

IN THE MATTER OF	:	BEFORE THE
SARA DOMERCHIE	:	HOWARD COUNTY
Appellant	:	BOARD OF APPEALS
v.	:	HEARING EXAMINER
DEPARTMENT OF PLANNING & ZONING, HOWARD COUNTY, MD	:	BA Case No. 744-D
Appellee		

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DECISION AND ORDER

On November 2, 2017, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the appeal of Sara Domerchie (Appellant). Appellant is appealing a Department of Planning and Zoning (DPZ) May 24, 2017 decision letter closing out code enforcement case CE 17-89 on property known as 4411 Manor Lane, which is zoned RC-DEO (Resource Conservation: Density Exchange Option), located in the 5th Election District, and identified as Tax Map 0029, Grid 0005, Parcel 19 (the Property). The Property is subject to a county agricultural preservation easement. The timely appeal is noted per Howard County Zoning Regulations (HCZR) § 102.0.B.

Appellant certified to compliance with the notice and advertising requirements of the Howard County Code (HCC). The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure. Carroll Holzer, Esq., represented Appellant. Sara Domerchie testified. Melissa Goldmeier, Assistant County Solicitor, represented DPZ. DPZ called Enforcement Inspector Steve Rolls as a witness.

Appellant introduced into evidence the exhibits as follows.

1A. May 24, 2017 letter to Sara Domerchie from Zoning Supervisor Anthony LaRose, re: CE 17-89

- B. May 12, 2017 handwritten letter to DPZ from Sara Domerchie, Zoning Inspection Request cover sheet re: Yoga is not an agricultural activity
- C. May 11, 2017 2-page request to Conduct Zoning Inspection submitted by Sara Domerchie
- D. Eventbrite screenshot: Manor Hill Brewery, May 21 "Pints, Poses, & an Extra POW" event
- 2. Case Field Report CE, 17-89
- 3. 2-page Farm Brewery Permit, Zoning Permit No. 13-002 issued to Manor Hill Farm, LLC – Manor Hill Brewing on December 12, 2013

DPZ introduced into evidence the exhibits as follows.

- 1. Special Farm Use Permit No. 16-002, issued to Marriner Family Irrevocable Trust & Manor Hill Farm, LLC on September 7, 2016

**I.
Preliminary Matters**

- 1. HCZR § 102.0.B is a Statutory Right of Appeal Requiring no Showing of Aggrievement

HCZR § 102.0. Violations, Enforcement, and Penalties, contains the general provisions authorizing DPZ to enforce violations of the Howard County Zoning Regulations and provides for a statutory right of appeal to the complainant filing a zoning violation complaint if DPZ determines no zoning violation exists and issues written notice to the complainant to this effect.

Any person who is aggrieved by an alleged violation of these regulations may request in writing that the Department of Planning and Zoning issue a Zoning Violation Notice. Such request shall include the complainant's address, the address of the violation, and a statement of the nature of the complaint so that the Department of Planning and Zoning can efficiently identify the property in question and to provide the complainant with the notification required herein. Provided the written complaint was not submitted anonymously, the Department of Planning and Zoning shall notify the complainant, in writing, it has received the written request within ten business days. If the Department of Planning and Zoning does not issue such a zoning violation notice within 60 days of receiving the written request, this shall be considered to be a final decision of the Department that the alleged violation does not exist, and the complainant shall have a right to appeal this decision to the Hearing Authority, provided that an appeal petition is filed with the Clerk of the Hearing Authority within 30 days after the final decision to not issue a Zoning Violation Notice. If such an appeal is taken, the Department of Planning and Zoning shall send a copy of the appeal petition to the owner and occupant of the premises.

Provided the complaint was not submitted anonymously, the Department of Planning and Zoning shall notify the complainant, in writing, if it determines the alleged violation exists and a violation notice is issued. Thereafter, the complainant shall receive written notice if a citation hearing before the Hearing Authority has been scheduled for the zoning violation case as provided in Section 16.1605 of the Howard County Code, or if the zoning violation case is closed. The written notice to a complainant about the closing of a zoning violation case shall briefly describe the reason(s) the case was closed, shall advise the complainant that the closed case file may be reviewed for more details; and shall advise the complainant of the right to appeal the decision to close the case to the Hearing Authority.

This noting of an appeal by a known complainant being a statutory right, it is not subject to the aggrieved person requirement contained in HCZR § 130.0.A.3, which authorizes appeals to the Hearing Authority by any person aggrieved, or by any officer, department, Board or bureau of the County affected by any decisions of the Department of Planning and Zoning.¹ Consequently, the only party in a public hearing on any such appeal is the complainant. For this reason, there is no public testimony sign-up sheet and in this appeal the Hearing Examiner was prohibited from entering into evidence or marking for identification Appellant counsel's list of other clients or neighbors, apparently, who attended the November 2, 2017 public hearing.

2. The Scope of an HCZR § 102.0.B Public Hearing

A public hearing held pursuant to an appeal taken from a code enforcement closeout letter is not a show cause hearing on the alleged violation. Pursuant to Hearing Examiner Rule of Procedure 10.2(c), if, at the § 102.0.B public hearing, Appellants meet their burden of proof and persuasion that a DPZ decision to close out a zoning violation complaint was clearly erroneous, arbitrary and capricious, or contrary to law, the Hearing Examiner issues an order instructing DPZ

¹ Hence in BA 707-D (February 9, 2015), the Hearing Examiner dismissed as appellants those persons who joined the complainant in his appeal from a code enforcement closeout letter.

to reopen the code enforcement case and proceed as further ordered. Thus, in BA 707-D (February 9, 2015), the Hearing Examiner found DPZ's reliance on a presumption of a building permit for an amateur radio antenna to legitimize its decision to close out the zoning complaint was contrary to law and ordered DPZ to reopen the code enforcement case and investigate the antenna's location relative to the applicable zoning use and structure setbacks.

2. Appellant's "Pre-Hearing Memorandum"

On or about October 31, 2017, Appellant filed a "pre-hearing memorandum." Hearing Examiner Rule of Procedure 10.3 authorizes the submission of legal memoranda by parties to assist in the hearing examiner's decision at the hearing examiner's discretion. Having not requested such memoranda, which the Hearing Examiner would seek only in a public hearing, the Hearing Examiner declined to accept Appellant's "pre-hearing memorandum."

3. The Hearing Examiner's Partial Denial of DPZ's Motion to Dismiss

DPZ on August 28, 2017 motioned to dismiss the appeal for lack of jurisdiction, arguing in main part Appellant impermissibly included in the administrative appeal petition multiple violations not alleged in her original complaint to DPZ, including the first time assertion of Manor Hill "functioning as a bar" and "commercial brewery" with "imported ingredients" in a "residential area" and hosting a variety of impermissible special events that "fall outside" the Property's permitted accessory use, including hosting food trucks, offering and serving full beer drafts, allowing visitors outside of permitted operating hours, permitting the sale of cases of beer, and selling promotional items. In DPZ's view, the addition of these new complaints deprives the Hearing Examiner of jurisdiction to hear the appeal, such complaints being first directed to DPZ

pursuant to county law. Appellant did not respond to the motion. At oral argument, Appellant contended the hearing on the merits could proceed as limited to her original zoning complaint.

Following oral argument, the Hearing Examiner declined to dismiss the petition in its entirety and instead limited the merits hearing to the issue of whether the two proposed "yoga and beer" events were permitted at Manor Hill Farm or Manor Hill Brewery. As a result, many of Appellant's contentions in the administrative appeal petition are inapplicable to the issue before the Hearing Examiner because they either include new complaints or allege cumulative impact from multiple events or uses. These contentions include the brief description of error, fact, or law presented by the appeal in the BA 744-D administrative appeal petition form supplement section: "The occurrence of MHB's commercial activities in my residential neighborhood have increased the amount and nature of the traffic flow so much that my family and I are no longer able to enjoy the peace and safety of Manor Lane. Manor Lane is narrow and winding with limited sight distance at several areas. It is not a safe road for the volume and type of traffic that now frequents MHB." Appellant's BA 744-D appeal petition statement of "other factors" she wishes the Hearing Examiner to consider likewise has no bearing on this appeal.

The State Farm Brewery regulations and the Manor Hill Permit describe a farm brewing beer from agricultural products grown on that farm and allowing tastings with activities and visitations under special conditions. In contrast, MHB is functioning as a bar and commercial brewery brewing beer with mostly imported ingredients on a conservation parcel in a residential neighborhood. The inconsistencies with allowed uses include but are not limited to routine operation of Manor Hill brewery as well as special events held at the property. See attached itemized lists.

What's more, Appellant's concerns about compliance with state Farm Brewery Alcoholic Beverage regulations, and by implication, Manor Hill Brewery's alcoholic beverage license/s, are

beyond the jurisdiction of Hearing Examiner and DPZ, being the sole province of the Howard County Alcohol Beverage Hearing Board and the Board of License Commissioners.

**II.
Statement of the Case**

On May 17, 2017, Sara Domerchie filed a request with DPZ to conduct a zoning inspection of Manor Hill Brewery at 4411 Manor Lane, identifying the nature of the complaint so (Appellant Exhibit 1C):

Intention to host commercial activity that does not comply with the Agritourism Special Farm Use Permit held by Manor Hill Brewery. Tickets are being sold for 2 separate "yoga & a beer" sessions on May 21st led by Katie Fica and DJ Payne. CLEARLY yoga is NOT an agricultural activity & NOT an activity permitted under Agritourism land use (Section 104.0.C, 106.1.C & 128.0.I). Furthermore, this will generate increase traffic through our single land residential neighborhood and potentially challenges the monitoring and enforcement of the "50 people at a time" regulation for Farm Brewery visitation.

The sessions are scheduled for May 21 from 3:30-4:30 & 4:30-6:00. I have included a screenshot of the ticket vendor's website which shows the complete information.

In response to the complaint, DPZ's Zoning Administration and Public Service Division (Zoning Division) Chief Geoffrey Goins opened code enforcement case CE-17-89 on or about May 22, 2017. (Appellant Exhibit 2). Enforcement Inspector Steve Rolls investigated the complaint, determined the complaint was unfounded, and closed the case. (Appellant Exhibit 2). By letter of May 24, 2017 (the closeout letter), Enforcement Supervisor Anthony La Rose explained to Ms. Domerchie why DPZ closed her zoning complaint. (Appellant Exhibit 1A).

An inspection was conducted on May 21, 2017. No violations of the Howard County Zoning Regulations were found as the activities taking place on site were consistent with both Zoning Permit 13-002 and the definition of a Farm Brewery-Class 1 [and] [f]urther, [that] fewer than 50 people were in attendance at the property at the time of inspection, which also complies with Zoning Permit 13-002.

III. Testimony

Appellant Sara Domerchie testified to having reviewed the CE case field report exhibits or have been provided documents by Inspector Rolls. On cross-examination, she testified to not having attended the yoga and beer events and understanding that fewer than 50 persons attended either event. She did not know how many attendees drank beer, went on tours, or purchased retail items.

Enforcement Inspector Steve Rolls testified to being a DPZ zoning inspector for the last eleven months and from early 2005 until late 2010. He was assigned to investigate Appellant's zoning complaint. He testified that Appellant Exhibit 1C is Ms. Domerchie's May 11, 2017 request to conduct a zoning inspection of the Property because the proposed yoga events are not an agricultural activity and that more than 50 people might attend, which would increase traffic.

Inspector Rolls further testified to conducting a field inspection at about 3:15pm on the afternoon of May 21, 2017, the date of the advertised beer and yoga events. He viewed the sign-in sheet listing 25 total attendees at one session only, due to low registration. He believed beer would be served based on the complaint and the advertisement. Based on his observations, there was no violation of the HCZR because up to 50 visitors are allowed at one time at an activity and product tastings are allowed.

Concerning Appellant Exhibit 2, the CE 17-89 case field report, he testified to Zoning Division Chief Geoffrey Goins entering the code sections (101.0, 104.0.B&C, and 128.0.O) as a matter of form. In addition to these sections, he also reviewed the definition of Farm Brewery-

Class 1A. He further testified to the Property having an Agritourism Special Use Farm Permit (No. 16-002), introduced as DPZ Exhibit 1. This Agritourism Enterprise Special Farm Use Permit was issued to the Marriner Family Irrevocable Trust & Manor Hill Farm, LLC for these activities: "Farm tours, farm stays, farm photography sessions, hay rides, corn mazes, classes related to agricultural products or skills, and picnic and party facilities offered in conjunction with the farm visitation." He considered this permit in his conclusions that "yoga" was well within the activities allowed under this permit. He did not consider the yoga activity to be an athletic facility because there was no change of use, being a one-time event attended by some 25 people.

On cross-examination, Mr. Rolls testified the class was held in a field just west of the Brewery. Attendees brought their own mats and water bottles. He did not observe the yogins drinking beer. When investigating a complaint, he considers the HCZR in its entirety. Concerning the Agritourism permit, he considered the "party facilities" as a possible venue for the yoga event, as a farm visitation. When questioned as to whether the activities he observed were related to agriculture or natural resources and incidental to the primary operation on the site, Inspector Rolls testified they were.

IV. Discussion

An initial matter to be resolved is which zoning permit undergirds the yoga and beer event at issue in this appeal. Appellant's May 17, 2017 zoning inspection request complains the yoga & beer sessions are noncompliant to the "Agritourism Special Farm Use Permit held by Manor Hill Brewery." Her administrative appeal petition, however, states the activities at issue are

"inconsistent with Zoning Permit 13-002 and the definition of a Farm Brewery-Class 1A," repeating the language in DPZ's closeout letter: "the activities taking place on site were consistent with both Zoning Permit 13-002 and the definition of a Farm Brewery-Class 1A."

The Hearing Examiner concurs with Appellant's administrative appeal petition statement and DPZ's closeout letter explanation that the applicable permit is the Farm Brewery-Class 1A Zoning Permit 13-002. HCZR § 128.0.O.2 requires a zoning permit for a Farm Brewery-Class 1A and provides in part that "[i]t is the responsibility of the winery or brewery owner to obtain any other required Federal, State and County approvals required prior to operating the use." For these purposes of this appeal, the "approvals" are the applicable alcoholic beverage licenses. No alcoholic beverage approval is required for "Special Farm Use Permit" activities issued under HCZR § 128.0.I, Permits for Special Farm Uses, and specifically the 16-002 Agritourism Enterprise Special Farm Use Permit issued to Marriner Family Irrevocable Trust & Manor Hill Farm, LLC for these activities.

Beyond this, however, the Zoning Permit No. 13-002 issued to Manor Hill Harm, LLC – Manor Hill Brewing on December 12, 2013, submitted as Appellant Exhibit 3, offers no insight as to range of permitted Farm Brewery activities.

Appellant argues "yoga" is a wholly independent commercial land use tethered to the HCZR 103.0 definition of "Commercial Athletic Facility" and the Commercial Athletic Facility and

Outdoor Athletic Facility uses permitted by conditional use petition approval.² (Outdoor athletic facilities are also permitted by right in certain zoning districts.) Appellant also relies on HCZR § 106.1, County Preservation Easements, which "enumerates the uses permitted on property in the RC or RR Districts which has been encumbered with a County Preservation Easement . . ." Because HCZR § 106.1.C prohibits these athletic conditional uses on such property, and the commercial use is not a listed accessory use permit as a matter of right, Appellant avers yoga is a prohibited use.

DPZ argues there was no violation of the HCZR because up to 50 visitors are allowed at one time at a Farm Brewery-Class 1 activity where product tastings are allowed consistent with Zoning Permit 13-002.

In accord with Hearing Examiner Rule of Procedure 10.2(c), in an appeal of an administrative agency decision, the petitioner must show by substantial evidence the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law. Because this appeal turns on whether DPZ properly concluded the yoga and beer event with fewer than 50 attendees qualified as permitted Farm Brewery-Class 1A uses, the legal issue presented is one of statutory construction and interpretation.

Statutory construction is an issue of law. In Harford County People's Counsel

² HCZR § 103.0. Athletic Facility, Commercial: A commercial facility principally providing activities, services or training in sports or exercise related matters, including such uses as tennis centers, health centers, gyms, climbing centers, dance studios, weight training centers, martial arts centers, swimming pools and similar uses. Commercial athletic facility uses do not include commercial recreation facility uses as defined.

HCZR § 131.0.N.6, Outdoor Athletic Facilities, permit the following outdoor athletic facilities are by conditional use petitions: athletic fields; swimming pools, community; swimming pools, commercial; tennis courts; disk golf courses; ropes courses; and archery ranges provided that . . .

V. Bel Air Realty Assocs. Ltd. P'shp, 148 Md. App. 244, 811 A.2d 828 (2002), which turned on the interpretation of what the court characterized as a "deceptively innocuous phrase" ("directly accessible") in the Harford County zoning code, the court examined its role in reviewing an administrative interpretation under Board of Physician Quality Assurance v. Banks, 354 Md. 59, 67-68, 729 A.2d 376, 380-381 (1999), which applies to the Hearing Examiner's appellate administrative review charge in this appeal.

With respect to statutory interpretation, we will likewise defer in the appropriate case to an agency's interpretation and application of its organic statute. [See *id.*] Thus, our scope of review is rather circumscribed. *Eastern Outdoor Advertising Co. v. Mayor and City Council of Baltimore*, 128 Md.App. 494, 515, 739 A.2d 854, 865 (1999), cert. denied, 358 Md. 163, 747 A.2d 644 (2000). Agencies are too often chided for maladroit interpretations. We will apply the same principles of statutory construction to the Harford County Code as are required in the interpretation of any statute or regulation. See *Young v. Anne Arundel County*, 146 Md.App. 526, 573, 807 A.2d 651, 679 (2002) (citing *Howard Research and Development Corp. v. Concerned Citizens for the Columbia Concept*, 297 Md. 357, 364, 466 A.2d 31, 34 (1983)). Because this appeal requires us to construe the language of the Zoning Code, "[t]he cardinal rule of [statutory construction] is to ascertain and effectuate the legislative intent." *The Pack Shack, Inc. v. Howard County*, 371 Md. 243, 252, 808 A.2d 795, 800 (2002). See *Marriott Employees Federal Credit Union v. Motor Vehicle Administration*, 346 Md. 437, 444, 697 A.2d 455, 458 (1997). In order to ascertain the Council's intent, we begin with the pertinent language of the Zoning Code, and ordinarily will not venture beyond its clear and explicit terms. See *id.*

We owe no deference when the agency's conclusions are premised on an error of law. See *Alviani v. Dixon*, 365 Md. 95, 109, 775 A.2d 1234, 1242 (2001). Cf. *Department of Health and Mental Hygiene v. Campbell*, 364 Md. 108, 118, 771 A.2d 1051, 1057 (2001) (citations omitted) (completely subject to review; some deference accorded). "In such a case the Court's review `is expansive, that is, the appellate court may substitute its judgment for that of the administrative agency.'" *Harford County, Maryland v. McDonough*, 74 Md.App. 119, 122, 536 A.2d 724, 725 (1988) (quoting *Gray v. Anne Arundel County*, 73 Md.App. 301, 309, 533 A.2d 1325, 1329 (1987)). But the administrator's "expertise should be taken into consideration and its decision should be afforded appropriate deference in our analysis of whether it was `premiered upon an erroneous conclusion of law.'" *Marzullo v. Kahl*, 366 Md. 158, 173, 783 A.2d 169, 178 (2001) (quoting *Banks*, 354 Md. at 68, 729 A.2d at 380). See *State Ethics Commission v. Antonetti*, 365 Md. 428, 447, 780 A.2d 1154, 1166 (2001).

For the reasons that follow, the Hearing Examiner defers to DPZ's interpretation of the contested

activities and dismisses this appeal.

HCZR § 103.0 defines a "Farm Brewery—Class 1A as: A farm brewery which includes *product tasting, product sales, site tours, and educational programs.*" Emphasis added. There being no evidence of Inspector Rolls having observed a site tour as part of the one "yoga and beer" event to support DPZ's conclusion the event was permitted, the controlling term is "educational program" coupled with product tasting.

A first step in discerning the meaning of the term "educational program" is through the application of the plain meaning doctrine and HCZR § 103.0, Definitions: "Terms used in these Zoning Regulations shall have the definition provided in any standard dictionary, unless specifically defined below or in any other provision of these Zoning Regulations." Appellant dismisses the event as an "educational program," but offered no plain meaning argument for the term. DPZ likewise offered no discrete agency interpretation of the term, instead reading together the definition, Zoning Permit 13-002 and the HCZR § 128.0.O regulations for a Farm Brewery-Class 1A together to support its interpretation of the event as a permissible use.

"Education" means: "1 a: the action or process of educating or of being educated; also: a stage of such a process." <https://www.merriam-webster.com/dictionary/education> (last visited November 22, 2017.) "Program" means: "1. a planned series of future events, items, or performances." <https://www.google.com/search?q=%22program%22+definition&ie=utf-8&oe=utf-8&client=firefox-b-1-ab> (last visited November 22, 2017). An "educational program," then, is an event, performance, or activity where the process of educating or being educated occurs.

Is "yoga and beer" an educational program where someone was educating or being educated at an event or performance and the educated attendees imbibed a farm brew? What is the permissible "content" of an educational event held by Manor Hill Brewery? Is it so narrowly to be defined to exclude all but brewing education, or is it a more expansive land use, as DPZ reads it? The Hearing Examiner's very query, of course, flags the term as ambiguous. When HCZR language is arguably ambiguous, the Hearing Examiner still defers to DPZ's interpretation of a term if reasonable, as guided by *Marriott Employees*, 346 Md. at 445-46, 697 A.2d at 458.

Sometimes the statutory language is susceptible of more than one meaning. When faced with an ambiguity, courts must consider not only the literal or usual meaning of the words but also the meaning of words in light of the statute as a whole and within the context of the objectives and purposes of the enactment. *Romm v. Flax*, 340 Md. 690, 693, 668 A.2d 1, 2 (1995). Common sense must guide us in our interpretation of statutes, and "we seek to avoid constructions that are illogical, unreasonable, or inconsistent with common sense." *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994). Although this Court is not limited to the literal or usual meaning of statutory language, *Romm*, 340 Md. at 693, 668 A.2d at 2, the Court may not insert or omit terms to make a statute express an intention not reflected in the statute's original form. *Bridges v. Nicely*, 304 Md. 1, 10-11, 497 A.2d 142, 147 (1985); *Police Comm'r v. Dowling*, 281 Md. 412, 419, 379 A.2d 1007, 1011 (1977).

In line with *Marriott Employees*, if the Hearing Examiner is to defer to the construction placed upon the use by DPZ, that the educational aspect of the yoga event where beer was tasted is a permissible event or activity consistent with the definition of a Farm Brewery-Class 1A, the HCZR § 128.0.O regulations for a Farm Brewery-Class 1A, and Zoning Permit 13-002, we must check this construction of the HCZR against the underlying purposes and language of the controlling regulations and legislative history. Even if the legislative terminology in context is ambiguous, but DPZ's interpretation as the agency charged with the administration of a Zoning

Code is reasonable and does not conflict with the terms of the Code, its interpretation is entitled to deference. See *Harford County People's Counsel v. Bel Air Realty Assocs.*, 811 A.2d at 844.

The Legislative History of "Farm Brewery-Class 1A"

Many amendments to the HCZR are proposed by petitioners desirous of a land use that may not be expressly permitted. Other petitioners seek to amend the HCZR for a particular land use to accommodate the use in a zoning district that would otherwise prohibit it. In this appeal, it was DPZ, the agency charged with administering the HCZR, who in 2013 proposed Zoning Regulation Amendment (ZRA) 146 to amend HCZR § 128.0.O, Farm Wineries, to accommodate two new land uses, Farm Breweries and Farm Breweries-Class 1A. The ZRA's impetus was the 2012 enactment of a new state Alcoholic Beverages law authorizing a Class 8 Farm Brewery License through Senate Bill 579, codified in Md. Ann. Code art. AB, § 2-210. AB §2-210(f) regulates in pertinent part the on-site consumption of beer, sales and food service at Farm Breweries and sets hours of operation for guests who attend a planned promotional event or other organized activity at the licensed facility.

(f) Hours of operation. - Subject to subsections (l) and (l) of this section, a license holder may exercise the privileges of the license each day:

(1) from 10 a.m. to 6 p.m., for consumption of beer and sales and service of food at the licensed farm; and

(2) from 10 a.m. to 10 p.m., for:

(i) sampling of beer;

(ii) consumption of beer off the licensed farm if the beer is packaged in sealed or resealable containers, such as growlers; and

(iii) *guests who attend a planned promotional event or other organized activity at the licensed farm.*

(g) Days of operation. -- Except as provided in Division II of this article, a Class 8 farm brewery license allows the license holder to operate 7 days a week.

Emphasis added. AB § 2-210 establishes state licensing rules for farm brewing and product tasting, but without appropriate zoning to regulate locations, setbacks, site size, sales, tastings, and other zoning controls on a farm where beer would be brewed, farm breweries could not operate in Howard County.

The technical staff report (TSR) written by DPZ and prepared for the Planning Board's public hearing recommendation to the County Council on ZRA (Zoning Regulation Amendment), ZRA 146, includes DPZ's proposed ZRA text and explanatory language. The TSR description of the ZRA explains the proposed amendments follow the enactment of 2012 state legislation "allowing a new beer manufacturing license category for Farm Breweries. This new law is intended to support farms within the state. Such a license would allow a farm to produce brewed beverages using 'home grown' ingredients, and would also allow the sale of the final products." TSR, pg. 2. The TSR also notes "a certain farm in the county that is an Agricultural Preservation Easement farm had applied for one of these licenses." TSR, pg. 2.

The TSR also states, while the "Zoning Regulations do not currently permit Farm Breweries, *in operation such uses would be almost identical to the currently permitted Farm Wineries*, differing mainly in the types of agricultural ingredients used in the processing, the ingredients processing methods, and the types of beverages that would result from the processing." Emphasis added. "The requested amendments are to make it an uncomplicated process for farm breweries to open and operate as a new accessory farming use in Howard County, and thereby help promote the growing of crops such as corn, grains, hops or other brewing-related plants, and the production of malt and other brewing ingredients." TSR, pg. 2.

ZRA 146 added definitions for "Farm Brewery" and "Farm Brewery-Class 1A" to HCZR § 103.0. Additionally, HCZR §§ 104.0.C and 105.0.C would be modified to permit a Farm Brewery and Farm Brewery Class-1A as an accessory use in the RR and RC zoning districts. An addendum to ZRA 146 amended HCZR § 106.0 to clarify the use would be permitted on property encumbered by a county agricultural preservation parcel easement.³ The County Council enacted CB 44-2013/ZRA 146 as proposed with only minor technical amendments.⁴

³ HCZR 106.1, County Preservation Easements, was a new section added during the 2013 Comprehensive Zoning Plan codifying DPZ policy about what uses were permitted or prohibited on different types of county agricultural preservation properties under the revised regulations. The new section incorporated in pertinent part the Preservation Easement land use language in HCZR §§ 104 & 105 (the Rural Conservation and Rural Residential Zoning Districts) and a DPZ policy document described as an "Ag Pres" use matrix long maintained by DPZ staffers. Separate subsections list the uses permitted as a matter of right, as accessory uses and as conditional uses according to the type of county preservation easement (ALPP purchased easements, ALPP dedicated easements and "Other" dedicated easements). A relatively new section, it is not uncommon for ZRAs to later include amending § 106.1 language to authorize the use on properties encumbered with a county preservation easement.

⁴ HCZR § 103.0, Farm Brewery: An agricultural processing facility located on a farm with equipment, components and supplies for the processing, production and packaging of beer, ale, porter, stout and similar malt-based or grain based beverages on the premises. Farm brewery activities may include associated cooking, fermenting, bottling, storage, aging, shipping, receiving, and may also include accessory facilities for laboratory work, maintenance, and office functions.

HCZR 128.0.O. Farm Winery—Class 1A or Farm Brewery—Class 1A

1. A Farm Winery—Class 1A or a Farm Brewery—Class 1A is permitted as an accessory use to farming in the RC and RR Districts, provided that the use complies with the following criteria:

a. The use is located on a lot or parcel of at least 5 acres. This use is permitted on any such parcel, including parcels with agricultural preservation easements and preservation parcels, excluding cluster preservation parcels in the RR District existing on July 4, 2011 for which easements have not been donated to the Agricultural Land Preservation Program.

b. The lot or parcel upon which the use is located shall have frontage on and direct access to:

(1) A road classified as an arterial or collector public road; or

(2) A local road, provided that:

(a) Access to an arterial or collector public road right-of-way is not feasible;

(b) The access to the local road is safe based on road conditions and accident history;

(c) If the local road is internal to a residential cluster subdivision, the subject property adjoins an arterial or collector highway, the local road access point is within 400 feet of its intersection with the arterial or collector highway, and there are no intervening driveways between the arterial or collector highway and the access to the property along the local road; and

This legislative history informs us DPZ intended Farm Breweries as a land use which "in operation such uses would be almost identical to the currently permitted Farm Wineries, differing mainly in the types of agricultural ingredients used in the processing, the ingredients processing methods, and the types of beverages that would result from the processing." If there is, then, a

(d) That the use of the local road for access to the property will not unduly conflict with other uses that access the local road.

c. The driveway providing access to the proposed site shall not be shared with other properties; however the Director of Planning and Zoning may waive this criteria if the petitioner provides affidavits from all persons who also share the driveway that they do not object to the use of the driveway for the use. If the use of a shared driveway is allowed, the petitioner shall demonstrate that the use will not result in damage to or deterioration of the shared driveway or in increased hazards to other users of the driveway. The Director of Planning and Zoning shall prescribe appropriate conditions and safeguards to ensure the petitioner's responsibility for repair of any damage or deterioration of the shared driveway caused by the use.

d. All winery or brewery related structures and uses associated with the winery or brewery, excluding cultivation areas shall be at least 75 feet from all lot lines and where possible minimize the impact on surrounding properties.

e. For a farm winery Class 1A use, the planting of at least two acres of grapes or other fruit on the property shall be initiated upon approval and successfully established within two years of approval. For a farm brewery Class 1A use, the planting of at least two acres of a primary ingredient used in the brewing of malt-based or grain-based beverages on the premises shall be initiated upon approval and successfully established within one year of approval.

f. Appropriate screening of adjoining parcels shall be provided, which may include a solid fence, wall, landscaping or a combination that presents an attractive and effective buffer.

g. The use shall be consistent with and support the farm and its production, shall not interfere with the implementation of soil conservation and water quality best management practices, and shall not impact floodplains, wetlands, stream buffers, steep slopes or other environmental features on the farm winery property.

h. The use shall be compatible with the rural character of the farm and the surrounding area.

i. A Farm Winery may produce, serve and sell food to complement wine tasting in accordance with Article 2B of Maryland State Code.

j. In addition to the beverages produced by the use, the retail sale of promotional items identifying the same winery or brewery, such as glassware, clothing, bottle openers or similar items, is permitted as an accessory use. Plants or produce grown on-site may also be sold.

k. Visitor hours shall be restricted to between 10:00 a.m. and 7:00 p.m., Sunday through Thursday; and 10:00 a.m. and 10:00 p.m., Friday and Saturday. DPZ may reduce the hours for visitors, but shall not increase them. The hours for winery and brewery processing and production operations are not limited.

l. At any one time, the number of visitors to the winery or Brewery shall not exceed 50 visitors.

2. A zoning permit is required for the use. As part of the approval process, the owner shall submit a site layout, which includes acreage, screening, parking, and building locations. If approved, after the required two-year or one-year time period, as applicable, the owner shall provide documentation to DPZ proving compliance with the planting requirements in Section 128.0.O.1.e and that it remains in compliance with all the other approval criteria. Thereafter, permit renewal is not required unless a violation occurs. It is the responsibility of the winery or brewery owner to obtain any other required Federal, State and County approvals required prior to operating the use.

limitation on the meaning of "educational program" intended by the amending language, we begin with the definitions of Farm Wineries to locate any limitation on the term within the context and objectives and purposes of the enactment.

These are the definitions of Farm Wineries (HCZR § 103.0), which like a Farm Brewery—Class 1A use, authorize affiliate "non-processing facility" farm winery land use activities.

Farm Winery: An agricultural processing facility located on a farm with a vineyard, orchard, hives, or similar area, which consists of vinification equipment, components and supplies for the processing, production and packaging of wine and similar fermented beverages on the premises. Farm winery activities may include associated crushing, fermenting and refermenting, distilling, blending, bottling, storage, aging, shipping, receiving, and may also include accessory facilities for laboratory work, maintenance, and office functions.

Farm Winery-Class 1A: A Farm Winery which operates for purposes of *wine tasting, wine sales, tours, educational programs, meetings and social events*.

Farm Winery-Class 1B: A Class 1A Farm Winery that requires approval as a Conditional Use.

Farm Winery-Class 2: A Farm Winery which operates on at least 25 acres for the purposes of *wine tasting, wine sales, tours, educational programs, meetings, social events and special events*.

Emphasis added. These definitions indicate the categories of Farm Winery-affiliate events permitted (those not directly concerned with the operational "agricultural processing" of wine) are less restrictive than a Farm Brewery event, extending beyond "educational programs" to encompass three additional activities: meetings, social events, and special events. Additionally, the two types of events permitted by Farm Winery Conditional use approval under HCZR § 131.0.N.59.j are even less restrictive, being categorized as an "Everyday Event" and a "Special Event."

(1) An Everyday Event is one that may occur each day of operation within a calendar year, or as may be further limited by the Hearing Authority, and the number of attendees at any single time shall be as specified by the Hearing Authority, but only up to a maximum of 50 persons at any given time. The most common type of activity in an everyday event is that of customers visiting a tasting

room at the Farm Winery to sample or purchase the products produced therein, *but may include other low-intensity activities such as individual or small group tours, educational programs, meetings, and social events; and*

(2) A Special Event is an indoor and/or outdoor event that may be approved by the Hearing Authority for up to fifteen (15) days within a calendar year. The maximum number of attendees at any given time on a 25 acre farm shall be 150 persons, provided, however, that the Hearing Authority may increase this maximum number of attendees in accordance with Section 131.0.58.k if the property qualifies for such an increase. For a Special Event that occurs on more than one calendar day, each calendar day is counted as one event.

Emphasis added.

The Hearing Examiner here highlights the regulatory inclusion of subsidiary use/event categories affiliated with Farm Winery activities - low intensity tours, educational programs, meetings, social events, and high-intensity "Special Events" - as a critical signal that a specific land use permitted as a matter of right by the HCZR – including accessory uses – may include supportive affiliate activities. A Farm Winery is an accessory agricultural and farm operation with affiliate uses, activities, or events. Beyond this, these Farm Winery definitions tell us an "educational program," is an event to be distinguished from a "meeting" or "social event" but otherwise there is no limitation on the term. If such a limitation exists, we must look to its use in other sections of the HCZR.

The term "educational program" appears in two other HCZR sections. Under the HCZR § 128.0.N.1 Supplementary Regulations for Apiaries, "Apiaries are permitted as an accessory use on lots containing community gardens, *sites where apiaries will form part of an educational program*, and on single-family residential lots . . . There is also an "Educational Program" Conditional Use Category: "Charitable or Philanthropic Institutions: Offices and Educational Programs." HCZR § 131.0.N.12.b defines such a facility as "limited to office functions and areas

for meetings and *educational programs related to the organization's primary purpose*. The Hearing Authority must specify the allowed capacity and frequency of educational programs." Emphasis added. The Howard County Conservancy is one such approved Conditional use. Only the "Educational Programs" Conditional Use restricts educational activity to "programs related to the organization's primary purpose."

Having interrogated the term "educational program" through application of the canons of statutory construction to "elucidate the meaning of the language," so characterized in *Miller v. City of Annapolis Historic Pres. Comm'n.*, 200 Md.App. 612, 632, 28 A.3d 147, 161 (2011), the Hearing Examiner defers to DPZ's interpretation of the term. There is no limitation on the term, no "related to the organization's primary purpose" qualification. It is permissible for an "educational program" to be a yoga event, activity, or performance with fewer than 50 attendees who taste beer during a visit. The educational program "Brewery Yoga" is a permissible Farm Brewery-Class 1A activity. This is "Millennial" land use (or perhaps more aptly, a Peter Franchot land use).

Appellant's argument that Brewery Yoga is a Commercial Athletic Facility or Outdoor Athletic Facility is vague and factually and legally unfounded. Inspector Rolls testified correctly that the Brewery Yoga event was not a change of use. These athletic uses are also principal uses.

Interestingly, other Maryland jurisdictions have enacted unrestricted farm brewery zoning regulations by simply adopting the exact "visitor" language of AB §2-210(f) as part of the definition of "Farm Brewery." For example, Queen Anne's County in 2017 enacted a definition of

"Farm Brewery" with this "activity" language: "Planned promotional events or other organized activities as permitted under Section 2-110 of the Alcoholic Beverages Article, as amended, of the Annotated Code of Maryland are included in this definition." Moreover, rather than amend the zoning regulations to establish a new zoning category, the Queen Anne's County legislature modified the definition of "Agriculture" to include the use as permitted by right. To be sure, an "educational program" is a more limited event or activity than any "other organized activity."

Finally, deference to a DPZ interpretation or statutory construction is not due if unreasonable. Administrative agencies are not vested with unbridled interpretive discretion. The appellate review invoked by Ms. Domerchie is an administrative hearing process through which known complainants may contest a code enforcement finding of no HCZR violation and this oversight review checks a DPZ zoning complaint close out for correctness. The appellant in BA 707-D, *supra*, though, had a more favorable outcome than does Ms. Domerchie, DPZ having wrongly closed out the neighbor's zoning complaint about the lawfulness of the use.⁵ In an actual code enforcement proceeding on a civil citation, alleged violators are afforded a due process hearing where they may challenge a DPZ interpretation. In one such proceeding, CE-13-139(a)&(b) (August 2, 2013), the Hearing Examiner dismissed the civil citation, finding DPZ's imposition of a limit on the numbers of days homeowners could host board games improper based on their interpretation of the use as a "private club," causing the department to sue sponte

⁵ DPZ ultimately issued the offending property owners a civil citation, prompting them to abate the violation by seeking approval for a lesser setback, which the Planning Board denied (the property being zoned New Town). On appeal, the Hearing Examiner denied the requested setback on other grounds, as did the Board of Appeals, which has not issued a decision and order as of the date of the instant Order.

invent an unsupportable policy decision to limit the assembly use to twice monthly, with no discernable guidance or examination of what is a customary accessory use in relation to a principal residential use.

The term "educational program" is sufficiently clear. Clarity is a question of reasonableness. As future United States Supreme Court Justice Souter observed in a New Hampshire Supreme Court zoning interpretation opinion, "[a] reference to 'sufficient' clarity is, of course, a criterion of reasonableness, and our prior cases have avoided any suggestion that a fussy standard of technical drafting should be applied in passing on the validity of municipal or administrative regulations." *Barton v. H.D. Riders Motorcycle Club, Inc.*, 131 N.H. 60, 64, 550 A.2d 91, 94 (1988). An absence of fussy precision in the application of the term "educational program" does not credential Appellant's assertion of yoga as commercial activity, not agricultural activity, and which, in the last instance, is a misunderstanding of how HCZR treats farm uses, which includes more than agricultural activity.

The HCZR do not define "agriculture." The pertinent terms are "farm" and "farming."

Farm: A lot or parcel of land used for farming that is 3.0 acres or larger.

Farming: The use of land for agricultural purposes, including:

- a. Crop production, apiaries, horticulture, orchards, agricultural nurseries, viticulture, silviculture, aquaculture, and animal and poultry husbandry;
- b. The growing, harvesting and primary processing of agricultural products;
- c. The breeding, raising, training, boarding and general care of livestock for uses other than food, such as sport or show purposes, as pets or for recreation;
- d. The operation of agricultural machinery and equipment that is an accessory use to a principal farming function. Agricultural machinery and equipment may be used on farms that are not the farm on which the machinery and equipment is normally stored;
- e. The construction and maintenance of barns, silos and other similar structures subject to compliance with any applicable bulk regulations;
- f. The transportation, storage, handling and application of fertilizer, soil amendments, pesticides and manure, subject to all Federal, State and Local laws;

- g. The temporary, onsite processing of chickens or rabbits on a farm in accordance with the Agriculture Article of the Annotated Code of Maryland; and
- h. *Other uses directly related to, or as an accessory use of, the premises for agricultural purposes including special farm uses permitted under Section 128.0.1.*

Not included in this definition are those uses subject to Section 131.0 Conditional Use requirements.

Emphasis added. A Farm Brewery-Class 1A is a farming use where land is used for agricultural purposes, including under subsection "h", those uses permitted as an accessory use of the premises for agricultural purposes." HCZR § 106.1 permits a Farm Brewery-Class 1A accessory use on property encumbered with a county preservation easement. In Howard County, the assertion that an objectionable farm use is commercial activity is a frequent challenge to a proposed use of land (like solar farms, or farm wineries) when the use implicates property subject to a county preservation easement.

The HCZR, and zoning regulations as a rule, manages affiliate land uses in general terms, like an "educational program," a "special farm use," or an "Everyday Event," not through fussy proscriptive or restrictive language, because the regulated use of land implicates multiple constitutional protections: freedom of assembly, free speech, and freedom of association. Fussy or restrictive regulatory language is routinely the basis of lawsuits alleging disfavored treatment. (These protections were at the forefront of CE-13-139(a)&(b), *supra*). Consequently, the Hearing Examiner on reconsideration of BA 14-017C, wherein she approved a Farm Winery conditional use petition from a property owner who had opposed the Farm Winery ZRA as commercial activity, modified an approval condition restricting "Special Events" to "private gatherings by invitation only" to restricting only "rock concerts and similar types of live music events that are

the primary purpose of a Special Event." The Hearing Examiner's intent on imposing the original approval condition was to forestall ticket-only activities like rock concerts, "grape stomps" or farmers markets, public gatherings frequently held at some area wineries and which generated traffic problems on narrow rural roads. The unintentional effect of the original "fussy" approval condition, as the petitioner underscored, was a prohibition on the constitutional protections afforded to events like political fundraisers, and even customer appreciation gatherings, which may both involve ticket sales.

Appellant may not like certain activities or events at 4411 Manor Lane, seemingly in part because she has concerns about traffic along Manor Lane, but the language of the HCZR permits educational program events, activities, or performances unrestricted in "educational" speech, assembly, and associational content, as legal Farm Brewery-Class 1A uses. Even so, administrative agencies are not vested with unbridled discretion. If a zoning regulation provision is so vague as to prompt arbitrary application, wrongly prohibiting some uses and permitting others, the solution is either a facial challenge in a court of law or a ZRA corrective or clarifying amendment. Appellant is well aware of the ZRA amendment process. A resident of Manor Lane, she was a protestant in the BA 14-018C appeal from the Hearing Examiner's decision of denial for a Pet Day Care conditional use petition proposed on Manor Lane. Litigation over the meaning of several provisions in the Pet Day Care Conditional Use category (HCZR § 131.0.N.3) at both hearings was resolved by an amending ZRA, which both clarified the noise standard and broadened the scope of the affiliate uses through an added definition of "Pet Day Care."

ORDER

Based upon the foregoing, it is this **14th Day of December 2017**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Sara Domerchie appealing a Department of Planning and Zoning May 24, 2017 decision letter closing out code enforcement case CE 17-89, is hereby **DISMISSED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFavre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.