

**Before the Zoning Hearing Board
Of the City of Bethlehem, Pennsylvania**

Northampton County

Appeal & Application of) **Date: April 13, 2018**
Valerie Peters,)
Applicant) **Re: 251 E. Church Street**

NOTICE OF RIGHT OF APPEAL
OF AGGRIEVED PARTY

You have the right to appeal this Decision if you are an “aggrieved party” under the Pennsylvania Municipalities Planning Code. You must appeal to the Court of Common Pleas of the County in which the subject property is situated. The City of Bethlehem is located partly in Northampton County and partly in Lehigh County.

In order to properly file an appeal, you should seek the advice of a lawyer. Please note that neither the Zoning Officer nor the Zoning Hearing Board Solicitor is permitted to give you legal advice. **PLEASE DO NOT CALL THIS OFFICE.**

You must file your appeal in writing within thirty (30) calendar days of the date of mailing of this Decision or your right to such an appeal is lost.

YOUR APPEAL PERIOD BEGINS

April 13, 2018
(Date of Mailing this Decision)

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Of the City of Bethlehem, Pennsylvania**

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**Appeal & Application of
Valerie Peters,
Applicant**

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DECISION

I. Preliminary Matters

A public hearing was held on **February 28, 2018 at 6:00 PM** before the Zoning Hearing Board of the City of Bethlehem ("Board") regarding Applicant's Appeal to the Zoning Hearing Board.

A. Parties

1. Applicant: Valerie Peters appeared as Applicant and had standing as the tenant of the property with permission of the owner. (The Application included an authorization signed by the owner's Trustee.)

2. Zoning Hearing Board: The Board comprised William Fitzpatrick (Chairman), James H. Schantz, Linda Shay Gardner, Terry Novatnack and Michael Santanasto. The Zoning Officer was Suzanne Borzak. Erich J. Schock of Fitzpatrick Lentz & Bubba, P.C., represented the Zoning Hearing Board as its Solicitor.

3. Protestant(s) / Interested Parties: Bruce Haines and Frank Boyer appeared as objectors.

B. Notice

Notice of the hearing was given by public advertisement, posting of the Property and regular mail to neighboring property owners pursuant to the applicable provisions of the

Pennsylvania Municipalities Planning Code,¹ the Zoning Ordinance of the City of Bethlehem² and the rules of the Board.³

C. Property

The subject property (the "Property") is located at **251 E. Church Street**, Bethlehem, Northampton County, Pennsylvania.

II. Applicable Law

The Board considered the case under the following statutory authority, as well as under applicable reported decisions of the appellate courts in Pennsylvania:

1. *The Codified Zoning Ordinance of the City of Bethlehem*, Ordinance No. 2210, effective September 25, 1970, as amended (hereinafter, the "Zoning Ordinance").
2. *The Pennsylvania Municipalities Planning Code*, 53 P.S. § 10101, *et seq.*, as reenacted 1988, Dec 21. P.L. 1329, No 170, § 2. (hereinafter, the "MPC").

¹ MPC § 10908(1) provides that "[p]ublic notice shall be given and written notice shall be given to the applicant, the zoning officer, such other persons as the governing body shall designate by ordinance and to any person who has made timely request for same. Written notices shall be given at such time and in such manner as shall be prescribed by ordinance or, in the absence of ordinance provisions, by rules of the board. In addition to the written notice provided herein, written notice of said hearing shall be conspicuously posted on the affected tract of land at least one week prior to the hearing."

² Article 1325.04(a) provides for notice to be given as follows: (a) Upon filing with the Board for an application for a special exception, variance or other appeal under this Ordinance, the Board shall determine a place and a reasonable time, and the City shall give notice as follows: (1) The City shall publish a public notice describing the location of the building or lot and the general nature of the matter involved in a newspaper of general circulation in the City in conformance with the Municipalities Planning Code. (2) The City shall give written notice to the applicant and persons who have made a timely request for notice of such hearing. In addition, notice shall be provided to those persons whose properties adjoin the property in question, and to the City Planning Commission. Such notice should be sent at least 7 days prior to the hearing. (3) The City shall provide written notice to the last known address of the primary owner of lots within 300 feet of the subject lot, unless the application only involves a dimensional variance on an owner occupied single family dwelling unit or its accessory structure. Failure of a person(s) to receive such notice shall not be grounds for an appeal, provided that a good faith effort was made to provide such notice.

³ The custom and practice in the City of Bethlehem is for the Zoning Officer to place the notice in the newspaper and to send written notice to interested parties by regular mail. The Applicant is given a fluorescent sign by the Zoning Officer at the time the Application is filed and the fee paid, and the Applicant is instructed to conspicuously post the property with the sign giving notice of the particulars of the hearing at least seven (7) days prior to the hearing.

III. Nature of Relief Sought

Applicant sought a special exception under §1304.01(b)(2) to use the Property for a one-room bed and breakfast.

IV. Evidence Received by the Board

In addition to testimonial evidence received by the Board from Applicant, the Board admitted the following Exhibits:

Exhibit A-1: Application and its attachments.

Boyer 1: Ad for bed and breakfast.

V. Findings of Fact

1. The Property, which is the subject of this appeal, is located at 251 E. Church Street in the Northampton County portion of the City of Bethlehem.

2. The Property is 30' x 180'.

3. The Property is located in the RT Residential Zoning District.

4. The Property contains a single-family dwelling with a separate, small apartment in the rear of the home.

5. According to the Zoning Officer, the residence formerly had been a two-unit dwelling.

6. The residence is no longer permitted as a two-family dwelling, so the apartment cannot be leased as a separate dwelling.

7. Applicant has occupied the residence since 2015 and uses the front part of the residence for her home.

8. The two portions of the residence are connected via a second-floor corridor.

9. The apartment had been used as an AirBnB since Spring 2017.

10. Applicant cannot register the residence under the short term lodging ordinance, because she is not the title owner.

11. The short-term lodging ordinance is not a zoning regulation.

12. A bed and breakfast is permitted by special exception in the RT Zoning District.

13. The Zoning Ordinance sets forth specific standards in §1322.03(g) to qualify as a bed and breakfast.

14. The bed and breakfast will be one (1) room.

15. No alteration to the home is proposed.

16. The footprint of the existing structure will not be altered.

17. The bed and breakfast will operate at lease 6 months per year, but no guest will stay more than 14 days.

18. The operator will reside at the Property.

19. The bed and breakfast will meet all other Zoning Ordinances and City requirements for health, building and fire safety.

VI. Conclusions/Analysis of Law

The Use Regulations for the RT Residential District are set forth in Section 1304.01 and provide, in pertinent part, that a bed and breakfast is permitted by special exception. Under Section 1302.12 a Bed and Breakfast is defined as:

A detached dwelling which may provide overnight lodging and serve breakfast to transient guests, and which includes the owner or primary operator residing on the premises.

A special exception is not an exception to a zoning ordinance, but rather a use, which is expressly permitted, absent a showing of a detrimental effect on the community. *Greaton Props. v. Lower Merion Twp.*, 796 A.2d 1038 (Pa. Cmwlth. 2002). *See also Heck vs. Zoning Hearing Bd.*

for Harveys Lake Borough, 397 A.2d 15, 18 (1979); *Appeal of Lynch Community Homes, Inc.*, 554 A.2d 155 (1989). Where a particular use is permitted in an area by special exception, the law recognizes that the local legislative body already considered the use for the area in terms of general matters such as health, safety, and the general welfare, as well as the general intent of the zoning ordinance. *Shamah v. Hellam Township Zoning Hearing Bd.*, 648 A.2d 1299 (Pa. Cmwlth. 1994).

Even though a special exception is a permitted use (and, for example, not subject to the stricter burden of a variance to allow a use that the zoning ordinance does not permit on a property), the burden to be met for a special exception is higher than in an instance where a use is permitted by right. For example, if a Bed and Breakfast had been permitted by right in the RT Residential District, scrutiny of the application would end after a determination that the proposed use met the definition of a Bed and Breakfast set forth in Section 1302.12.

The initial burden on Applicant is to establish that the proposed use satisfies the objective requirements of the zoning ordinance for the grant of a special exception or conditional use. *In re Appeal of Brickstone Realty Corp.*, 789 A.2d 333 (Pa. Cmwlth. 2001). The seminal case in this regard is *Bray v. Zoning Bd. of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980). In *Bray*, a city appealed from a decision reversing a denial by a zoning board of adjustment of an application to establish a roller-skating rink in an area shopping center. The Court provided a detailed analysis relating to each party's burden in a special exception matter. The *Bray* Court began its analysis by describing the various types of requirements relating to special exceptions stating:

As to special exceptions, our cases have repeatedly made clear that the Owner has both the persuasion burden and the initial evidence presentation duty to show that the proposal complies with the "terms of the ordinance" which expressly govern such a grant. This rule means the Owner must bring the proposal within the specific requirements expressed in the ordinance for the use (or area,

bulk, parking or other approval) sought as a special exception. Those specific requirements, standards or “conditions” can be classified as follows:

1. The kind of use (or area, bulk, parking or other approval) i.e., the threshold definition of what is authorized as a special exception;
2. Specific requirements or standards applicable to the special exception e. g., special setbacks, size limits; and
3. Specific requirements applicable to such kind of use even when not a special exception, e.g., setback limits or size maximums or parking requirements applicable to that type of use whenever allowed, as a permitted use or otherwise.

Every special exception will always involve item 1 above and must involve item 2 if it is not to involve an unconstitutional delegation of legislative power. Item 3 above, where present, is necessarily part of the threshold requirement because the special exception use naturally must comply with the requirements applicable to that type of use throughout the ordinance, unless expressly exempted from them.

Bray, 410 A.2d at 910-911 (citations omitted).

The first category noted above would require Applicant to demonstrate that the use falls within the definition of “Bed and Breakfast”. For the purposes of this Application, the Board determined that the proposed use meets the definition. While the objectors elicited testimony and presented evidence questioning the bed and breakfast designation, none of the testimony or evidence demonstrated the use to be anything other than a bed and breakfast as defined in the Zoning Ordinance. This point is important – the description of a use is compared against its description in the Zoning Ordinance. While in other places one or more characteristics of Applicant’s use might preclude its being a bed and breakfast, in the City of Bethlehem, as the bed and breakfast use is currently defined, this use is a bed and breakfast. Also, Applicant contended that it met all of the requirements that fall within the third category noted by the Court in *Bray*, such as the parking and dimensional requirements for the use applicable generally in the RT Residential District. No evidence at the hearing demonstrated any deficiency in that regard.

Finally, the second category of specific requirements described by the Court in *Bray* are set forth in Section 1322.03(g) of the Zoning Ordinance. This provision comprises eight (8) criteria to be met by an applicant seeking special exception approval for a Bed and Breakfast and are applicable only to a Bed and Breakfast.

(g) Bed and Breakfast Inn.

- (1) No more than 5 rooms may be offered for rent in a residential district.
- (2) The bed and breakfast must be in an existing structure and not a new structure or outbuilding.
- (3) In a residential district, the only meal to be served is breakfast and to lodgers of the bed and breakfast exclusively.
- (4) Signs shall conform to Section 1320.08(a)(2), in a residential district.
- (5) No exterior structural alteration of the building shall be made except as may be necessary for purposes of sanitation, handicapped accessibility, historic rehabilitation or safety.
- (6) The bed and breakfast must meet all City requirements for health, fire, and building safety.
- (7) The bed and breakfast must be in operation a minimum of 6 months per year.
- (8) The maximum uninterrupted length of stay shall be fourteen (14) days.

An applicant must present evidence to demonstrate compliance with these particular requirements. The Board finds that the facility described by Applicant and in its documentary evidence meets the burden to demonstrate compliance with the specific standards.

In addition to the above specific requirements, the City of Bethlehem Zoning Ordinance also contains "General Requirements and Standards Applicable to all Special Exceptions."

Section 1325.08. The Board is instructed to grant a special exception:

...only if it finds adequate evidence that any proposed use submitted for a special exception will meet all of the following general requirements, as well as any specific requirements and standards listed for the proposed use. The Board shall, among other things, require that any proposed use and location be:

- (1) In accordance with the City of Bethlehem Comprehensive Plan and consistent with the spirit, purposes, and intent of this Ordinance.

(2) In the best interest of Bethlehem, the convenience of the community, the public welfare, and be a substantial improvement to property in the immediate vicinity.

(3) Suitable for the property in question, and designed, constructed, operated and maintained so as to be in harmony with and appropriate in appearance with the existing or intended character of the general vicinity.

(4) In conformance with all applicable requirements of this Ordinance.

(5) Suitable in terms of permitting the logical, efficient and economical extension of public services and facilities such as public water, sewers, police and fire protection and public schools.

(6) Suitable in terms of effects on street, traffic and safety with adequate sidewalks and vehicular access arrangements to protect major streets from undue congestion and hazard.

With respect to these general requirements relating to detrimental effect of a use on health, safety and welfare, the City of Bethlehem's Zoning Ordinance is permitted to place the burden of persuasion on the applicant, as it does, but the burden of production would first lie with anyone objecting to the application. *Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board*, 590 A.2d 65 (Pa. Cmwlth. 1991). "[W]hen municipalities have put general, non-specific or non-objective requirements into the ordinance with respect to special exceptions, our decisions have usually not seen such general provisions as part of the threshold persuasion burden and presentation duty of the Owner." *Bray*, 410 A.2d at 911 (citations omitted). The *Bray* Court then quotes *Derr Flooring Co. v. Whitmarsh Township Zoning Board*, 285 A.2d 538 (1972), which reasoned:

Once an Owner has met the burden of proving his compliance with all of the specific conditions and requirements of the zoning ordinance, he has met his initial burden of proof. If the protestants to the issuance of a special exception raise specific issues concerning health, safety and general welfare, then the burden would continue to be with the Owner. The Owner would be required to come forward to meet the objections so as to show that the intended use would not violate the health, safety and general welfare of the community with relation to such objections. It would then be the duty of the Board in the exercise of its

discretionary power to determine whether or not the Owner had met his burden of proof. *Derr*, 285 A.2d at 542.

To defeat a special exception use based upon the proposal's affect on public health, safety and welfare, the impact to the public interest must be greater than that which might be expected under normal circumstances. *Lower Providence Township and Wood v. Ford*, 283 A.2d 731 (Pa. Cmwlth. 1971).

The Board believes Applicant demonstrated that the proposed Bed and breakfast is in the best interest of Bethlehem and is not contrary to the public welfare. Applicant met the burden of proof required by *Bray*. Further, the objectors' evidence failed to change the Board's opinion that a one-room bed and breakfast in a zoning district that allows the use would adversely impact the public health, safety and welfare.

In summary, the Board concluded that while the Property physically could continue as a residential use, practicality dictated that the use variance is a reasonable deviation. Based on all of the above and the particular facts of this proposal, the Board believed Applicant met her burden of proof.

VII. Conclusions of Law

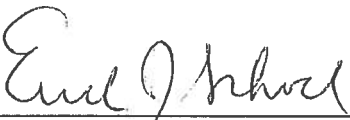
1. A bed and breakfast is not permitted on the Property, and a special exception is required.
2. Applicant's use as described meets the definition of a bed and breakfast.
3. Applicant met the standard for a special exception.

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VIII. Decision of the Board

Based upon the foregoing, by a 5-0 vote the Zoning Hearing Board granted a special exception from §1304.01(b)(2) of the Zoning Ordinance to use the Property for a bed and breakfast, subject to the following conditions: (1) that the property has to be the primary occupancy of Applicant as long as the bed and breakfast is in operation; and (2) the owner shall maintain open access to all areas of the residence (meaning the former apartment cannot be operated as a separate dwelling).

THE BOARD:



ERICH J. SCHOCK
Solicitor

*/s/ Suzanne Borzak **

SUZANNE BORZAK,
Zoning Officer

*/s/ William Fitzpatrick **

WILLIAM FITZPATRICK
Chairman

*/s/ James H. Schantz **

TERRY
Member

*/s/ Linda Shay Gardner **

LINDA SHAY GARDNER
Member

*/s/ Terry Novatnack **

TERRY NOVATNACK
Member

*/s/ Michael Santanasto, Esquire **

MICHAEL SANTANASTO
Member

DATE(S) OF HEARING: February 28, 2018

DATE OF WRITTEN DECISION: April 13, 2018

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Of the City of Bethlehem, Pennsylvania**

Northampton County

**Appeal & Application of
Valerie Peters,
Applicant**

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Date: April 13, 2018

Re: 251 E. Church Street

Certificate of Service

I, Erich J. Schock, Solicitor, do hereby certify that I sent a true and correct copy of the forgoing Decision to the Applicant and its counsel by regular U.S. Mail sent first class on the addresses and on the date set forth below:

Valerie Peters
251 E. Church Street
Bethlehem, PA 18018
Applicant

Madeline P. Peters
3947 Norfolk Drive
Bethlehem, PA 18020
Owner

Bruce Haines
63 W. Church Street
Bethlehem, PA 18018
Objector

Frank Boyer
234 E. Market Street
Bethlehem, PA 18018
Objector

FITZPATRICK LENTZ & BUBBA, P.C.

Date: April 13, 2018

BY: 

ERICH J. SCHOCK, ESQUIRE
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Attorney for Zoning Hearing Board
Of the City of Bethlehem