

HOWARD COUNTY BOARD OF APPEALS HEARING EXAMINER

In the Matter of

**JEFFERY L. UNDERWOOD & SHARI
UNDERWOOD**

Civil Citation Nos. CE 14-31(a)(i), 14-31(b)(i),
14-31(a)(ii) and 14-31(b)(ii)
Citations Issued: July 18, 2014

Respondents

ORDER

This matter came before the Howard County Board of Appeals Hearing Examiner on March 26, 2015, for a hearing on Department of Planning and Zoning citations for violations of Howard County Zoning Regulations (HCZR) §§ 109.0.C.7.b, 128.0.D.8, 101.0.O and 109.0.B & .C, involving the continued off-street parking or storage of unregistered, inoperable, wrecked, dismantled or destroyed motor vehicles and the continued operation of a retail sales business, including the practice of having customers come to the property to complete paperwork for the sale and to accept delivery of merchandise, on R-12 (Residential: Single) zoned property known as 6551 Walnut Grove. On July 18, 2014, pursuant to Howard County Code (HCC) Title 24, "Civil Penalties," and Subtitle 3 of Title 16 of the HCC, Department of Planning and Zoning, Zoning Enforcement Supervisor Anthony LaRose issued Shari Underwood and Jeffrey L. Underwood Civil Citations CE 14-31(a)(i), 14-31(b)(i), 14-31(a)(ii) and 14-31(b)(ii). The civil citations were served by certified and regular mail.

David Moore, Senior Assistant County Solicitor, represented the Department of Planning and Zoning (DPZ). Zoning Enforcement Supervisor Anthony LaRose (Supervisor LaRose) appeared for the hearing and testified. Respondent Jeffrey Underwood appeared for the hearing and testified. The Hearing Examiner viewed the subject property as required by the Hearing Examiner

Rules of Procedure.

DPZ requested a fine in the amount of five hundred dollars and an order instructing Respondents to abate the retail use violation immediately, to remove or enclose the trailer, or, no later than 60 days from the date of the Order, to provide DPZ with Maryland Motor Vehicle Administration certification that the trailer is not required to be registered.

DPZ introduced into evidence the exhibits as follows.

1. April 7, 2014 letter to Anthony LaRose from Nicolas E. O'Leary, Area Supervisor, Baltimore Field Division, U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, re: firearms sales/transfers at 6551 Walnut Grove
2. Photographs, small trailer, July 17, 2014
3. CE14-31b Notice of Violation issued to Shari Underwood, June 6, 2014
4. CE 14-31(a)(i) Civil Citation issued to Jeffrey L. Underwood (motor vehicle citation)
CE 14-31(a)(ii) Civil Citation issued to Jeffrey L. Underwood (retail sales citation)
5. CE 14-31(b)(i) Civil Citation issued to Shari Underwood (motor vehicle citation)
CE 14-31(b)(ii) Civil Citation issued to Shari Underwood (retail sales citation)
6. July 18, 2014 cover letter for civil citations,
7. A-C. Photographs of trailer March 15, 2015

Respondent introduced into evidence the exhibits as follows.

1. Undated letter to Zoning Enforcement Supervisor Anthony LaRose from Jeffrey Underwood responding to "violation notice" CE 14-31, re: Mr. Underwood's interpretation of the HCZR
2. Federal Firearms License 8-52-027-07-7M-08474, FFL 07-Manufacturer of Firearms Other than Destructive Devices, premises: 9190 Red Branch Road, Suite X Columbia, MD 21045
3. Photographs, quick change interchangeable barrels in multiple calibers
4. Graphic depicting Firearm Transfer Chain of Title

I. CIVIL CITATIONS CE 14-31(a)(ii) & CE 14-31(b)(ii) – Retail Sales

A. The Firearms Business Home Occupation Use

1. In October 2012, Jeffrey Underwood submitted a Home Occupation information form to DPZ for his firearms business, stated as the internet transfers of firearms at the address of

6551 Walnut Grove, Columbia, Maryland, 21044, with no clients visiting the residence. The information provided also indicated that no site sales would be conducted. Through an approval letter of December 6, 2013, DPZ granted the Home Occupation application, provided "no sale or rental of commodities shall take place on the premise...sales activities include customers coming to the property to pick up merchandise, view catalogs, merchandise or samples to place orders and customers coming to the property to fill out paperwork for, or negotiate a sale." DPZ conditioned the approval on two restrictions: 1) that only internet firearms transfers would take place and 2) that no one would be visiting the residence. DPZ Exhibit 1.

2. By letter of April 7, 2014 to Supervisor LaRose from Nicolas E. O'Leary, Area Supervisor, Baltimore Field Division, U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), ATF Area Supervisor O'Leary recounted a series of emails, letters and conversations between himself, Supervisor LaRose, Mr. Underwood and other ATF personnel regarding Mr. Underwood's firearms business at 6551 Walnut Grove, the nature of the home occupation use approved by DPZ and public information about Mr. Underwood's firearms business. DPZ Exhibit 1.

The letter explains to Supervisor LaRose that given DPZ's use restrictions imposed on the home occupation use, Mr. Underwood would not be permitted to conduct firearms sales or transfers to non-licensees, with the consequence that he (Mr. Underwood) would be unable to engage in any of the activities relating to his firearms business, as discussed in a Mr. Underwood's March 15, 2014 email to ATF Industry Operations Investigator (IOI) Gretchen Arlington, because customers would be required to appear at Mr. Underwood's residence to complete ATF required

paperwork for a firearms transfer (through Mr. Underwood, an FFL dealer). As the letter further explains, IOI Jason Gluck had met with Mr. Underwood at his residence to review the home occupation restrictions on December 13, 2013 and IOI Gluck also discovered that Mr. Underwood was advertising on the social media site Facebook that he can "conduct all Maryland transfers" (which would include a customer coming to his home). Also related in the letter is IOI Gretchen Arlington's "Google" search about what public information was available about Mr. Underwood's firearms business. The letter further informed Supervisor LaRose that the ATF Baltimore Field Office would refer information to Supervisor LaRose's office and referenced a March 21, 2014 email to Supervisor LaRose from IOI Arlington about unauthorized firearms transfers at the premises and customers coming to Mr. Underwood's home.

B. The Notice of Violations and Civil Citations

3. Supervisor LaRose testified to being DPZ's Enforcement Zoning Supervisor. He investigated a complaint about firearms sales at 6551 Walnut Grove (the Property). During his investigation, he communicated in April 2014 with several U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives agents, including IOI Gretchen Arlington and IOI Jason Gluck, who reached out to him in reference to Mr. Underwood's operation on his property. DPZ Exhibit 1 is a copy of an April 7, 2014 letter to Supervisor LaRose from Nicolas E. O'Leary, Area Supervisor, Baltimore Field Division, U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives. He had earlier received emails from IOIs Arlington and Gluck and spoken on the phone with IOI Arlington.

4. Supervisor LaRose explained that Mr. Underwood held three FFLs in April 2014. Based on his interactions with the ATF agents, Supervisor LaRose understood that all sales or merchandise, including background checks and firearms deliveries must occur in the same location; customers would have to come to the Property to purchase firearms and take delivery of them through sales or transfers. He understood from Mr. Underwood and the ATF agents that people come to the Property to fill out paperwork and take delivery of the firearms either from Mr. Underwood or through Mr. Underwood. He has had several conversations with Mr. Underwood on this topic since he opened the case. In his opinion, DPZ Exhibit 1 accurately reflects his conversations and correspondence with ATF.

5. Supervisor LaRose identified DPZ Exhibit 3 as a copy of the Notice of Violation (NOV) he issued to Mr. Underwood (see the Preliminary Matters discussion below in Part I, Conclusions of Law). The NOV entered into evidence charges Respondent Shari Underwood with the operation of a retail sales business, including the practices of having customers come to the property to complete paperwork for the sale and accept delivery of the merchandise, on R-12 (Residential: Single) zoned property in violation of HCZR §§ 101.0.O and 109.0.B & .C. The NOV instructs the Respondent to cease use of the property for the operation of a retail sales business and cease the practice of having customers come to the Property to complete paperwork for the sale and to accept delivery of the merchandise. Respondent was further instructed to correct the violations and bring the Property into compliance with the HCZR within 30 days of the NOV. The notices were sent by certified and regular mail to 6551 Walnut Grove. Mr. Underwood informed Supervisor LaRose that he would not correct the violation and would continue operating the

business until DPZ issued the citation and he could challenge it. As Mr. LaRose explained, Mr. Underwood did not believe his business operation qualified as retail because it was more like his other real estate business. Supervisor LaRose did not know if Mrs. Underwood was part of the firearms business; however, the HCZR hold property owners responsible for the activity on their properties.

6. On July 18, 2014, Supervisor LaRose issued civil citations to Respondents for the continued operation of a retail sales business, including the practice of having customers come to the property to complete paperwork for the sale and to accept delivery of merchandise on R-12 (Residential: Single) zoned property. DPZ issued civil citation CE 14-31(a)(ii) to Jeffrey L. Underwood and civil citation CE 14-31(b)(ii) to Shari Underwood. The civil citations were sent by certified and regular mail to Respondents at 6551 Walnut Grove. DPZ Exhibits 4 and 5. DPZ Exhibit 6 is a copy of the civil citation cover letter (the citation cover letter) sent to Mr. Underwood with the civil citations. The citation cover letter summarizes a June 3, 2014 meeting with Supervisor LaRose, Mr. Underwood and IOI Gluck, wherein Mr. Underwood stated customers come to the Property to complete paperwork and have background checks run as part of the purchase of a firearm and that further, that customers come to the Property to take possession of the firearms once the paperwork and background check are approved, in accordance with Federal law. The citation cover letter further states Mr. Underwood confirmed these activities in a letter received on July 14, 2014. It also puts Mr. Underwood on notice that failure to abate the violations may result in fines up to \$250 per day for every day the violation remains, but that confirmation of abatement by DPZ before August 1, 2014 might result in a dismissal of the fines.

7. The Supervisor explained DPZ interprets the HCZR as prohibiting Respondents' use of the Property for retail. A retail use would include customers coming to the Property to fill out paperwork to order firearms and accept delivery. As the ATF agents explained to him, these activities would have to occur at the premises where records are kept pursuant to Mr. Underwood FFL license/s. Mr. Underwood has never indicated to him that the records were now being kept elsewhere.

8. Mr. Underwood argued in his cross-examination of Supervisor LaRose and in his direct testimony that the activities occurring at the Property in relation to his FFL license/s is not retail activity but only paperwork relating to the regulated transfer of firearms purchased by individuals on the internet. He likened these activities to the paperwork activities he conducts at the Property in relation to his real estate operations. Mr. Underwood testified that he was a title/real estate attorney/appraiser whose clients come to the Property to complete paperwork for title transfers and other transactions. As an FFL dealer, he only handles paperwork related to firearms transfers purchased by someone over the internet from a distributor to a lawful buyer. He likened his firearms dealer activities, which he characterized as "fee-for service," to his title work. When crossed, Supervisor LaRose agreed that clients could come to Mr. Underwood's home to complete real estate purchases and sign documents.

9. Upon receipt of the NOV, Mr. Underwood in an undated letter to Supervisor LaRose contended that he does not operate retail sales, that customers do not complete paperwork for the sale of merchandise but that "clients do visit for consultation on a myriad of interests, from Attorney-expert consultation[s] to munitions education and more....." The letter explained that

"[r]are or occasional clients visit the premises to conduct the transfer of title to their homes or munitions purchased through another party. Munitions—due to federal guidelines—transfer of ownership must pass through a federally regulated professional—just as an attorney transfers title to real estate . . . [a] transfer of title is not a sale." The letter also notes that "gunsmithing" is an approved use and further argues that HCZR § 128.0.C.1.e allows the restricted sale or rental of commodities, including occasional sales of goods, "etc.," reading "etc." as allowing arms sales and monthly munitions parties where customers can order their desired arms for later pick up where title is transferred.

10. Mr. Underwood questioned the Supervisor about his awareness of a new FFL license in reference to Respondent Exhibit 2, a copy of Federal Firearms License 8-52-027-07-7M-08474, Manufacturer of Firearms Other than Destructive Devices issued to Uncommon Arms and the licensee Jeffrey Underwood, at 9190 Red Branch Road, Suite X, Columbia, MD 21045. Supervisor LaRose replied that the premises complies with the HCZR for the retail sales of firearms. Respondent stated that since obtaining this license, he has conducted all transfers from Red Branch Road. The FFL-07 license is superior to an FFL-01 dealer license and includes a dealer license. After the state (General Assembly) enacted the Firearms Safety Act of 2013, he upgraded to the FFL 07-7A-0579 license around September 2014; this license permits him to manufacture and sell firearms in certain districts, subject to certain conditions. He can sell firearms at the Red Branch Road location. He applied for this license in an abundance of caution should his home office license be denied for transfers. Respondent also introduced Respondent Exhibit 3, a graphic describing what he testified was the firearms transfer to a lawful buyer process. He does

not carry inventory; he provides a service, which supplements his real estate brokerage, appraiser and title work. He has relinquished his other FFLs, excepting FFL-07-7A- 07579, which is still active and allows him to take firearms deliveries at the Walnut Grove Property and then take these firearms to Red Branch Road for transfer, being unable to wait all day at Red Branch Road. He has also retained his FFL-08 license at Walnut Grove but has never activated it.

11. The Hearing Examiner questioned Supervisor LaRose about how the HCZR regulate retail uses in the absence of a definition of "retail." He explained retail uses are specifically allowed in the business zones (B-1 and B-2) and the shopping center district (SC). The Home Occupations section (HCZR § 128.0) allows a limited group of businesses to sell retail products, and customers are allowed to come to these home occupation locations. However, a firearms business would be a Specialty Store, which is a retail store use permitted as a matter of right in several zoning districts. When asked, the Supervisor read the definition of "Specialty Store" into the record.

Specialty Store: A retail business that principally offers a specific type or category of merchandise for sale or rental. Examples include but are not limited to stores specializing in art supplies, bicycles, books, cards, electronics, fabrics, flowers, gifts, hobbies, house wares, jewelry, luggage, musical instruments, news publications, optical goods, pets, photographic supplies, radios and televisions, sewing machines, sporting goods, stationary, or works of art.

Supervisor LaRose agreed that retail sales allowed by the HCZR are intended to be sold to public consumers (as opposed to private transactions). A person could come into a Specialty Store and order something from a catalog or through electronic shopping and this, too, would be

considered retail. Retail sales are limited to certain districts because of customer traffic and additional parking, deliveries and noise.

12. On redirect, Supervisor LaRose testified that Mr. Underwood would be permitted to conduct gunsmithing (firearms repair services) at the Property provided he goes to the customer to pick up and deliver the repaired firearms. HCZR § 128.0.C.1.h.6 expressly authorizes a gun repair Home Occupation use provided the operator picks up and delivers guns in a standard passenger vehicle. This narrowly limited use is to be distinguished from general retail uses.

13. The Hearing Examiner questioned Respondent about the location of his principal residence, which Mr. Underwood gave as 7337 Pindell School Road and which is his official domicile and voting address. He conducts his real estate/brokerage business out of 6551 Walnut Grove and sometimes sleeps there. His wife is the primary resident of Walnut Grove. The Hearing Examiner also questioned Respondent about firearms dealer licensing by the Maryland State Police, including whether he must collect sales taxes, or demonstrate zoning compliance for his state license. It was Mr. Underwood's testimony that the only requirement is that he complete certain forms (like 77R) for the transfer of a regulated firearm.

II. CIVIL CITATIONS CE 14-31(a)(ii) & CE 14-31(b)(ii) – The Trailer

14. Supervisor LaRose testified to DPZ Exhibit 2 being a copy of two photographs depicting a small trailer he observed on the Property on July 17, 2014 during his inspection of the Property. He photographed the trailer because he did not observe a license on it. He sent a Notice of Violation for a different trailer on the Property with no tags when he inspected the Property and discussed the trailer shown in DPZ Exhibit 2 with Mr. Underwood in July. In Mr. Underwood's

correspondence to him, Mr. Underwood contended no license or registration was required for the trailer. However, Supervisor LaRose testified it was his professional experience that the HCZR requires all vehicles to be registered and licensed. He does not believe this trailer is exempt under MVA laws and regulations.

15. Inspector LaRose issued an NOV to Jeffrey Underwood (CE 14-31a) and to Shari Underwood (CE 14-31b) on June 6, 2014. DPZ Exhibit 3. The NOV issued to Shari Underwood states that a June 3, 2014 inspection found a violation of HCZR §§ 109.0.C.7.b & 128.0.D.7¹ for the off-street parking or storage of unregistered, inoperable, wrecked, dismantled or destroyed motor vehicles on R-12 (Residential: Single) zoned property and ordered Respondent to register, repair or remove any such vehicles from the property within 30 days of the date of the NOV. The citations were sent by certified and regular mail to Respondent at 6551 Walnut Grove.

16. After inspecting the Property and finding the violation had not been abated, Inspector LaRose issued civil citation CE 14-31(a)(i) to Jeffrey L. Underwood and CE 14-31(b)(i) to Shari Underwood for the continued off-street parking or storage of unregistered, inoperable, wrecked, dismantled or destroyed motor vehicles on R-12 (Residential: Single) zoned property on July 18, 2014. DPZ Exhibits 4 and 5. The July 18, 2014 civil citation cover letter informs Mr. Underwood that the large trailer on the Property now bears a Maryland license plate, but that the small trailer next to it has no license plates and remains in violation of the HCZR. DPZ Exhibit 6. DPZ Exhibit 7A-C comprises photographs taken by Supervisor LaRose on March 25, 2015. The Supervisor

¹ The reference to § 128.0.D.7 appears to be a typographical error. The correct reference is § 128.0.D.8.

explained they show the hitch on the trailer and a location on the rear of the trailer for a license plate, which based on his experience means the trailer must be registered and licensed.

17. On cross-examination, Mr. LaRose testified to his belief that the trailer needs to be registered because the HCZR require all motor vehicles to be registered and tagged. He did not see in plain sight any vehicle identification number (VIN number) on the trailer during his inspections. The HCZR defines a "motor vehicle" as any vehicle that is self-propelled or designed to go on the street. He believes the small trailer is designed to be street worthy based on the tires, frame and hitch. He regularly cites trailers without licenses and to the best of his memory, all trailers cited by him or county enforcement inspectors have been required to be street-worthy and tagged. The county would require documentation from the manufacturer or a verifiable letter from the Motor Vehicle Administration that the specific vehicle need not be registered to dismiss the citation. He did not know if a farm trailer with an orange triangle would not need to be licensed or tagged by the MVA.

18. In his direct testimony, Mr. Underwood testified that the trailer is single-axle, not rated to haul objects for more than a short distance and cannot be driven more than ten MPH. In his view, the trailer is not "licensable." He also contended the citation was impermissibly issued because citations are driven by citizen complaints only. He also argued in this cross-examination that it is a farm vehicle that need not be licensed. On this point, Supervisor LaRose stated the Property was not a farm in response to the Hearing Examiner's query.

19. The Hearing Examiner questioned Mr. Underwood as to why he did not store the trailer in the two-car garage on the Property. Mr. Underwood replied that his wife uses one space and that he uses the other space for storage and a workshop.

BURDEN OF PROOF

Pursuant to HCC 16.1605(d), in an appeal of a citation issued under Section 16.1603 of Subtitle 16, Enforcement of The Howard County Subdivision and Land Development Regulations and the HCZR, the burden of proof is on the county to show, by a preponderance of the evidence, that the alleged violator has violated the laws or regulations in question. However, it is the alleged violator's burden to provide all affirmative defenses, including the defense of nonconforming use.

CONCLUSIONS OF LAW

I. Preliminary Matters

A. The Notice of Violation (DPZ Exhibit 3)

DPZ introduced DPZ Exhibit 3 during Supervisor LaRose's direct testimony. Supervisor LaRose identified it as the NOV issued to Jeffrey Underwood. DPZ Exhibit 3, though, as provided to the Hearing Examiner, is the NOV (CE14-31b), issued to Shari Underwood. Presumably, a separate, identical NOV was issued to Jeffrey Underwood (CE14-31a), as would be consistent with the numbering of NOVs issued to multiple Respondents and based on the civil citations, which were separately issued to Shari Underwood and Jeffrey Underwood (Mr. Underwood having been issued civil citations CE 14-31(a)(i) & (ii)).

This absence of an exhibit copy of the NOV issued to Mr. Underwood notwithstanding, the Hearing Examiner finds legally sufficient evidence in the record to conclude that DPZ has met its regulatory obligation to first issue Mr. Underwood an NOV before citing him. Respondent's Exhibit 1 is Mr. Underwood's undated letter sent to Supervisor LaRose in response to having been issued NOV CE 14-31a. (Presumably, this is the letter DPZ received from Mr. Underwood on July 14, 2014.) Additionally, as found above, Mr. Underwood informed Supervisor LaRose that he would not correct the violation (NOV) and would continue operating the business until he was issued the citation and could challenge it and/or was ordered to discontinue the business operation.

B. On the Legal and Necessary Distinction between Federal and State Laws Controlling the Sale, Rental or Transfer of Firearms and "Retail Sales" in the Howard County HCZR

Under Federal and state law, a person in the business of selling firearms is a firearms dealer. Firearms dealers (with exceptions not pertinent to this case) must hold a federal firearms license (FFL), of which there are several types. In Maryland, when a person wants to purchase a regulated firearm through the internet (an online firearms transaction), the firearm must be shipped to a local FFL dealer. Before the firearm is released to the buyer, the local FFL dealer performs and reports required background checks and, if necessary, a person who purchases, rents, or transfers a regulated firearm, must complete a Maryland State Police Application and Affidavit to Purchase a Regulated Firearm (MSP 77R).² The local FFL then physically transfers the

² The Hearing Examiner's general discussion here of federal and state law is meant only for the limited purpose of offering a broad overview of the pertinent commerce in firearms regime in order to provide a framework for the retail zoning issues in this case. Any misstatement about the federal and state legal landscape of firearms commerce has no legal bearing on the Examiner's conclusions in this Order.

firearm to the buyer, concluding the transaction. When DPZ issued the civil citations, Jeffrey Underwood held multiple FFLs with a business address of 6551 Walnut Grove.

The terms "selling," "renting" and "transferring" have specific legislative and regulatory meanings under Federal and state laws controlling commerce in firearms, as interpreted by state and federal courts. These laws preempt the local regulation of firearms sales, purchase, rentals and transfers (subject to certain exceptions not pertinent to this Order). They also recognize—at least in the Fourth Circuit—that local zoning laws comporting with the Second Amendment right to commerce in arms do not regulate the sale, rental or transfer of regulated firearms, only *where* FFL dealers may sell, rent or transfer regulated firearms commercially. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (overturning the District of Columbia's complete ban on handguns within its limits). As the *Heller* clarified, "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.") *Id.* at 626-627; Daniel J. Bolin and Brent O. Denzin, *When All Heller Breaks Loose: Gun Regulation Considerations for Zoning and Planning Officials Under the New Second Amendment*, 44 URBAN LAWYER, 678, 680 (Summer 2012).

Accordingly, when considering DPZ's code enforcement action in this case, which involves the activities of a firearms dealer operating out of residentially zoned property, 6551 Walnut Grove, pursuant to a DPZ-approved Home Occupation use, as restricted, the terms "sales" and/or "transfer" do not have the same meaning applied in federal and state legislation and regulations, as these laws are interpreted by Maryland courts and the Fourth Circuit. Rather Mr. Underwood's

business activities considered by DPZ to be in violation of the HCZR are evaluated solely in the context of the retail sales provisions of the HCZR.

II. Civil Citations CE 14-31(a)(ii) & CE 14-31(b)(ii) -- Retail Sales

The Hearing Examiner concludes the civil citations were properly issued after the requisite notices of violation pursuant to Title 16.602 of the HCC. HCZR § 101.0 prohibits all uses unless specifically enumerated as a use permitted as a matter of right or as an accessory use in the various districts as provided by these regulations. HCZR §§ 109.0.B & .C regulate, respectively, what uses are permitted as a matter of right or as a permitted accessory use in the R-12 zoning district.³ Retail Sales, subject to the exceptions provided in § 128.0.C.1.e (to be discussed next), is neither a permitted use nor an accessory use in the R-12 zoning district.

³ Section 109.0.B. Uses Permitted as a Matter of Right

1. One single-family detached dwelling unit per lot.
2. One zero lot line dwelling unit per lot.
3. Single-family semi-detached dwellings.
4. Farming, provided that on a residential lot or parcel of less than 40,000 square feet no livestock shall be permitted. However, residential chicken keeping is allowed as noted in Section 128.0.
5. Conservation areas, including wildlife and forest preserves, environmental management areas, reforestation areas, and similar uses.
6. Convents and monasteries used for residential purposes.
7. Government structures, facilities and uses, including public schools and colleges.
8. Private recreational facilities, such as swimming pools, basketball courts and tennis courts, reserved for the use of on-site residents and their guests. Such facilities may be located within condominium developments as well as within communities where all properties are included within recorded covenants and liens which govern and provide financial support for operations of the facilities.
9. Carnivals and fairs sponsored by and operated on a nonprofit basis for the benefit of charitable, social, civic or educational organizations, subject to the requirements of Section 128.0.D.
10. Seasonal sales of Christmas trees or other decorative plant materials, subject to the requirements of Section 128.0.D.
11. Underground pipelines; electric transmission and distribution lines; telephone, telegraph and CATV lines; mobile transformer units; telephone equipment boxes; and other similar public utility uses not requiring a Conditional Use.
12. Commercial communication antennas attached to structures, subject to the requirements of Section 128.0.E.4. Commercial communication towers located on government property, excluding School Board property, and with a height of less than 200 feet measured from ground level, subject to the requirements of Sections 128.0.E.2 and 128.0.E.3. This height limit does not apply to government communication towers, which are permitted as a matter

of right under the provisions for "Government structures, facilities and uses."

13. Volunteer fire departments.

109.0.C. Accessory Uses

The following are permitted accessory uses in the R-12 District. More than one accessory use shall be permitted on a lot, provided that the combination of accessory uses remains secondary, incidental and subordinate to the principal use.

1. Any use normally and customarily incidental to any use permitted as a matter of right in this District. Accessory structures are subject to the requirements of section 128.0.A.
2. Accessory apartments, subject to the requirements of section 128.0.A., provided that:
 - a. The area of the lot is at least 12,000 square feet;
 - b. Except for an exterior entrance and necessary parking area, there shall be no external evidence of the accessory apartment; and,
 - c. The accessory apartment shall have no more than two bedrooms.
3. Farm tenant houses, caretakers' cottages and similar uses customarily accessory to agricultural and residential estate uses, provided that these uses shall not be permitted on parcels of less than 50 acres, and further provided that one unit shall be allowed for each 50 acres of that parcel.
4. The housing by a resident family of:
 - a. Not more than four non-transient roomers or boarders; or
 - b. Not more than eight mentally and/or physically disabled persons or persons 62 years of age or older, provided the use is registered, licensed or certified by the State of Maryland; or
 - c. A combination of a and b above, provided that the total number of persons housed in addition to the resident family does not exceed eight.
5. Home occupations, subject to the requirements of Section 128.0.C.
6. Home care, provided that if home care is combined with housing of mentally or physically disabled persons or persons 62 years of age or older, as allowed by Subsection 4.b above, the total number of persons receiving home care at any one time plus the number of persons being housed shall not exceed eight.
7. Parking:
 - a. Off-street parking of no more than two commercial vehicles on lots of three or more acres and no more than one commercial vehicle on lots of less than three acres. Private off-street parking is restricted to vehicles used in connection with or in relation to a principal use permitted as a matter of right in the district.
 - b. Off-street parking or storage of unregistered, inoperable, wrecked, dismantled or destroyed motor vehicles shall not be permitted, except as provided by Section 128.0.D.
8. Storage of recreational vehicles or boats, provided that on lots of 20,000 square feet or smaller, such storage shall be limited to the following:
 - a. One recreational vehicle with a length of 30 feet or less; and
 - b. One boat with a length of 20 feet or less.
9. Farm stand, subject to the requirements of Section 128.0.I
10. Snowball stands, subject to the requirements of Section 128.0.D.
11. Home-based contractors on lots larger than two acres, subject to the requirements of Section 128.0.C.2.
12. Small Wind Energy System, building mounted, on single-family detached dwellings and non-residential structures only, subject to the requirements of Section 128.0.L
13. Residential chicken keeping, subject to the requirements of Section 128.0.D.
14. Accessory Solar Collectors.

Based on the facts of this particular case, the Hearing Examiner concludes the activities associated with purchasers coming to the Property to file paperwork for background checks and such other paperwork as may be required for purchased products and all necessary paperwork attendant to the acquisition of the product is an impermissible retail "house call." Customers must come to the Property to gain possession of the product they purchased, including all necessary transactions (paperwork and fees) between Respondent Underwood and a purchaser/customer. This is retail sales activity. These retail sales acts are not permitted in residential districts. Importantly, Mr. Underwood is engaged in business conduct within a highly regulated market of a product for retail sale; he is engaged in the retail trade of a retail product. The transaction part of the retail activity or arena in which a product is transferred to the purchaser is not an "after-market" transaction; it is, in 2015, embedded in the retail landscape of the product being sold.

Mr. Underwood sought to categorize the nature of his activities at the Property by likening them to the title transfer work he conducts at the Property. Mr. Underwood having acknowledged on cross-examination that he is not in fact a title/real estate attorney and does not have a license to practice law, it is unclear to the Hearing Examiner what he meant by "title transfer." He is a real estate broker and appraiser, but these professions do not directly involve transactions in which legal "title" to real estate is transferred. Moreover, as every real estate attorney knows, title to real property does not "transfer" (convey) until an instrument (deed) is recorded to effect a change of ownership, just as ownership of the product purchased through

an internet sale does not convey until Mr. Underwood delivers the product to a lawful purchaser after all necessary paperwork is completed.

The Hearing Examiner finds no merit in Respondent's argument that HCZR § 128.0.C.1.e authorizes retail arms sales and monthly munitions parties where customers can order their desired arms for later pick up where title is transferred. This section provides as follows.

e. The unrestricted sale or rental of commodities may not take place on the lot. Allowed sales related activities include: processing orders by mail, telephone or computer; receiving and mailing merchandise (subject to the limitation on truck deliveries); storage of catalogues, samples, previously ordered merchandise and inventory; office functions such as telephone, computer, and record keeping. *In addition, occasional, small volume sales associated with home parties held for the purposes of the display and sale of goods such as cookware, fashion accessories, skin care products, etc. may occur on the site no more than once a month.* (Emphasis added.)

As the Hearing Examiner explained during the proceeding, the highlighted language was a late zoning text amendment to the 2013 comprehensive zoning process to resolve retail sales problems.⁴ Early on in the process, DPZ proposed substantive changes to the § 128.0.C Home Occupation use to address this specific issue and general enforcement problems with the use. To this end, the February 25, 2013 Preliminary Zoning Text Amendments reviewed by the Planning Board proposed to regulate Home Businesses through Home Occupation Permits and these amendments strictly prohibited the sale or rental of commodities on a lot. DPZ Director Marsha McLaughlin presented a "Regulations Highlights" summary to the Planning Board during a

⁴ This document is available at <http://www.howardcountymd.gov/compzoning.aspx?id=6442466051>. The County Council work sessions are available at <http://cc.howardcountymd.gov/Online-Tools/Watch-Us> under the "Comprehensive Planning" link. CB32-2013, as introduced and enrolled (the final bill with amendments) is available at <https://apps.howardcountymd.gov/olis/LegislationDetail.aspx?LegislationID=455>. Sites visited April 12, 2015.

February 25, 2013 briefing, which summary described in pertinent part the need to revise "the regulations for home-based businesses to clarify which uses are allowed and which are not permitted, and to require a more stringent evaluation of those businesses which would have customers/patrons come to the home." Proposed § 128.0.C.1.6 provided as follows.

No sale or rental of commodities shall take place on the lot.

PERMITTED ACTIVITIES INCLUDE: STORAGE OF CATALOGUES, SAMPLES, PREVIOUSLY ORDERED MERCHANDISE AND INVENTORY; OFFICE FUNCTIONS SUCH AS TELEPHONE, COMPUTER, AND RECORD KEEPING; RECEIVING ORDERS BY MAIL, TELEPHONE OR COMPUTER; RECEIVING AND MAILING OF MERCHANDISE (SUBJECT TO THE LIMIT ON TRUCK DELIVERIES).

PROHIBITED ACTIVITIES INCLUDE: CUSTOMERS COMING TO THE LOT OR THE DISTRIBUTION OF MERCHANDISE TO SALESPEOPLE FOR OFF-SITE DELIVERY TO CUSTOMERS.

The Zoning Text Amendments introduced as CB 32-2013 eliminated the permit-based Home Business use and proposed to regulate Home Occupations subject in pertinent part to unrevised subsection C.6. During the July 17 and July 22, 2013 County Council work sessions, Planning Director Marsha McLaughlin again explained the proposed language as intending in part to address enforcement problems with home occupation uses that were actually retail in nature and the County Council discussed further potential amendments to the retail sales restriction imposed by § 128.0.C in the context of the "Tupperware Party" problem, home parties where occasional small volume sales of product occurred. Amendment 76 to CB 32-2013, introduced July 25, 2013, renumbered § 128.0.C.1.6 to § 128.0.C.1.e with the above "home parties" language Mr. Underwood reads as legitimating the activities at issue in this case.

This legislative history indicates otherwise. The County Council intended to permit only a limited range of retail sales as part of a Home Occupation Use and Amendment 76 plainly manifests that narrow intention.

III. Civil Citations CE 14-31(a)(ii) & CE 14-31(b)(ii) – The Trailer

The Hearing Examiner concludes the civil citations were properly issued after the requisite notices of violation pursuant to Title 16.602 of the HCC. HCZR § 109.0.C.7.b prohibits the off-street parking or storage of unregistered, inoperable, wrecked, dismantled or destroyed motor vehicles, subject to certain exceptions not pertinent to this case. Section 128.0.D.8 prohibits in residential districts the off-street parking or storage of unregistered, inoperable, wrecked, dismantled or destroyed motor vehicles. Section 103.0 defines a "motor vehicle" as "[a]ny self-propelled vehicle or *trailer* that is not operated on rails and which if designed to be driven, towed or used on a public street or highway would be required by the Maryland Vehicle Law to be registered and licensed." (Emphasis added.) Supervisor LaRose testified to DPZ's longstanding determination, based on his experience in administering and enforcing the HCZR, that the small trailer must be registered and licensed because it is a motor vehicle and not exempt under MVA laws and regulations. DPZ regularly cites trailers without licenses and the tires, frame and hitch on the small trailer indicate it street-worthiness.

Great weight is to be accorded to an agency's consistent, long-standing construction and application of a statute by an agency charged with administering it. See *Stachowski v. Sysco Food Servs. of Baltimore, Inc.*, 402 Md. 506, 517 (2007) (a non-zoning case) (citing *Marriott Employees Fed. Credit Union v. MVA*, 346 Md. 437, 445 (1997)). Importantly, "trailer" is not a term of art

subject to interpretation; it is an unambiguous term in the HCZR and the Maryland Vehicle Law. Under the HCZR, a "trailer" is a motor vehicle that if designed to be towed or used on a public street or highway would be required by the Maryland Vehicle Law to be registered and licensed. This "Maryland Vehicle Law" reference is to the Maryland Code Transportation Article, which is known as the "Motor Vehicle Law." Md. TRANSP. Code Ann. § 11-169 (2014) defines a "trailer" as a vehicle that "(1) Has no motive power; (2) Is designed to carry people or property and to be towed by a motor vehicle; and (3) Is constructed so that no part of its weight rests on the towing vehicle." Md. TRANSP. Code Ann. §§ 13-101 et seq. contains the laws pertaining to motor vehicle titling and registration. Md. TRANSP. Code Ann. § 13-402 regulates vehicles subject to registration and provides in pertinent part as follows.

§ 13-402. Vehicles subject to registration; exceptions

(a) General rule; parking unregistered vehicles. --

(1) Except as otherwise provided in this section or elsewhere in the Maryland Vehicle Law, each motor vehicle, trailer, semitrailer, and pole trailer driven on a highway shall be registered under this subtitle.

(2) If a motor vehicle required to be registered under this subtitle is not registered, a person may not park the unregistered motor vehicle on any:

(i) Public alley, street, or highway; or

(ii) Private property used by the public in general, including parking lots of shopping centers, condominiums, apartments, or town house developments.

(3) The provisions of paragraph (2) of this subsection do not apply to a motor vehicle that is exempt from registration under this section or § 13-402.1 of this subtitle.

(b) Certificate of title required for registration. -- Except as otherwise expressly authorized in this title, the Administration may not register or renew the registration of a vehicle unless the Administration has issued to the owner a certificate of title of the vehicle or has received an application for the certificate of title.

Section 13-402(c) excepts certain vehicles from registration, including a farm tractor or any farm equipment.

This recitation of motor vehicle law clearly supports Supervisor's LaRose's determination that the trailer must be registered and licensed.

IV. The Legitimacy of the Home Occupation Use

The evidence of record indicates that Respondent Jeffrey Underwood does not reside at 6551 Walnut Grove, but rather, at 7337 Pindell School Road, his official domicile and voting address. If this is so, Mr. Underwood is not permitted to operate a Home Occupation use at the Walnut Grove. The Hearing Examiner puts Mr. Underwood on notice here that DPZ has the authority to revoke an unlawful Home Occupation use or to take any other appropriate action to have the use discontinued.

Mr. Underwood is also on notice that HCZR § 128.0.C.1.I imposes an additional requirement for Home Occupations requiring Department of Planning and Zoning approval of a federal, state or local permit or license, authorizing home occupation confirmation approval by the Department of Planning and Zoning based on the requirements of § 128.0.C.1. Although Mr. Underwood testified he was not required to demonstrate zoning compliance for his state dealer license (issued by the Maryland State Police), the Hearing Examiner takes notice, pursuant to Hearing Examiner Rule 9.6, that Md. PUBLIC SAFETY Code Ann. § 5-101 et seq., Md. CRIMINAL LAW Code Ann. § 4-101 et seq. and Code of Maryland Regulations (COMAR) §§ 29.03.01.01-.58,

requires persons applying for a Regulation Firearms Dealer's license to include in the application all zoning compliance documents from the County where the business will be located.⁵

V. The FFL Licenses Attached to 6551 Walnut Grove

When DPZ approved the Home Occupation application by letter of December 6, 2013, Jeffrey Underwood had at least three FFLs tied to 6551 Walnut Grove. Although this Order directs Respondents to abate the retail sales use of the Property immediately, the Hearing Examiner cannot order Mr. Underwood to terminate the FFLs at the Property or move them to another address, such action being the sole province of federal and state authorities.

⁵ This information was obtained from the Maryland State Police website page on Firearms Dealers applications. <https://www.mdsp.org/Organization/SupportServicesBureau/LicensingDivision/MainLicensingPage/LicensingandRegistration/Firearms/FirearmsDealers.aspx>. Site visited March 17, 2015.

ORDER

It is therefore this **29th day of April 2015**, by the Howard County Board of Appeals Hearing

Examiner, **ORDERED** that:

1. Respondents shall cease the retail sales business at 6551 Walnut Grove immediately.
2. Respondents shall remove the trailer from the premises, locate it within a completely enclosed building or screen it such that it is not visible from ground level from any adjacent properties or public street rights-of-way. An unregistered, inoperable, wrecked, dismantled, or destroyed motor vehicle placed under a tarp or car cover shall not be considered to be screened, pursuant to HCZR § 128.0.D.8.a.
3. The Department of Planning and Zoning shall dismiss the motor vehicle violation for an unregistered motor vehicle (trailer) upon receipt of a letter (the exception letter) from the Maryland Motor Vehicle Administration that the trailer is not required to be licensed and registered. Respondent shall submit the exception letter to Supervisor LaRose no later than sixty calendar days from the date of this Order. The letter shall indicate the authority of the official to make the determination, the controlling Maryland Code Transportation Article authorizing the exception and shall include the address, phone number and email address of the official issuing the letter.
4. It **FURTHER ORDERED** that a civil fine is imposed in the amount of five hundred dollars.
5. It is **FURTHER ORDERED** that the civil penalty/fine shall be paid no later than sixty calendar days from the date of this Order. A failure to pay the fine by the due date may result in a lien being placed on the property for the fine amount, per Section 16.1611(a)(1) of the Howard County Code.
6. Because compliance is the goal of code enforcement, it is **FURTHER ORDERED** that the Hearing Examiner will rescind the civil penalty upon a DPZ determination that Respondents have ceased the retail use of 6551 Walnut Grove, brought the trailer into compliance with the Howard County Zoning Regulations or, in the alternative, upon DPZ verification of the exception letter with the Motor Vehicle Administration official who issued it.
7. It is **FURTHER ORDERED** that the five hundred dollar fine will be imposed if there is a subsequent finding against the Respondent for the same violation, in addition to any fine imposed in a subsequent Order for the same violation.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

NOTICE TO RESPONDENTS: Respondents are advised that pursuant to Section 16.1608.(c) of the Howard County Code, all fines are due and payable by the date indicated in the citation; and are payable to the Director of Finance of Howard County. Pursuant to Section 16.1609, a final order issued by the Hearing Examiner may be appealed within 30 calendar days of the date of this order by the alleged violator to the Board of Appeals in accordance with Section 16.304 of this title.* If an alleged violator appeals the final order of the hearing examiner, the alleged violator may request the stay of any civil fine imposed by a final order pending the final resolution of an appeal. Pursuant to Section 16.1610, if a final order of the Hearing Examiner includes a civil fine and the order is appealed to the Board of Appeals, the alleged violator shall post security in the amount of the civil fine to the director in a form acceptable to the Director of Finance. After all appeals are exhausted, if a civil fine is reduced or vacated, the security shall be reduced proportionately; any surplus shall be returned to the alleged violator; and any balance shall be used to satisfy the civil fine; or is not reduced or vacated, the security shall satisfy the fine assessed and accrue to the benefit of the county. Pursuant to Section 16.1611, if a final order issued by a Hearing Examiner assesses a civil fine and the alleged violator does not pay the fine within the time required by the order, the Hearing Examiner shall certify to the Director of Finance the amount owed that shall become a lien on the property on which the violation existed; and be collected in the manner provided for the collection of real estate taxes. Pursuant to Section 16.1612, if an alleged violator fails to comply with an order to correct a violation within the time provided in the order, the county may seek a court order authorizing entry on to the property to correct the violation and may procure the performance of the work by county employees or by contract to correct the violation. The cost and expense of work performed under this section a lien on the property on which the violation exists upon certification to the Director of Finance of the amount owed.

* Howard County Code Sec. 16.304.(a), Appeal to Board of Appeals, provides in pertinent part that the Board will hear the appeal of a citation issued under subtitle 16 of this title on the record in accordance with section 2.210(b) of this Code (Section 2.210(b) of the Board of Appeals Rules of Procedure.)