordinance of 1942, as amended (the "Zoning Ordinance") permits "[t]he keeping of and shelters for farm animals other than common household pets" by special exception.

Mistyann Scram-Miller ("Landowner") is the co-owner of the property located at 156 Gypsy Lane, Upper Merion Township (the "Property"). Landowner resides in a single-family detached dwelling on the Property and applied for a special exception to permit the keeping and sheltering of up to 20 "chickens/fowl of various breeds", within a 26'x10' coop and run.

The ZHB voted to grant the contested application, subject to conditions, including restricting the total number of fowl permitted to 7, including not more than 1 rooster.

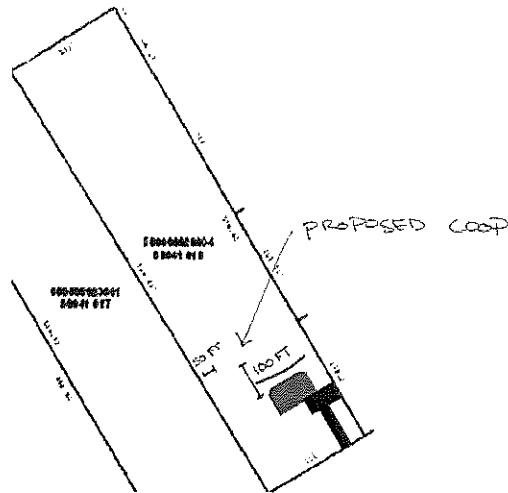
On May 3, 2017, the Zoning Hearing Board of Upper Merion Township ("ZHB") held a public hearing on Landowner's application. All ZHB members were present at the hearing: Mark S. DePillis, Esquire, Chairman, M Jonathan Garzillo, Vice-Chairman, Maria Mengel, Secretary, John M. Tallman, Jr., Member, and Lynne Z. Gold-Bikin, Esquire, Member. Marc D. Jonas, Esquire, of Eastburn and Gray, P.C. represented the ZHB as its solicitor. Landowner was not represented by counsel.

The hearing was duly advertised, notice was given in accordance with the requirements of the Zoning Ordinance, and the proceedings were stenographically recorded. After careful consideration of the evidence presented, the ZHB makes the following findings of fact and conclusions of law:

**A. FINDINGS OF FACT**

**BACKGROUND**

1. Landowner is the co-owner of the Property. [Ex. ZHB-1.]
2. The Property is located in the Township's R-1 *Single-Family Residential District*. [Ex. ZHB-1.]
3. The Property comprises 1.3 acres. [N.T. p. 6.]
4. The Property contains a single-family detached dwelling in which Landowner resides. [N.T. p. 5.]
5. Landowner proposes a 26'x10' coop and run, located in the rear yard:



[Ex. ZHB-8.]

## ZHB HEARING

6. The following ZHB exhibits were made part of the record:
  - a. ZHB-1—ZHB application
  - b. ZHB-2—aerial of property
  - c. ZHB-3—2 photographs of existing single-family detached dwelling
  - d. ZHB-4—8 pictures of examples of coops
  - e. ZHB-5—sample floor plan
  - f. ZHB-6—tax map
  - g. ZHB-7—tax map with hand-drawn existing features
  - h. ZHB-8—tax map with hand-drawn proposed features
  - i. ZHB-9—list of neighboring property owners with notation reflecting support/object, including attachments:
    - (i) letter to neighbor at 148 Gypsy Lane—no objection beyond concern regarding rooster in morning
    - (ii) letter to neighbor at 166 Gypsy Lane—no objection
  - j. ZHB-10—opinion and order of the Upper Merion Township Zoning Hearing Board, application no. 2014-06—special exception, chicken coop for 6 guinea hens—granted, date of mailing May 8, 2014
  - k. ZHB-11—opinion and order of the Upper Merion Township Zoning Hearing Board application no. 2012-025—special exception, chicken coop for up to 4 Bantam chickens—granted, decision date November 14, 2012
  - l. ZHB-12—opinion and order of the Upper Merion Township Zoning Hearing Board , application no. 2011-08—special exception, chicken coop for no more than 15 chickens and 1 rooster—granted, decision date June 15, 2011
  - m. ZHB-13—article titled "The Benefits of Backyard Chickens", Organic Lifestyle Magazine, last updated July 15, 2015
  - n. ZHB-14—article titled "Guinea Fowl Are Nature's Pest Control

7. Landowner testified on her own behalf, offering the following testimony:
  - a. Landowner proposed a 26'x10' fenced enclosure, to surround an insulated coop and run. [N.T. pp. 5, 7.]
  - b. Landowner currently has 5 hens and a rooster, along with 6 pullets (young hens). [N.T. p. 9.] Landowner did not obtain a special exception first, as required.
  - c. Landowner sought to keep/shelter 20 fowl, and to increase the number of roosters on the property by an unspecified number. [N.T. pp. 9-10.]
  - d. At night, the fowl would be kept in the coop. [N.T. p. 14.]
  - e. Landowner's current rooster "crows whenever he crows", "sometimes very early in the morning, sometimes in the middle of the day, sometimes late afternoon." [N.T. p. 15.]
  - f. Landowner agreed that she would not sell eggs produced by the fowl, and that, if she wanted to sell eggs in the future, she would re-apply to the ZHB. [N.T. p. 18.]
  - g. The enclosure would be located 50 feet from the abutting property located at 166 Gypsy Lane, and no more than 100 feet from the rear of Landowner's house. [N.T. p. 20.]
8. Four neighbors spoke in opposition to landowner's application: (1) Dr. Jaqueline Conyers, 181 Gypsy Lane (catty-corner from the Property); (2) Brian Corrigan, 157 Gypsy Lane (across Gypsy Lane from the Property); (3) Patty Gallagher, 146 Gypsy Lane (abutting property to the rear); and (4) Anthony Kaney, 148 Gypsy Lane (abutting property to the east).
9. Objecting neighbors' concerns were:
  - a. the increased presence of foxes and possums due to the chickens/fowl [N.T. p. 24];
  - b. the "sheer number" of chickens/fowl proposed [N.T. p. 28];
  - c. noise associated with the rooster [N.T. p. 35]; and
  - d. effect on property values and marketability of properties [N.T. p. 42].

## B. DISCUSSION

"A special exception is a conditionally permitted use, allowed by the legislature if specifically listed standards are met." *In re Brickstone Realty Corp.*, 789 A.2d 333, 340 (Pa. Commw. Ct. 2001) (citing *Bray v. Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Commw. Ct. 1980)); see also Zoning Ordinance § 165-251.B(2). "A special exception is thus 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.* (citing *Shamah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299 (Pa. Commw. Ct. 1994)). Where a particular use is permitted in a zone by special exception, "it is presumed that the local legislature has already considered that such use satisfies local concerns for the general health, safety, and welfare and that such use comports with the intent of the zoning ordinance." *Id.*

In demonstrating entitlement to a special exception, an applicant:

... has both the duty to present evidence and the burden of persuading the [B]oard that the proposed use satisfies the objective requirements of the ordinance.... Once the applicant meets these burdens, a presumption arises that the use is consistent with the health, safety and general welfare of the community. The burden then normally shifts to the objectors of the application to present evidence and persuade the Board that the proposed use will have a generally detrimental effect.

*MarkWest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd.*, 102 A.3d 549, 553 (Pa. Commw. Ct. 2014) (quoting *Greaton Props. v. Lower Merion Twp.*, 796 A.2d 1038, 1045–46 (Pa. Commw. Ct. 2002)). In order to demonstrate that a proposed use will have the requisite detrimental effect, an objecting property owner must demonstrate that there is a "high degree of probability" that the detrimental effect

alleged is not normally generated by the type of use proposed. *Mehring v. Zoning Hearing Board of Manchester Twp.*, 762 A.2d 1137, 1141 (Pa. Commw. Ct. 2000); *In re Brickstone Realty Corp.*, 789 A.2d 333, 342 (Pa. Commw. Ct. 2001).

Section 165-251.B(1) *Powers* contains the Zoning Ordinance's general special exception standards. Zoning Ordinance § 165-251.B(1) *Powers* requires that an applicant demonstrate that the proposed special exception: (1) complies with the statement of community development objectives as stated in Article I and the intent of the applicable zoning district; (2) will not adversely affect neighboring land uses; (3) will be properly serviced by all existing public-service systems; and (4) is properly designed with regard to, e.g., internal circulation, parking, and buffering. Zoning Ordinance § 165-251.B(1).

The ZHB may impose "such reasonable conditions and safeguards as it may deem necessary to implement the purposes of the [Zoning Ordinance]." Zoning Ordinance § 165-251.B(1)(g).

1. **Landowner demonstrated compliance with the objective criteria for a special exception to permit the keeping of chickens/fowl on the Property.**

Under the Zoning Ordinance, "[t]he keeping of and shelters for farm animals other than common household pets" is permitted as an accessory use by special exception. Zoning Ordinance § 165-209.A(2)(e).

Landowner met the objective criteria of section 209.A(2)(e): she proposed to keep and shelter farm animals (chickens/fowl) as an accessory use to her single-family detached dwelling. Landowner agreed to the condition that she would not sell any eggs produced by the fowl.

The ZHB concluded, however, that the keeping and sheltering of up to 20 chickens/fowl is inconsistent with the purpose of section 165-209.A(2)(e) to permit the keeping/sheltering of farm animals as an accessory use. Given the facts presented at the hearing, that number of animals would adversely affect neighboring residential land uses. The ZHB therefore conditioned its approval of Landowner's application as set forth below, including limiting the number of fowl that may be kept/sheltered on the Property to 7 fowl, including not more than 1 rooster within the maximum 7 allowed.

The limitation of the number of fowl is consistent with prior decisions of the ZHB in similar applications, some of which were included with Landowner's application.

**2. The objecting neighbors failed to demonstrated that the keeping and sheltering of chickens/fowl as an accessory use to Landowner's dwelling, as conditioned, would have a generally detrimental effect.**

The objecting neighbors failed to demonstrate that the keeping and sheltering of chickens/fowl, as conditioned, would have a detrimental effect not normally generated by this type of use. See *In re Brickstone Realty Corp.*, 789 A.2d at 342.

In order to support denial of a special exception, notwithstanding Landowner's demonstration that the keeping and sheltering of chickens/fowl, as conditioned, met the objective requirements of the Zoning Ordinance, the objecting neighbors were required to demonstrate "more than unsubstantiated concerns or vague generalities" of the detrimental effect of the keeping and sheltering of the chickens/fowl. See *Dunbar v. Zoning Hearing Bd. of City of Bethlehem*, 144 A.3d 219, 226 (Pa. Commw. Ct. 2016). "The mere speculation of possible harms resulting from the proposed use fails to satisfy the objectors' burden." *Mehring v. Zoning Hearing Bd. of Manchester Twp.*, 762 A.2d

1137, 1141 (Pa. Commw. Ct. 2000); see *Tennyson v. Zoning Hearing Bd. of West Bradford Twp.*, 952 A.2d 739, 746 (Pa. Commw. Ct. 2008).

The objections of the objecting neighbors were limited to: (1) the increased presence of foxes and possums due to the chickens/fowl; (2) the number of chickens/fowl proposed to be kept and sheltered on the Property; (3) the noise associated with the rooster; and (4) effect on property values and marketability. These objections supported the imposition of the conditions imposed by the ZHB, but were not sufficient to provide a basis for denial of the application.

Objecting neighbors failed to articulate, let alone demonstrate, how Landowner's proposed keeping and sheltering of chickens/fowl, as limited by the conditions imposed by the ZHB, would result in an increased presence of foxes/possums, or rooster noise, to a degree not normally generated by the presence of chickens/fowl.

With respect to the concern over property values, objecting neighbors presented no evidence to support the claim that Landowner's keeping and sheltering of chickens/fowl would negatively affect their property values.<sup>1</sup>

Objecting neighbors presented no witnesses, expert or otherwise, to support their claimed concerns. Objecting neighbors failed to meet their burden.

Although the ZHB did find the objecting neighbors' concerns regarding the number of chickens/fowl proposed to be kept/sheltered on the Property credible, those concerns are addressed by the conditions imposed by the ZHB.

---

<sup>1</sup> Although one of the objecting neighbors, Mr. Kaney, testified that he spoke with a realtor who would not "recommend that anybody buy a property" next to a property on which chickens/fowl are kept and sheltered, the realtor did not testify before the ZHB. Mr. Kaney's representations regarding the conversation constitute nothing more than hearsay and were not considered by the ZHB.



3. **Landowner demonstrated compliance with the general standards for a special exception enumerated in Zoning Ordinance § 165-251.B(1).**

Based on the evidence presented, the ZHB finds that Landowner demonstrated that the keeping and sheltering of chickens/fowl, as conditioned, complies with the applicable general standards for a special exception enumerated in the Zoning Ordinance. The ZHB finds that (1) the keeping and sheltering of 7 fowl to include not more than 1 rooster within that number complies with the community development objectives stated in Article I of the Zoning Ordinance;<sup>2</sup> (2) the keeping and sheltering of 7 fowl to include not more than 1 rooster will not adversely affect neighboring land uses; (3) the keeping and sheltering of chickens/fowl does not impact existing public-service systems; and (4) the keeping and sheltering of chickens/fowl does not increase the parking demand on the Property, particularly given Landowner's agreement not to sell the eggs produced by the fowl. See Zoning Ordinance § 165-251.B(1).

**C. CONCLUSIONS OF LAW**

1. The ZHB has jurisdiction under section 909.1(a)(6) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(6), and Zoning Ordinance §165-215.A(6).
2. Landowner has standing to seek the requested special exception as the legal co-owner of the Property.
3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.

---

<sup>2</sup> The Zoning Ordinance does not enumerate a "specific intent" for the R-1 *Single-Family Residential Zoning District*.

4. Zoning Ordinance § 165-209.A(2)(e) *Accessory uses* permits “[t]he keeping of and shelters for farm animals other than common household pets” by special exception.
5. Landowner demonstrated that the keeping and sheltering of chickens/fowl on the Property as an accessory use to the single-family detached dwelling met the objective criteria of the Zoning Ordinance.
6. The ZHB attached reasonable conditions to its approval of Landowner’s application, as set forth in its motion below, pursuant to Zoning Ordinance § 165-251.B(1)(g).
7. Landowner demonstrated that the keeping and sheltering of chickens/fowl, as conditioned, met the standards of Zoning Ordinance § 165-251.B(1).
8. Objecting neighbors failed to demonstrate that the keeping and sheltering of chickens/fowl, as conditioned, would have a generally detrimental effect such that the special exception should be denied.
9. Landowner demonstrated entitlement to the requested special exception to keep and shelter not more than 7 fowl, including not more than 1 rooster within that total number.

At its May 3, 2017 public meeting, the ZHB voted to grant the application, which was followed by the mailing of the following notice of decision:

**MOTION**

AND NOW, this 3rd day of May, 2017, the Zoning Hearing Board of Upper Merion Township GRANTS a special exception pursuant to section 165-209.A(2)(e) *Accessory uses* to permit a chicken coop and enclosure for not more than 7 fowl, including not more than 1 rooster. The relief was conditioned as follows:

1. there shall be no more than 7 fowl
2. the 7 fowl shall include no more than 1 rooster
3. no egg or other commercial sales may occur
4. the chicken coop and run/enclosure are limited to the 10'x26' coop and run depicted on the hand-drawn sketch submitted with the application. A copy of the sketch accompanies this letter
5. the chicken coop and run shall be located consistent with the hand-drawn plan attached hereto, specifically:
  - a. no more than 100 feet from the rear of the existing single-family detached dwelling on the property, and
  - b. no closer than 50 feet from the side property line shared with the abutting property located at 166 Gypsy Lane, county tax parcel no. 58-00-089-23-001.

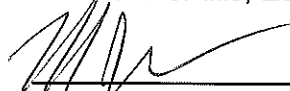
Because this application was contested, a decision with findings of facts, conclusions of law, and reasons will follow.

\*\*\*\*\*

This decision may be appealed to the Court of Common Pleas of Montgomery County within 30 days of the date of mailing.

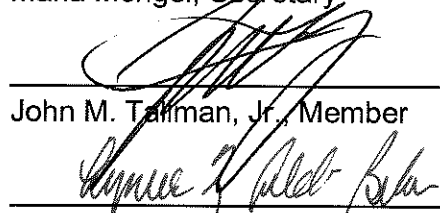
**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**

\_\_\_\_\_  
Mark S. DePillis, Esquire, Chairman

  
\_\_\_\_\_  
M. Jonathan Garzillo, Vice Chairman

\_\_\_\_\_  
Maria Mengel, Secretary

\_\_\_\_\_  
John M. Tallman, Jr., Member

  
\_\_\_\_\_  
Lynne Z. Gold-Bikin, Esquire, Member

Date of Mailing: