

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

**MONTGOMERY COUNTY, PA**

**APPLICATION OF BRYAN AND LEIGH ANN CAPONE KELLY**

**APPLICATION NO. 2021-21**

**PROPERTY: 598 GENERAL ARMSTRONG ROAD**

**TAX PARCEL NO. 58-00-07873-00-7**

**DECISION**

This application is about Sal, the chicken, and a request for a special exception to permit the keeping of and shelter for Sal as an accessory use to a principal single-family residential use in the R-2A Residential zoning district. The application was granted, subject to conditions, including that the applicants keep only one chicken, do not keep additional chickens, or replace the existing chicken.

Bryan and Leigh Ann Capone Kelly (“Landowners”) are the owners of the property located 598 General Armstrong Road, tax parcel no. 58-00-07873-00-7 (the “Property”). The Property is in the R-2A Residential zoning district (“R-2A District”) of Upper Merion Township (the “Township”). Landowners reside in a single-family residential dwelling on the Property and applied for a special exception to permit the keeping of and shelter for a chicken within a chicken coop on the Property.

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.

On November 17, 2021, the Zoning Hearing Board of Upper Merion Township (“ZHB”) held an advertised public hearing on Landowners’ application. The following members of the ZHB were present at the hearing: M Jonathan Garzillo, Chairman; John

M. Tallman, Jr., Vice-Chair, Vivian Peikin, Esq., Secretary; Mark S. DePillis, Esq., member; and Hedda Schupak, member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm of Eastburn and Gray, P.C. The applicant was unrepresented.

Neighboring property owners, Donald Nazaryk, Timothy J. Sally, and Khanh Tran (“Objectors”), appeared in opposition to the application.

The hearing was duly advertised, notice was given in accordance with the requirements of the Zoning Ordinance, and the proceedings were stenographically recorded. Because the application was contested, the ZHB issues this decision with findings of fact, conclusions of law, and reasons.

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. Landowners are the owners of the Property. [Ex. ZHB-2]
2. The Property is identified as tax parcel no. 58-00-03753-01-3. [Ex. ZHB-7]
3. The Property is located in the Township’s R-2A Residential zoning district. [Ex. ZHB-1]
4. The Property is improved with a single-family residential dwelling and a storage shed. [Ex. ZHB-1]

**ZHB HEARING**

5. The ZHB marked the following exhibits:
  - a. ZHB-1 – application;

- b. ZHB-2 – Deed dated May 22, 2017, between Lillian C. Smith and David W.M. Cassidy (grantors), and Bryan Kelly and Leigh Ann Capone-Kelly (grantees), recorded in deed book 6046 page 2130;
  - c. ZHB-3 – plan entitled, “Plan of Property of Section #3”, prepared by Valley Forge Engineers, Inc., dated July 11, 1958, last revised November 22, 1958;
  - d. ZHB-4 – Annotated tax map of Property showing location of proposed chicken coop;
  - e. ZHB-5 – Photograph of proposed chicken coop;
  - f. ZHB-6 – Google Maps aerial image and street views of the Property;
  - g. ZHB-7 – Montgomery County Board of Assessment Appeals property records and tax map for tax parcel 58-00-07873-00-7;
  - h. ZHB-8 – Letter from ZHB Solicitor to Landowners, dated November 1, 2021, regarding incomplete plan submission;
  - i. ZHB-9 – Legal Notice.
- 6. Landowners did not introduce any exhibits during the hearing.
  - 7. Objectors did not introduce any exhibits during the hearing.
  - 8. Landowner, Bryan Kelly, testified in support of the application.
  - 9. Mr. Kelly testified, in pertinent part, as follows:
    - a. Landowners adopted a chicken after finding the animal in a grocery store parking lot. Subsequently, Landowners applied for a special exception to keep and shelter the chicken at the Property. [N.T., p. 5.]

- b. Landowner has a portable chicken coop which is approximately 6 feet wide by 2 ½ feet deep and can hold up to four chickens. [N.T., pp. 7-8.]
  - c. The application for a special exception sought permission to keep 2-4 female chickens on the Property. However Landowner agreed to accept a condition, if the application were granted, restricting Landowners to only the one chicken. [N.T., pp. 5, 12, 17, 33-34]
  - d. The coop will be kept inside the garage during the winter, and it will be moved outside during the warmer months. [N.T., p. 6.]
  - e. The chicken will only be permitted outside of the coop and to roam in the yard when Landowners are home and supervising. [N.T., pp. 9-10, 31.]
  - f. The Property's side yard and back yard are fenced. [N.T., pp. 9-10.]
  - g. Landowner intends to keep the chicken as a family pet rather than as livestock. [N.T., p. 6.]
  - h. The chicken is approximately sixteen weeks old and does not crow. The only noise the chicken makes are clucking noises. [N.T., pp. 7-8, 31.]
  - i. Landowner will keep the chicken inside the dwelling if it begins to crow in order to reduce noise for neighbors. [N.T., pp. 13-14.]
  - j. Landowners also have two dogs, seven cats, four cockatoos, and a tortoise on the Property. [N.T., p. 16].
10. Landowners offered no expert testimony in support of their application.

11. Objectors presented 3 witnesses: Donald Nazaryk, who resides at 611 Keebler Road; Timothy J. Sally, who resides at 644 General Armstrong Road; and Khanh Tran, who resides at 633 General Armstrong Road.

12. Mr. Nazaryk expressed concerns that Landowners would obtain multiple chickens and testified that a rooster does not belong in a residential neighborhood because it will make excessive noise, and attract rodents and hawks. [N.T., pp. 19-24.]

13. Mr. Nazaryk has never heard Landowners' chicken crowing or making other noises. [N.T., p. 23.]

14. Mr. Sally testified about concerns regarding the effect that allowing chickens in the neighborhood would have on property values and the marketability of properties. [N.T., pp. 26-28.]

15. No expert testified to support the claim that chickens (or this chicken would) have a negative impact on property values or marketability.

16. Mr. Tran expressed concerns regarding noise associated with roosters, that Landowners would acquire additional chickens, and that Landowners' chicken might escape from the Property and roam throughout the neighborhood. [N.T., pp. 28-30.]

## **B. DISCUSSION**

“A special exception is a conditionally permitted use, allowed by the legislature if specifically listed standards are met.” *In re Appeal of Brickstone Realty Corp.*, 789 A.2d 333, 340 (Pa. Cmwlth. 2001) (citing *Bray v. Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980)); see also Zoning Ordinance § 165-251.B(1). “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. Cmwlth. 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. Cmwlth. 2014) (quoting *Greaton Props. v. Lower Merion Twp.*, 796 A.2d 1038, 1045-46 (Pa. Cmwlth. 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 Bd. of Manchester Twp.*, 762 A.2d 1137, 1141 (Pa. Cmwlth. 2000); *In re Appeal of Brickstone Realty Corp.*, 789 A.2d 333, 342 (Pa. Cmwlth. 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 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 conditions as are necessary to ensure compliance with the purpose and intent of [the Zoning Ordinance].” Zoning Ordinance § 165-251.B(1)(g).

**1. Landowners demonstrated compliance with the standards for a special exception enumerated in the Zoning Ordinance.**

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). Landowners met the objective criteria of section 165-209.A(2)(e): they proposed to keep and shelter a farm animal (chicken) as an accessory use to their single-family detached dwelling. Landowners agreed to the condition that they will keep only one chicken, and will keep no additional chickens or replace the existing chicken.

Landowners also demonstrated that the keeping and sheltering of the chicken complies with the applicable general standards for a special exception enumerated in the Zoning Ordinance. The ZHB finds that (1) the keeping of and shelter for one chicken and agreement to not keep additional chickens or replace the existing rooster complies with the community development objectives stated in Article I of the Zoning Ordinance;<sup>1</sup> (2) the keeping of and shelter for one rooster and agreement to not keep additional chickens or replace the existing rooster will not adversely affect neighboring land uses; (3) the keeping of and shelter for one rooster and agreement to not keep additional chickens or

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<sup>1</sup> The Zoning Ordinance does not enumerate a “specific intent” for the R-2A Residential District.

replace the existing rooster does not impact existing public-service systems; and (4) Landowners demonstrated proper design for the keeping of and shelter for one chicken on the Property.

**2. The Objectors failed to demonstrate that the keeping of and shelter for one rooster as an accessory use to Landowner's dwelling, as conditioned, would have a generally detrimental effect.**

The Objectors failed to demonstrate that the keeping of one chicken, as conditioned, would have a detrimental effect not normally generated by this type of use. *See In re Appeal of Brickstone Realty Corp.*, 789 A.2d at 342.

In order to support a denial of a special exception, 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 chicken. *Dunbar v. Zoning Hearing Bd.*, 144 A.3d 219, 226 (Pa. Cmwlth. 2016). "The mere speculation of possible harms resulting from the proposed use fails to satisfy the objectors' burden." *Mehring*, 762 A.2d at 1141.

The Objectors' concerns were limited to: (1) the noise associated with the chicken; (2) the possibility that Landowners acquire additional chickens; (3) the increased presence of rodents and hawks due to the chicken; (4) the effect on property values and marketability; and (5) the potential of the chicken's escaping from the Property and roaming the neighborhood.

The Objectors failed to demonstrate how Landowners' proposed keeping of and shelter for a single chicken, as limited by the conditions imposed by the ZHB, would result in an increased presence of rodents/hawks, or noise, to a degree not normally generated

by the presence of a chicken. Landowner testified that to date the chicken has never crowed, and Objectors admitted they have never heard the chicken crow.

With respect to the concern over property values and marketability, Objectors presented no evidence to support the claim that Landowners' keeping and sheltering of the chicken would negatively affect their property values or the marketability of properties.

Objectors' concern over the chicken's escaping from the Property was unfounded because the Property is fenced and there was no evidence presented that the chicken would be able to go over the fence. Further, Landowner testified that the chicken would be supervised when outside in the yard.

Although the ZHB did find the Objectors' concerns regarding the number of chickens on the Property credible, those concerns are addressed by the conditions imposed by the ZHB.

### **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 §165-251.A(6).

2. Landowners have standing to seek the requested zoning relief as the owners of the Property.

3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.

4. Section 165-209.A(2)(e) *Accessory uses* of the Zoning Ordinance permits “[t]he keeping of and shelters for farm animals other than common household pets” by special exception.

5. Landowners demonstrated that the keeping of and shelter for a chicken on the Property as an accessory use to the principal single-family detached dwelling meets the objective criteria of the Zoning Ordinance.

6. The ZHB attached reasonable conditions to its approval of Landowners' application, as set forth in the below notice of decision, pursuant to Zoning Ordinance § 165-251.B(1)(g).

7. Landowners demonstrated that the keeping of and shelter for a chicken, as conditioned, met the standards of Zoning Ordinance § 165-251.B(1).

8. Objectors failed to demonstrate that the keeping of and shelter for a chicken, as conditioned, would have a generally detrimental effect such that the special exception should be denied.

9. Landowners demonstrated entitlement to the requested special exception to keep and shelter one chicken on the Property.

At the conclusion of the November 17, 2021 hearing, the ZHB voted to grant the application. On October 18, 2021, the ZHB mailed the following notice of decision to Landowners:

*This letter provides notice of the decision of the Upper Merion Township Zoning Hearing Board following the conclusion of the hearing on Wednesday, November 17, 2021.*

*The Zoning Hearing Board voted to grant a special exception pursuant to section 165-209.A(2)(e) of the Upper Merion Township Zoning Ordinance of 1942, as Amended, to allow the keeping of and shelter for 1 existing chicken. This approval allows for the keeping of 1 chicken and does not permit the keeping of additional chickens, or a replacement of the existing chicken.*

*Because this application was contested, the Zoning Hearing Board will issue a decision with findings of fact, conclusions of law, and reasons.*

*The approval is subject to a 30-day appeal period beginning from the date of entry (mailing) of the notice of decision.*

*The applicant is directed to section 165-257 "Expiration of Special Exceptions or Variances" and applicable statutory provisions governing the expiration of special exceptions.*

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**



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M Jonathan Garzillo  
Chairperson