

STANLEY J.A. LASKOWSKI
DOUGLAS K. MARSICO
PETER M. GOOD
ELIZABETH H. FEATHER
DAVID A. WION
JEAN D. SEIBERT
PAUL J. ESPOSITO
THOMAS E. BRENNER
JOSEPH M. SEMBROT
STEPHANIE A. WILSON

CALDWELL & KEARNS

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

3631 NORTH FRONT STREET
HARRISBURG, PENNSYLVANIA 17110-1533

717-232-7661
FAX: 717-232-2766

THEFIRM@CKLEGAL.NET

OF COUNSEL
JAMES R. CLIPPINGER
CHARLES J. DEHART, III
THOMAS J. WEBER

RETIRE
RICHARD L. KEARNS
JAMES D. CAMPBELL, JR.

THOMAS D. CALDWELL, JR.
(1928-2001)
CARL G. WASS
(1937-2010)

dwion@cklegal.net

July 24, 2018

Kenneth Klinepeter, Borough Manager
Borough of Middletown
60 West Emaus Street
Middletown, PA 17057

**RE: APPEAL OF BOROUGH ZONING OFFICER NOTICE OF VIOLATION AT
239 W. WATER STREET (SWEET ARROW PROPERTIES, LLC) INVOLVING
RENTAL TO MORE THAN TWO (2) PERSONS UNRELATED BY BLOOD,
MARRIAGE OR ADOPTION
MIDDLETOWN ZONING HEARING BOARD WRITTEN DECISION**

Dear Mr. Klinepeter:

As a result of the action taken in regard to the referenced matter by the Middletown Zoning Hearing Board at the continued hearing of Thursday, June 28, 2018, I am enclosing herewith the written Decision of the Board relating to its action. Kindly govern yourself accordingly.

Very truly yours,



David A. Wion
CALDWELL & KEARNS, P.C.

DAW/nb
/Enclosure

cc: Jack Still, Chairman
Donald Graham, Member
Robert Fallinger, Member

16117-010/FL*183684

In re: Application of Sweet Arrow : Before the Zoning Hearing Board,
Properties, LLC, for Appeal of Notice of :
Violation : Borough of Middletown,
 : Dauphin County, Pennsylvania
 :
 : Docket No. 18-03
 :
 : Hearings: May 8, 2018; June 28, 2018
 :
 : Decision: July 24, 2018
 :
 : Written Decision Mailed: July 24, 2018

DECISION OF THE ZONING HEARING BOARD

The Zoning Hearing Board of the Borough of Middletown, Dauphin County, Pennsylvania, properly advertised and posted a public hearing for the initial date of May 8, 2018, upon an appeal from the Notice of Violation dated February 23, 2018, by the Borough Zoning Officer finding the Applicant in violation of the Middletown Borough Zoning Ordinance (MZO) Section 701.B, which allows single-family, semi-detached dwellings as a permitted use, but in the instant situation violating the definition of family prohibiting no more than two (2) persons unrelated by blood, marriage or adoption from living in the dwelling. The property of the Applicant, 239 West Water Street in the Borough of Middletown, Dauphin County, Pennsylvania, was found by the Zoning Officer to be rented to a total of four (4) students unrelated by blood, marriage or adoption and therefore a violation of the MZO.

The Appellant is Sweet Arrow Properties, LLC, of 805 Adelia Street, Middletown, PA 17057, owner of the property located at 239 West Water Street, Middletown, Dauphin County, PA, Tax Parcel ID 42-035-020.

Public notice of the May, 2018 public hearing was published in the Patriot News on Tuesday, April 24, 2018, and Tuesday, May 1, 2018, in accordance with the requirements of the Pennsylvania Municipalities Planning Code (MPC) and the Borough of Middletown Zoning Ordinance (MZO). Additionally, written notice of the hearing was conspicuously posted on the affected property by the Middletown Zoning Officer, Al Geosits, who certified to the posting. Written notice was also provided to the Applicant, Sweet Arrow Properties, LLC. Written notice was further provided to the members of the Middletown Borough Council and Mayor, Grace Miller, the Borough Secretary, and Steve Cassidy, Secretary of the Middletown Borough Planning Commission.

Upon the conclusion of the May 8, 2018 hearing, the hearing, by agreement of the parties, was continued until June 28, 2018.

All members of the Zoning Hearing Board, i.e., John Still, Chairman, Donald Graham and Robert Fallinger, were present throughout the hearings. Testimony on behalf of the Applicant, Sweet Arrow Properties, LLC, was provided by Diana McGlone, a minority owner of the company, and Dennis McGlone, a majority owner of the company. Sweet Arrow Properties, LLC, was represented by legal counsel, David J. Lanza.

Testimony was given on behalf of the Borough of Middletown, Appellee in this matter, by the Middletown Zoning and Codes Officer, Alfred J. Geosits, Jr. The Borough was represented by the Borough Solicitor, Attorney James A. Diamond, of Eckert Seamans Cherin & Mellott, LLC. Testimony was also offered by several individual citizens permitted to appear by the Board, who signed the Entry of Appearance form provided by the Board. All witnesses who offered testimony were duly sworn during the course of the hearings.

At the continued hearing of June 28, 2018, the Board, by motion, denied the appeal.

FINDINGS OF FACT

1. The property which is the subject of this appeal, 239 West Water Street, Middletown, Dauphin County, PA (“Property”), is owned by Sweet Arrow Properties, LLC, a Pennsylvania limited liability company. Borough Exhibit (Ex.) 3.

2. Sweet Arrow Properties, LLC, is a Pennsylvania limited liability company which has two (2) owners/members, Ms. Diana McGlone and her father, Dennis J. McGlone. N.T. 36, 47.

3. The Property at 239 West Water Street, Middletown, Dauphin County, PA, is also known as Dauphin County Tax Parcel No. 42-035-020. Application for Hearing and attached Notice of Violation, Board Ex. 3; Borough Ex. 3-D; Dauphin County Tax Assessment Card, Borough Ex. 4.

4. The Property located at 239 West Water Street, Middletown, Dauphin County, PA, contains thereon a single-family, half twin residence on a tract of land 1,681 square feet in size. Borough Ex. 4, p.1.

5. The Property at 239 West Water Street is located in an R-2 Zoning District of the 2013 MZO. Notes of Testimony (N.T.) 28. The tract at 239 West Water Street, Middletown, Dauphin County, PA, is located at the intersection of West Water Street and Nissley Street. N.T. 12-13.

6. The Applicant, Sweet Arrow Properties, LLC, has leased the Property located at 239 West Water Street, Middletown, Dauphin County, PA, to four (4) occupants over the last year. N.T. 36. Appellant charges each of the students at least \$535 per month. Borough Ex. 5.

7. The neighborhood in which the Property is located is principally a residential neighborhood, although a commercial mall is located directly across Nissley Street to the west. N.T. 20.

8. There is a lack of parking in the immediate vicinity and neighborhood of the Property, creating a parking problem in the area. N.T. pp. 12-13; 53; 58; 64-66; 76-82; 87.

9. Although not attributed to the Property in question, testimony from a resident indicated that there is noise in the neighborhood from parties. N.T. 60.

10. Testimony of the Sweet Arrow Properties, LLC member/owner, Dennis J. McGlone, indicated that the LLC knew that parking was going to be a problem in this area. N.T. 87.

11. The four (4) persons who rented the Property at 239 West Water Street, Middletown, Dauphin County, PA, are unrelated to each other by blood, marriage or adoption. N.T. 52-53.

12. The persons to whom the property was leased were all adults over the age of 18. N.T. 53.

13. The individuals to whom the Applicant leased area in 239 West Water Street are not a protected class under the Federal Fair Housing Act, 42 U.S.C. §3601 et seq. (FHA).

14. The Notice of Violation under appeal was issued on February 23, 2018, by Middletown Borough Zoning Officer Al Geosits to Appellant, Sweet Water Properties, LLC. The Notice of Violation charged Sweet Water Properties, LLC, with unlawfully using the Property in violation of the permitted uses provisions of the MZO applicable to the R-2 Zoning District, and the definition in the Zoning Ordinance of the term “family”, which prohibits no more than two (2) persons unrelated by blood, marriage or adoption from occupying one

dwelling unit. The Notice indicated that the property was being rented to a total of four (4) students who are unrelated by blood, marriage or adoption. See Notice of Violation, part of Application for Hearing, Board Ex. 3.

15. The Application for Hearing filed by Sweet Arrow Properties, LLC, appealing the Notice of Violation from the Zoning Officer was filed March 23, 2018.

16. The initial hearing on the Application was held on May 8, 2018, 46 days from the filing of the Application for Hearing.

17. The hearing on May 8, 2018, was continued by agreement of the parties until June 28, 2018, at which time the Board rendered its decision. N.T. 92.

CONCLUSIONS OF LAW

18. The Zoning Hearing Board has exclusive jurisdiction to hear the instant appeal from the determination of Zoning Officer Al Geosits to enforce the Zoning Ordinance by sending a Notice of Violation to Sweet Arrow Properties, LLC, in the nature of a “cease and desist order” for renting to a total of four (4) students unrelated by blood, marriage or adoption.

Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10909.1(a)(3), 53 P.S. §10909.1(a)(3); and the Middletown Zoning Ordinance (MZO) Section 260-233E.(5).

19. The Zoning Hearing Board has exclusive jurisdiction to hear the instant appeal to the extent that Applicant challenges the substantive validity of the Middletown Zoning Ordinance definition of “family” in that it prohibits Appellant’s for-profit rental company from leasing a single dwelling unit to four (4) unrelated adult college students or other adults under separate leases and therefor violates the Federal Fair Housing Act. Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10909.1(a)(1); and the Middletown Zoning Ordinance (MZO) §260-233E.(1).

20. Appellant has taken the legal position that it is entitled to a deemed approval of its appeal and a dismissal of the Zoning Officer's Notice of Violation because the initial hearing in this matter before the Zoning Hearing Board occurred more than thirty (30) days after the filing of its Application.

21. The requirements pertaining to the holding by the Zoning Hearing Board of its first hearing on a matter, and the subsequent provisions regarding deemed approvals for a failure of the ZHB to timely hold a first hearing, provide that:

“The first hearing before the board or hearing officer shall be commenced within 60 days from the date of receipt of the applicant's application, unless the applicant has agreed in writing to an extension of time.” 53 P.S. §10908(1.2) and Middletown Zoning Ordinance §260-233D.(1)(c).

In the instant matter, since the Application was filed on March 23, 2018, and the first hearing by the Zoning Hearing Board on the Application was held on May 8, 2018, 46 days from the filing of the Application, the hearing was well within the 60 days required by law.

22. Appellant's rental operations at 239 West Water Street, Middletown, Dauphin County, PA, a single-family, semi-detached dwelling unit, involved Appellant renting to more than two (2) persons unrelated by blood, marriage or adoption, which property was not shown by Appellant to constitute a permitted use in the R-2 District for student housing, and therefore violated the Zoning Ordinance as charged by the Zoning Officer in the Notice of Violation under appeal.

23. United States Supreme Court precedent, beginning with the landmark case of Belle Terre v. Boraas, 416 U.S. 1 (1974), 94 S.Ct. 1536, 39 L.Ed. 2d 797 (1974), has unequivocally established that zoning ordinances having the effect of restricting the number of unrelated persons who may live together in a residential zone do not violate U.S. Constitutional requirements, including 14th Amendment equal protection requirements or associational interests,

as such ordinance provisions inherently bear a rational relationship to the permissible state objectives and typical zoning goals of controlling density, maintaining the residential character of neighborhoods, and allotting and controlling parking and traffic facilities. In Belle Terre, the United States Supreme Court addressed this issue in the very context of a challenge to this type of ordinance as applied to bar the occupancy in a single rented dwelling unit by more than two unrelated college students. *Id.*

24. Similarly, the Pennsylvania Commonwealth Court in the recent decision of Schwartz v. Phila. Zoning Bd. of Adjustment, 126 A.3d 1032 (Pa. Cmwlth. 2015), *appeal denied*, 636 Pa. 654, 141 A.3d 483 (2016), addressed a case on point with the instant matter before our Board and reaffirmed that under Pennsylvania law a zoning ordinance limiting single-family residential dwelling unit use based on a definition of “family” that permits an unlimited number of persons related by blood, marriage or adoption to cohabit in a single-dwelling unit, while tightly restricting the number of unrelated persons, such as unrelated college students, was constitutional and proper. That case, like the instant matter, involved landlords cited for violations of a zoning ordinance for an unauthorized use of having more than three unrelated individuals in a single rented dwelling unit in order to supply student housing for nearby Drexel University. *See id.*

25. In Schwartz, as in our situation, the commercial landlords were violating the clear letter of the zoning ordinance by renting to unrelated college students. They attempted to claim that the ordinance was unlawful and invalid. The Pennsylvania Commonwealth Court, rejecting the attempt to strike down the zoning ordinance provisions, held that “zoning ordinances defining ‘family’ using biological and legal bonds are not facially unconstitutional, and the definition of ‘family’ found in the [zoning ordinance] is not unconstitutional as applied to

Appellants' [student housing rental] use of their properties.” Schwartz, 126 A.3d, at 1044, *appeal denied*, 636 Pa. 654, 141 A.3d 483 (2016).

26. The Middletown Zoning Ordinance definition of family is legally appropriate pursuant to the above legal precedents, and meets the “rational basis tests” required in Belle Terre, *id.*, and Schwartz as being related to a proper legislative police power objective limiting single-family residential uses within the Borough as defined by “family”. As the U.S. Supreme Court noted in Belle Terre:

“The regimes of boarding houses, fraternity houses and the like present urban problems. More people occupy given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.”

Belle Terre at 9.

As in Belle Terre, the problems of parking and noise are also found in the instant situation and reflect the Ordinance’s attempt to limit the problems created thereby.

27. Appellants also suggest that the Zoning Ordinance as applied in this situation to the unrelated persons (students) is discriminatory under the Fair Housing Act and the Pennsylvania Human Relations Act. The Fair Housing Act provides in §3604 that:

“...it shall be unlawful –

(b) ...to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling,...because of...familial status....”

42 U.S.C.A. §3604(b).

The Fair Housing Act further provides, in §3602(k), a definition of familial status as follows:

(k) “Familial status” means one or more individuals (who have not attained the age of 18 years) being domiciled with –

(1) a parent or other person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

28. In the instant matter, the testimony clearly revealed that none of the persons to whom the Property was rented were under the age of 18 and therefore they are not part of a protected class under the above provisions of the Fair Housing Act.

29. The Pennsylvania Human Relations Act similarly provides it to be a discriminatory practice for any person to discriminate in the leasing of a housing accommodation because of “familial status” of any person. 43 P.S. §955(h)(3). “Familial status” is defined under the PHRA identically to the definition found in the Fair Housing Act. 43 P.S. §954(t). As a result, the above provisions have no application in the instant matter.

30. The Notice of Violation of February 23, 2018 issued by the Middletown Zoning Officer, as applied to the Appellant’s actions in renting to students all over the age of 18 years, did not constitute unlawful discrimination under the Fair Housing Act nor the Pennsylvania Human Relations Act.

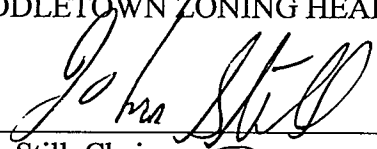
31. The Applicant’s appeal should be denied.

ORDER

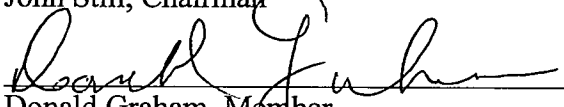
Pursuant to the Factual Findings and Conclusions of Law previously set forth, the instant appeal is denied.

MIDDLETOWN ZONING HEARING BOARD

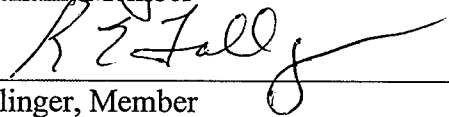
By:



John Still, Chairman



Donald Graham, Member



Robert Fallinger, Member

16117-010/FL*183287