

IN THE MATTER OF

**OLYA MACMILLAN, T/A  
NEW LIFE HEALTH & WELLNESS CENTER**

Appellant

vs.

**DEPARTMENT OF PLANNING  
AND ZONING HOWARD COUNTY,  
MARYLAND**

Appellee

: BEFORE THE  
:  
: HOWARD COUNTY  
:  
: BOARD OF APPEALS  
:  
: HEARING EXAMINER  
:  
: BA Case No. 696D

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**DECISION AND ORDER**

On February 25, 2013, 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 Olya MacMillan t/a New Health and Wellness Center (New Life or Appellant). New Life is appealing a Department of Planning and Zoning (DPZ or Appellee) October 18, 2012 letter denying its Home Occupation Application for colon hydrotherapy use within premises known as 13157 Benson Estates Court, Ellicott City, 21042, which is located in an RR-DEO (Rural Residential: Density Exchange Option) zoning district.

The appeal is filed pursuant to Section 130.B.b.4 of the Howard County Zoning Regulations (HCZR).

New Life 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.

Andrew Robinson, Esquire, represented Appellant New Life. Lewis Taylor, Assistant County Solicitor, represented the Appellee, the Department of Planning and Zoning. Olya MacMillan

testified on her own behalf. Anthony LaRose testified on behalf of DPZ.

New Life introduced into evidence the exhibits as follows.

1. Home Occupation Application
2. Letter denying application from Anthony LaRose, DPZ Zoning Supervisor, to Appellant, November 1, 2012
3. Area of colon hydrotherapy business
4. Photographs of colon hydrotherapy business area
5. Photographs of Appellant's dwelling, exterior

DPZ introduced into evidence the exhibits as follows.

1. Home Occupation Application, 10717 Hillingdon Road, Denied March 29, 2012
2. Home Occupation Application, 3855 Route 97, Denied November 10, 2012
3. Examples of "personal services" zoning regulations definitions from other jurisdictions

### **Background**

On October 18, 2012, DPZ received a Home Occupation application from New Life to operate a "colon hydrotherapy" business in her residence at 13157 Benson Estates Court. Appellant Exhibit 1. A "Home Occupation" is the accessory use of a residential property for business purposes which are clearly incidental and secondary to the residential use. § 103.A 104.<sup>1</sup> The application provided the information as follows about the business-related activity to take place in the residence.

1. Area of Home Occupation use: 360 sq. ft.
2. Total floor area of residence: 3100 sq. ft.
3. Number of non-resident employees: none
4. Description of business-related activity: colon hydrotherapy
5. Description of business-related items to be delivered or stored at the residence: one gallon disinfecting chemical, speculum tubes
6. (The Application form has no Number 6.)
7. Storage of business-related items elsewhere: not applicable
8. Sales questions: not applicable
9. Will clients or other business-related visitors visit the residence? Yes

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<sup>1</sup> All section references are to the HCZR.

10. Parking. Two parking spaces for clients
11. Other relevant information: not applicable

Anthony La Rose, DPZ Supervisor, Division of Public Service and Zoning Administration reviewed the application, which he denied on October 26, 2012. New Life Exhibit 1. By letter dated November 1, 2012, Supervisor La Rose informed New Life in relevant part that the use, as proposed, indicates noncompliance with §§ 105.B&C and 101.O of the HCZR. He explained that colon hydrotherapy businesses are classified as "personal service establishments" under the HCZR and as such, are not permitted in the RR zone. New Life Exhibit 2.

New Life timely filed an administrative appeal petition on November 27, 2012. The petition states the appeal is taken from November 1, 2012 Home Occupation application denial. In the section provided for a brief description of error, fact, or law presented by the appeal, New Life states DPZ's decision to deny the Home-Occupation application (as set forth in the attached denial notice) was arbitrary, capricious, and contrary to the text of the HCZR. The petition also states New Life is aggrieved because DPZ's determination has denied her the lawful use of her premises for the stated Home Occupation.

During the proceeding, Ms. MacMillan presented a detailed description of colon hydrotherapy and the operation of her business, which she has been running out of her residence for several months. New Life's photographic Exhibit 4 depicts the waiting room and hydrotherapy area. Ms. MacMillan explained that colon hydrotherapy is a method by which the colon and intestinal tract are cleansed/detoxified with water. The cleansing process involves a client inserting a tube that injects water into the colon, via the rectum, using special equipment. The waste is removed through a waste disposal tube and, eventually, into her septic system. Due to

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the length of the consultation before any hydrotherapy, Ms. MacMillan sees only a few clients on any given day. She is the sole employee of the approximately 360-sq. foot operation, which is located in her basement and accessed from a separate entrance. There are two parking spaces available for clients.

**Standard of Review**

Pursuant to Hearing Examiner Rule of Procedure Rule 10.2(c), the petitioner (in this case Appellant) must show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

**Discussion and Analysis**

The gravamen of this appeal is how Zoning Supervisor La Rose determines what accessory uses are considered permissible Home Occupations in the zoning districts where they may be allowed, pursuant to § 128.C.1, which provides as follows.

**128.C.1. Home Occupations**

Home occupations which meet the following requirements are permitted accessory uses in all residential zoning districts and in residential land use areas of the NT, PGCC and MXD Districts. If more than one home occupation is located within a residence or on a residential lot, the requirements given below apply to the cumulative total of all home occupations on the site.

- a. The total area devoted to home occupations shall not exceed 33% of the gross floor area of the dwelling or 800 square feet, whichever is less.
- b. A home occupation shall be located entirely within a dwelling, an accessory building, or both, except that a home office which may be visited by clients shall be located within a dwelling. An office visited by clients may not be separated from the remainder of the structure by an attached garage or an open or enclosed breezeway.
- c. A home occupation shall not alter the residential appearance and character of the dwelling, accessory building or lot.
- d. There shall be no exterior evidence, other than a permitted sign, to indicate that the lot is being used for any purpose other than that of a dwelling. Exterior evidence shall include outdoor display or storage, noise, dust, vibration, glare, fumes, odors or extensive parking area.
- e. No sale or rental of commodities shall take place on the lot.

f. A home occupation shall be conducted by persons residing in the dwelling. In addition, the following number of nonresident employees may work on the lot in connection with the home occupation:

(1) On a lot 40,000 square feet or larger, no more than two full-time equivalent employees not residing in the dwelling, not to exceed four individuals, shall be permitted.

(2) On a lot smaller than 40,000 square feet which is improved by a single-family detached dwelling, no more than one full-time equivalent employee not residing in the dwelling, not to exceed two individuals, shall be permitted.

(3) Within a single-family attached or apartment dwelling, no more than one fulltime equivalent employee not residing in the dwelling, not to exceed one individual, shall be permitted provided that the nonresident employee shall work only between 9:00 a.m. and 5:00 p.m. Monday through Friday.

g. No business-related deliveries by trucks with more than two axles shall be permitted. Parcel post and other similar delivery trucks are permitted.

*h. Home occupations may include the uses listed below, as well as other uses which comply with all requirements of this section.*

*(1) Art or hand craft studios.*

*(2) Direct sale product distribution (e.g., Amway, Avon, Tupperware, etc.).*

*(3) Mail-order or telephone sales.*

*(4) Dressmaker, seamstress, tailor, and similar uses.*

*(5) Typing and computer services.*

*(6) Repair services for computer hardware, clocks, jewelry, cameras, guns, and similar uses.*

*(7) Tutoring.*

*(8) Business or professional offices which have no more than two vehicles visiting the home occupation at any one time.*

*(9) Catering, subject to Health Department approval.*

*(10) In the RC and RR Districts only, lawn mower and small engine repair on lots of three acres or larger.*

i. The following uses are not permitted as home occupations:

(1) Vehicle repair, sales or rental.

(2) Restaurants.

(3) Manufacturing and processing operations, other than production of handcrafts and similar activities.

(4) Furniture refinishing.

(5) Uses which require a conditional use in any residential zoning district.

j. Certain home occupations which do not comply with the requirements of this section may be permitted as conditional use, subject to the provisions of Section 131.N.28 and other applicable regulations.

(Emphasis added.)

New Life argues DPZ erred in making a "bright-line rule" of excluding personal services as a permissible Home Occupation accessory use in the RR zoning district. As New Life reads § 128.C.1.h, a Home Occupation accessory use may be any of the ten uses set forth therein "as well as other uses which comply with all requirements of this section." It is New Life's contention, therefore, that a proposed Home Occupation accessory use need only comport with the standards set forth in §§ 128.a-g and i. In support of this interpretation, New Life emphasized the absence of a definition for "personal services" in the HCZR.

Lastly, New Life charges DPZ error in barring all personal service establishments in the RR zone because § 128.C.1.h.(4) specifically lists one personal service – "tailor" – as well as "similar uses" as a permissible Home Occupation. Noted New Life, "tailors" are routinely included in the commonly mentioned lists of personal service establishment in the HCZR, the most expansive such list being "barber shops, beauty shops, opticians, photographers, and tailors." In Appellant's view, the inclusion of a personal service use, tailor[ing], as an identified permissible Home Occupation is further proof of the arbitrary and capricious nature of the denial.

Zoning Supervisor Anthony LaRose testified to being a DPZ employee for eleven years and the person responsible for reviewing Home Occupation applications. Referring to Appellant's Exhibit 2, the November 1, 2012 letter to New Life denying the Home Occupation application Zoning Supervisor LaRose explained he denied the application based on nonconformance with §§ 105.B&C and 101.O. His interpretative logic for determining why the colon hydrotherapy use is not permitted as a Home Occupation accessory use proceeds as follows.

- § 101.O prohibits any use that is not specifically enumerated as a use permitted as a matter of right or as an accessory use in the various districts.

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- § 105.B regulates uses permitted as a matter of right in the RR zone, and does not include colon hydrotherapy. If colon hydrotherapy use is not permitted as a matter of right in the RR zoning district, then it is prohibited unless allowed only as an accessory use.
- § 105.C regulates accessory uses permitted as a matter of right in the RR zone. Colon hydrotherapy is not a permitted accessory use because it is not expressly listed as such under § 105.C.

§ 105.C.5 does authorize Home Occupation accessory uses. An accessory use is something incidental or subordinate to and customarily found in connection with a principal use or structure.<sup>2</sup> Home Occupation accessory uses in the RR zone may include, in relevant part, any use normally and customarily incidental to a principal residential use.

- § 128.C.1 addresses Home Occupation accessory uses in residential zones and certain residential areas of other zones. Colon hydrotherapy is not a Home Occupation accessory use in the RR zone, as regulated by § 128.C.1 because it is a personal service establishment. A Personal service use or establishment is not a Home Occupation because personal service uses are not one of the 10 Home Occupation uses expressly listed under § 128.C.1.h, nor is it subordinate to and customarily found in connection with a principal residential use or structure in the RR district.

Zoning Supervisor La Rose expanded upon his determination that personal service uses are not allowable Home Occupations in the RR zone through an analysis of how the HCZR accommodates personal service establishments. Some personal services not permitted as a Home Occupations accessory use may be permitted upon conditional use approval if they are listed as a conditional use in § 105.G. If a Home Occupation use accessory use proposed in the RR zone were permitted as a commercial use in other zones as a matter of right or as an accessory use, the use would not be considered a Home Occupation use. Business and Office uses, however, are potentially okay as Home Occupation accessory uses in the RR zone because they are customarily found in connection with a rural residential use.

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<sup>2</sup> HCZR § 103.A.3 defines an "accessory use" or "accessory structure" as a use or structure which is incidental to, subordinate to, and customarily found in connection with a principal use or structure and which is situated on the same lot as the principal use or structure, except that where specifically provided in the applicable section of these

On cross-examination, Appellant's counsel disputed the Zoning Supervisor's exclusion of personal services as a permissible Home Occupation accessory use in the RR zoning district, pointing out that "tailors" are one of the Home Occupation uses in § 128.C.1.h's "list of ten." Zoning Supervisor La Rose conceded that tailoring is a personal service establishment and therefore not prohibited per se because someone may work at home mending or making clothing. Nonetheless, he reemphasized his consistent interpretation of §§ 101.O and 105.B&C as excluding any Home Occupation use not listed under 128.C.1.h or closely similar to the 10 uses, because he would not deem such a use to be accessory in the Rural Residential zone. Asked to explain the purpose for this limitation on Home Occupation uses in the RR zone, the Zoning Supervisor said the intention is to maintain the character of rural residential neighborhoods.

Zoning Supervisor LaRose further testified to having denied personal service establishment Home Occupations in other zoning districts based on the same zoning logic. On March 29, 2012, he denied a Home Occupation application to teach henna hand design and eyebrow threading in an R-SA-8 (Residential: Single Attached) zoning district pursuant to §§ 111.B&C, which regulate uses permitted by right or as an accessory use, explaining the HCZR classifies the proposed uses as a "personal services establishment," which are not permitted in the zone. DPZ Exhibit 1. On November 10, 2011, he similarly denied a Home Occupation application for a "holistic wellness center" (including hydrotherapy) in an RC zone because it, too, is classified as a personal service establishment, which is not permitted in the zone. DPZ Exhibits 1 & 2.



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The County Council has enacted legislation in the form of the Howard County Zoning Regulations to control the extent of Home Occupation accessory uses in all residential zoning districts and in residential land use areas of the NT, PGCC and MXD Districts. The Council determined some Home Occupations are not legitimate accessory uses in residential zones or areas and expressly prohibited them. It also restricted the gross floor area of a Home Occupation use, its location in a dwelling or accessory building, imposed conditions to ensure the use does not indicate the lot is not used for anything but a dwelling, and limited the number and types of employees. Because certain Home Occupations may have a greater impact, the Council permitted some as a conditional use in a specific zoning district, subject to the approval of a conditional use petition by the Hearing Authority. These Home Occupation accessory use regulations ensure a reasonable relation to the health and welfare the Council is mandated to promote.

The Council also reasonably concluded certain types of Home Occupations may be legitimate accessory uses, the "list of 10" in § 128.C.1.h. Importantly, the Council did not legislate an exclusive list of Home Occupations permitted in all zones or in specific zones.<sup>3</sup> The Council instead delegated its police power to DPZ, empowering it with the discretionary authority to consider what Home Occupation uses are subordinate to and customarily found in connection with a specific residential zone or the residential land use areas of the NT, PGCC and MXD Districts. Section 128.C.1.h thus states Home Occupations "*may* include the uses listed below, as well as other uses which comply with all requirements of this section." (Emphasis added.)

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<sup>3</sup> The exception being § 128.C.1.h.(10), which addresses lawn mower and small engine repair Home Occupations on lots of three acres or larger in the RC and RR Districts only.

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In accordance with the HCZR Rules of Construction, the use of the word "may" here is "permissive" (§ 101.C); it is advisory or directory language bestowing upon DPZ the discretionary authority to make informed policy judgments as to what types of Home Occupations are appropriate in the residential districts and the residential areas of the NT, PGCC and MXD Districts.

The Home Occupation use is an accessory use, the Zoning Supervisor explained; any such use must be customarily found in connection with the residential uses in the districts where they may be located. For eleven years, Zoning Supervisor La Rose has exercised his delegated authority to make individual, zone-specific determinations as to what Home Occupations are customarily found in connection with a principal residential use. His review of proposed Home Occupation uses is conservative or restrained, in that he considers the "list of ten," or something close to a use in the list, to be those very uses customarily associated with a principal residential use in a given zone. His literal interpretation of "customary" precludes the allowance of new uses, but the Hearing Examiner believes this consistent interpretation and application of Home Occupation uses is a reasonable one, in that it is consonant with the broader treatment of accessory uses in the HCZR. It also accords with the legal principle that an administrative agency's interpretation and application of the statute that the agency administers should ordinarily be given considerable weight by reviewing courts. *Swoboda v. Wilder*, 173 Md. App. 615, 920 A.2d 518, 529-530 (2007) (internal citations omitted). To read "may" and the additional language in § 128.C.1 as broadly as New Life does leads to an unreasonable result, one contrary to legislative intent, and contravening the Rule to Avoid Surplusage, a textual principle of statutory interpretation that statutes should not be interpreted in a way that renders a word or phrase superfluous. Were the

Hearing Examiner to heed New Life's desired interpretation of a Home Occupation use, the "list of ten" itself would be redundant or meaningless.

In this case, Zoning Supervisor LaRose read together §§ 101.O, 105.B&C and 128.C.1 and made a determination that a colon hydrotherapy business is a personal service establishment, which is not a customary Home Occupation accessory use in the RR zone. The Hearing Examiner finds it reasonable for the Zoning Supervisor to have so concluded. His consistent application of the "list of ten" Home Occupation uses may comprise a closed system of customary Home Occupation uses (only those kinds of home work uses traditionally in existence in a rural home) but the Hearing Examiner cannot say this interpretation frustrates the intent of the Home Occupation land use category or is unduly restrictive in its application.<sup>4</sup>

A final consideration is New Life's recognition that § 128.C.1.h.(4) lists "tailors" – a personal service establishment – as a type of Home Occupation use. In New Life's view, the inclusion of at least one personal service establishment as a Home Occupation use is substantial evidence of the Zoning Supervisor's arbitrary and capricious denial of its application because said denial is based on the prohibition of personal service Home Occupations in the RR zone.

Certainly, New Life's "bright-line rule" characterization of the Zoning Supervisor's determination that personal service establishments are barred as Home Occupations in the RR zone might seemingly support reversing the denial into question, when tailors may be permitted. New Life's (partial) rehabilitation of personal service establishments as Home Occupations in the RR zone notwithstanding, the substantive legal issue here is not whether this omission is cause for

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<sup>4</sup> In the Hearing Examiner's view, the economic realities spurring the kind of Home Occupation New Life would like to operate in the residence requires a systematic, legislative review of the land use category, not a quasi-judicial revision.

reversing the denial or expanding the list of customary accessory uses allowed as Home Occupations. Rather, the Hearing Examiner's concern is whether the denial, as a final decision, comported with minimum due process notice requirements.

Due process requires administrative agency final decisions to notice – explain – the reasons for the action taken, here, the denial of a Home Occupation application. The denial explains the colon hydrotherapy business does not comply with §§ 105.B&C and 101.O of the HCZR because colon hydrotherapy businesses are classified as "personal service establishments" under the HCZR and as such, are not allowed in the RR zone. That one personal service—tailoring – may be an approvable Home Occupation does not warrant an invalidation of the Zoning Supervisor's action, in the Hearing Examiner's view. A remand to correct the explanatory language to reference "tailor" and similar personal service use exceptions in the explanation is likewise unwarranted, as this remand action would only exalt form over the substantial and reasonable basis for the denial.

**ORDER**

Based upon the foregoing, it is this **18<sup>th</sup> Day of March 2013** by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition of Olya MacMillan t/a New Health and Wellness Center is **DENIED**.

**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.