

HOWARD COUNTY BOARD OF APPEALS HEARING EXAMINER

In the Matter of

MICHELLE LYNN HYMOWITZ &

Civil Citation.Nos. CE- **12-139(a)**

& CE-**12-139(b)**

ERIC BRIAN HYMOWITZ

Respondents

DECISION AND ORDER

This matter came before the Howard County Board of Appeals Hearing Examiner on April 25, and June 27, 2013¹ for a hearing on Department of Planning and Zoning citations for violations of the Howard County Zoning Regulations (HCZR), Sections 109.B&C and 101.O, operating a private club from a residential property in an R-12 (Residential: Single Family) zoning district, on property known as 6025 Augustine Avenue.

On March 18, 2013, pursuant to Howard County Code (HCC) Title 24, "Civil Penalties," and Subtitle 3 of Title 16 of the HCC, Department of Planning and Zoning (DPZ) Inspector Tamara Frank issued Michelle Lynn Hymowitz civil citation CE-12-139(a) and Eric Brian Hymowitz civil citation CE-12-139(b) by certified mail. These persons are identified as the property owners on the Maryland State Department of Assessments and Taxation information property sheet.

Nowelle A. Ghahhari, Assistant County Solicitor, represented the Department of Planning and Zoning. Zoning Regulations Inspector Tamara Frank, Gary Byron, Matt Ruzicka, Amanda Ruzicka, and Michael Bosworth appeared as DPZ witnesses and testified. Andrea

¹ The May 23, 2013 hearing was continued without convening.

LeWinter, Esquire, represented Michelle Lynn Hymowitz and Eric Brian Hymowitz (Respondents). Eric Hass, Rodney Bacigalupo, Ann Rudolph, Michelle Lynn Hymowitz and Eric Brian Hymowitz appeared as Respondents' witnesses and testified.

The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure.

The Department of Planning and Zoning proposed a civil penalty of five hundred dollars and a thirty-day period to pay the fine and abate the violation.

DPZ introduced into evidence the exhibits as follows.

- 1(a)&(b). Notices of violation, December 12, 2012
2. Games Club of Maryland website, www.gamesclubofmd.org²
3. Civil citations, March 18, 2013
4. List of upcoming gatherings and parking request of neighbors
5. Email from Matt Ruzicka to Michelle Mazzola, January 6, 2012
6. Email from Michelle Mazzola to Matt Ruzicka, January 9, 2012
7. Email from Matt Ruzicka to Michelle Mazzola, February 15, 2012
- 8.1-17. Photographs, various dates
9. Letter from Karen and Kirk Murdock expressing safety concerns about parking on Adcock Lane and Augustine Avenue, April 24, 2013

Respondents introduced into evidence the exhibits as follows.

1. Games Club of Maryland Board of Directors Meeting, December 19, 2012

A Preliminary Matter

During the hearing, Respondents challenged the legal adequacy of Inspector Frank's determination to issue the notices of violations and the civil citations. They argued, through

² For convenience, the Hearing Examiner has numbered the individual pages of this exhibit, referenced as DPZ Exhibit 2, HE p.*.

counsel, that Ms. Frank did not observe or witness the alleged violations personally, but instead relied on the allegations and evidence of neighbors unhappy with the parking situation.

The Howard County Code does not require an inspector to observe the alleged violation personally. Rather, HCC § 16.1602 imposes upon the Director of Planning and Zoning a "duty to investigate" an alleged violation to determine whether a violation exists or has occurred. Sec. 16.1603.(a)(1) authorizes the director to issue a civil citation to an alleged violator after the issuance of a notice of violation if the violation continues after the reasonable time stated in the notice of violation has passed.

Nonetheless, administrative due process requires the code enforcement inspection and investigation process to be a standardized operating procedure to ensure consistent compliance with all applicable codes, ordinances, and regulations. In Howard County, zoning inspectors routinely and customarily investigate alleged violations through a site inspection, talking to the alleged violators, neighbors, and either documenting their site inspections photographically or adopting photographs taken by others, subject to authenticating them. This manner of investigation is standard operating procedure in Howard County. The ultimate evidentiary value of an inspector's investigative findings is determined at a code enforcement hearing, as was the case in this proceeding.

DPZ WITNESSES -- DIRECT TESTIMONY AND EVIDENCE

Testimony of Zoning Inspector Tamara Frank

At the April 25, 2013 hearing, Zoning Inspector Tamara Frank testified to being a

regulations inspector for two years, prior to which she was a DPZ planning support technician. She received a complaint about the use of 6025 Augustine Avenue as a gaming club. One of the property owners, Mr. Eric Hymowitz, called her before she inspected the property, asking if his wife's several times a month parties were allowed under the zoning regulations. When asked what types of parties were being held, Mr. Hymowitz explained they were gaming parties with 10-15 people per party. No entry fees are collected, but Ms. Hymowitz asks for small donations to help pay for food. The parties are advertized on a website, www.gamesclubofmd.org. Inspector Frank informed Mr. Hymowitz that she would review the game club website and get back to him. After reviewing the website, she informed Mr. Hymowitz that the events were a "gaming club" prohibited by the HCZR because the R-12 did not permit gaming clubs and they needed to find another location for the parties. She obtained the term "gaming club" from the website.

Inspector Frank inspected the premises on December 12, 2012 at 11:50 a.m. She obtained the names and addresses of the two property owners (Respondents) from the Maryland State Department of Assessments and Taxation information sheet for the Property. She issued Notices of Violation CE 12-129(a)&(b) to Respondents by certified mail on December 12, 2012. The notices inform Respondents that violations of HCZR Sections 109.B&C and 101.O exist on the premises. These violations are described as "[O]peration of a private gaming club from a residential property on an R-12 (Residential: Single) zoned property." The action required to correct the violations and bring the property into compliance within 30 days is

described as "[c]ease the use of the property for a private gaming club. Provide the new location and a copy of the lease for the gaming club." DPZ Exhibit 1:

After issuing the notices of violation, Inspector Frank continued her investigation, revisiting the gaming club website. She identified DPZ Exhibit 2 as pages from the club website, www.gamesclubofmd.org, which she visited on various dates.³ Inspector Frank testified the first page (apparently the home page) identifies the site as that of the Games Club of Maryland (GCOM). The Board of Directors page identifies Michelle Hymowitz as GCOM Vice-President (HE Page 37). On the "Where We Play" page, the "Elkridge" Host location is identified as "closed" (HE Pages 27-8). These pages also identify Michelle Hymowitz as the Elkridge location Host and Eric Hymowitz as the Co-Host. The "GCOM Host" page explains the services and resources available to hosts (DPZ Exhibit 2, HE pgs. 8-26). This page also describes coverage under GCOM's liability insurance requirements (DPZ Exhibit 2, HE p. 22). According to this page, general liability insurance is available for all official GCOM locations subject to specific criteria. There are multiple Host locations. Some are commercial locations, others residential.

Inspector Frank referenced the GCOM by-laws page (DPZ Exhibit 2, HE pgs. 2-8). The GCOM FAQ page identified GCOM as a 501(c)(7) non-profit, tax-exempt organization with the Internal Revenue Service. Regarding club membership, Ms. Frank testified that anyone may attend a meeting held pursuant to Article VII of the by-laws, but that membership is otherwise

3. It appears that Inspector Frank clicked on the website's navigation menu and pulled up pages on different club topics. The pages specifically referenced in Ms. Frank's testimony are checked in the bottom right hand page. For convenience, the Hearing Examiner has numbered the pages as HE Pages 1-39.

required (DPZ Exhibit 2, HE pgs. 33-36). Money is not taken at events. Donations to pay for food are welcome. Based on her research, there is no physical location for the club itself.

The Inspector issued Michelle Lynn Hymowitz and Eric Brian Hymowitz Civil Citations CE-12-139(a)&(b) on March 18, 2013. The citations state the Hymowitzes have continued to operate a private club from a residential property on an R-12 (Residential: Single Family) zoned property known as 6025 Augustine Avenue in violation of HCZR Sections 109.B&C and 101.O. She believes the violation is ongoing, based on updates from the complainant and no notification from Respondents that they have abated the violations.

On cross-examination, Inspector Frank conceded to never having cited anyone else for a private club violation. She did not derive her definition of "private club" from the HCZR because there is none. She determined GCOM was a club based on the GCOM website, which calls itself a club, the absence of "private club" as an allowed or accessory use in the R-12 zoning district, and on the fact that GCOM is a non-profit club. She also met with her supervisors, who determined GCOM was a private club. When asked if she could come up with other examples of "clubs," she could not. However, based on conversations with Zoning Supervisor LaRose, GCOM is a private club because it was a non-profit, membership dues based (subject to certain requirements), and gives out treats and prizes during games. She alerted him to the cessation of the site as a Host location, but explained the gaming parties were continuing based on eyewitness accounts, including photographs, and tracking comings and goings.

When asked the basis for issuing the civil citation, the Inspector concluded there was a continuing violation in light of her investigation of vehicle ownership license plates visible in an

eyewitness photograph. She ran the tags of eight vehicles on April 23, 2013 and determined GCOM members owned three of the eight vehicles after checking vehicle owner names with membership information on the GCOM website. She further explained the instigating complaint, which she read into the record, emphasized parking and safety issues and the frequency of meetings, including a four-day convention between December 29 and January 1, during which time some attendees did not leave. Mr. Hymowitz also told her 3-4 meetings are held each month.

Testimony of Zoning Regulations Inspection Supervisor Anthony LaRose

At the April 25, 2013 hearing, Anthony N. LaRose testified to being the Division of Public Service and Zoning Supervisor (Supervisor LaRose) for about eight years and a Howard County zoning employee for about nine years. He was previously a Prince George's County zoning inspector for about 16 years. Supervisor LaRose stated the HCZR does not define "private club." However, these same regulations specify that a term not defined in the HCZR shall have the common use definition. He therefore understands "private club" to mean "a group of people who get together for a common interest or activity." The County's interpretation of "private club" arose once before in a prior zoning case, where DPZ issued a notice of violation for the operation of a private club, where admission was required and attendees charged for food and drink. The County ultimately chose to prosecute the violation in civil court. Supervisor LaRose also referenced a number of conditional use categories not defined in the HCZR, including aircraft landing and storage areas, antique shops, outdoor athletic facilities, beauty parlor/barbershop, spring or well water bottling, and cemeteries/mausoleums.

On cross-examination, Supervisor LaRose distinguished between someone having friends over to play "Bunko" and a private club based the number of persons attending (about 30), the number of different games played and the irregularity of "friendly" games versus games played at a private club. In his view, the definition of a private club can be very broad. Three people could constitute a private club. He has no specific knowledge of what took place within the residence after DPZ issued the notice and citation.

The Hearing Examiner asked Supervisor LaRose if he consulted other county laws in deriving the definition of private club, to which Mr. LaRose replied he had not.⁴ When further questioned by the Hearing Examiner, Supervisor La Rose explained he had assessed the potential approval of the "private club" as a "non-profit club" conditional use based on GCOM's status as a non-profit club, only to conclude the Hymowitz property would not meet the conditional use category standards of HCZR Section 131.N. 36, being too small and not being located on a collector or arterial road.

Testimony of Matt Ruzicka

DPZ witness Matthew Ruzicka testified on April 25, 2013 to residing across the street from the Hymowitzes for about two years. He has observed numerous events lasting 10-15 hours at a time and with 15-30 attendee cars on the street. One Year's weekend, there was a

⁴ The Hearing Examiner took notice that HCC §12.6004.(a)(1), concerning smoking in public places exempts A private club or lodge owned and operated by a membership association licensed under Article 2B of the State Code if: (i) The association's duties are performed by its members, including, but not limited to, food preparation and security; and (ii) The members do not receive compensation for the performance of the association's duties.

four-day event where attendees did not leave. One attendee told him there was a gaming convention. Events are held 4-7 times a month. The Friday events generally ran from 6-7 p.m. to 2-3 a.m. On Saturdays and Sundays, they began around 12 p.m. and can last until late evening. On these occasions, there is no on-street parking for residents. The weekend events draw the most people, about 20-30 people.

Mr. Ruzicka spoke to his neighbors about the events, who informed him the events started about the time the Hymowitzes moved in. In July 2011, he could not park his truck in front of his house, so he went across the street to speak to Eric Hymowitz about the number of events and associated parking. During this conversation, he observed numerous large gaming tables. The neighbors are concerned about neighborhood safety, which is compromised when there an event because folks have to cross the street to walk on the sole sidewalk. He believes fire trucks and other emergency vehicles would have a difficult time traveling along Augustine Avenue. Between October and November 2011, neighbors received meeting schedules from the Hymowitzes. In late December 2012, he gathered a petition from neighbors, asking event attendees to park elsewhere. The petitions were placed on attendees' windshield.

In early January 2012, he contacted the GCOM president, hoping to reach some accord about the parking and number of events. DPZ Exhibit 5 is a copy of Mr. Ruzicka's January 6, 2012 email to GCOM president Michelle Mazzola outlining neighbors' concerns about parking, the frequency of events, and event attendee parking misdeeds. Ms. Mazzola's January 9, 2012 response email informed Mr. Ruzicka that she would look into the parking problem. DPZ Exhibit 6. A February 15, 2012 email from Mr. Ruzicka to Ms. Mazzola discussed problems with event

attendees parking too close to driveways and includes language from a Howard County ordinance, which prohibits individuals from stopping in front of or within five feet of a public driveway or within a private driveway. DPZ Exhibit 7. On June 4, 2012, Mr. Ruzicka emailed Ms. Mazzola about a recent (possibly June 2) 14+-hour, very large gathering at the Hymowitz residence, to which Ms Mazzola responded by stating it was a birthday party, not a GCOM session. Mr. Ruzicka responded with the comment that it was the "usual suspects." DPZ Exhibit 7. He did not observe any balloons on the house or anything indicating a birthday during that event.

That same January, he sat out trashcans to reserve a parking spot in front of his house and an event attendee hit (or moved) one while parking. He spoke to Michelle Hymowitz and explained the problem. He contacted police in November 2012 after an attendee hit the trashcans he had put out for garbage pickup. The officers informed him they would move cars if necessary to provide access for emergency vehicles.

Referring to DPZ Exhibit 4, Mr. Ruzicka explained it was a list of gatherings at the Hymowitz residence between December 9, 2011 and January 20, 2012, indicating seven gatherings in December and seven in January. The Hymowitzes provided this list to neighbors in late November. According to the second page, there are gatherings every other Friday, the second Saturday of each month, and the third Sunday of each month and the third Wednesday of each month. He acknowledged a games sign was no longer displayed outside the Hymowitz house after he contacted DPZ. Since then, the number of events has decreased. Mr. Ruzicka identified DPZ Exhibit 8.1-17 as copies of photographs taken by him or his wife documenting

Hymowitz guest cars between December 8, 2012 and April 21, 2013, according to the dates above the photographs. They were taken from his home or in the area of his home. Based on these photographs, Mr. Ruzicka believes the game club is continuing.

Date	Exhibit No.	Photograph
3.29.13	8.4, second photo	Guest/arriving at the Hymowitz residence and carrying what he identified as board games. Multiple observations of these persons attending events
4.12.13	8.3	Persons games sacks with board games
2.17.13	8.6	Person carrying 5-6 board games, regular visitor Person carrying knapsack with board games, person taking take out chairs
12.30.12	8.14	Bags filled with board games next to Hymowitz vehicle, attendee car backseat filled with games

On cross-examination, Mr. Ruzicka acknowledged the police officers who came out to address his complaint did not ticket anyone. In his mind, the impact of the June 4, 2012 birthday party at the Hymowitz residence was the same as that of a GCOM event. When attendees park on Adcock Lane as requested, there is less impact on Augustine Avenue. He has observed no unusual noises, smells, or illegal behavior.

Testimony of Amanda Ruzicka

Amanda Ruzicka testified on April 25, 2013 that the sole sidewalk on is on the Hymowitz side of Augustine Avenue. Sometime attendee cars have blocked residents' ability to walk on the sidewalk. The Sunday before the hearing, she observed several regular guests coming to the Hymowitz residence.

Testimony of Michael Bosworth

Mr. Bosworth testified on April 25, 2013 to residing across from the Hymowitzes, about two houses up from the Ruzickas. He has lived there for almost two years. He once went to the Hymowitz residence last summer trying to learn who was parking in front of his house. While

speaking to Michele Hymowitz at the door, he observed several people sitting around tables. He could not discern if they were playing games. He has observed persons carrying board games into the Hymowitz residence, the last time being a few weeks ago.

Testimony of Gary Byron

Mr. Bryon, who lives next door to the Hymowitzes, testified on April 25, 2013 to being unconcerned about the nature of the events. He is concerned with the parking problem. He once counted 18 cars as part of an event. He has not observed as many events recently. At one time, the Hymowitzes had a game club sign on the door, but it is no longer there. On cross-examination, he stated the amount of parking has gone down.

RESPONDENTS' WITNESSES – DIRECT TESTIMONY AND EVIDENCE

Testimony of Eric Hass

Eric Hass testified on April 25, 2013 to being a GCOM officer. He described GCOM as a non-profit social club for board games. As the GCOM secretary, he keeps Board meeting minutes. Mr. Hass explained a person could become a GCOM board member by attending three events at any sanctioned GCOM event or location and completing a membership form. Individuals usually find out about a GCOM event from the GCOM website. No event at the Hymowitz residence has been listed on the GCOM website since December 12, 2012. Prior to that time, there were GCOM sanctioned events. Consequently, a person attending an event at the Hymowitz residence since December 12, 2012 could not count the attendance toward membership.

Referring to Respondent Exhibit 1, Mr. Hass explained it was a copy of minutes from the Games Club of Maryland Board of Directors December 19, 2012 meeting. The Club Operations Location Updates minutes states the "Elkridge location is closed; neighbor complained to Z&P; Zoning and Planning Board investigating." GCOM Board meetings are held at member's homes. Most GCOM host locations put out GCOM flags for events. There are about 600 GCOM members and about 200-300 members attend conventions.

On cross-examination, Mr. Hass testified that between 4-30 persons attend a regular GCOM event. The individual hosts control the number of attendees. Concerning the ways members are notified of events, Mr. Hass stated there is an email list. No GCOM email was sent about an event at the Hymowitz residence since it was removed as a host location.

Testimony of Rodney Bacigalupo

Rodney Bacigalupo testified on April 25, 2013 to being a GCOM Director-at-Large, the Librarian and the Euroquest convention director. As Director-at Large, he attends Board meetings. Board meetings have been held at the Hymowitz residence; the last being 2012. He stores the Library and as the Euroquest convention director, he organizes the event. He is a GCOM listed Host. The witness testified to attending social gatherings at the Hymowitz residence 2-3 times a month. He learned of the gatherings from the Hymowitzes themselves, not from the GCOM website or email list. He attending a March 17 St. Patrick's Day social gathering at the Hymowitzes, which he stated was not a GCOM event. The 20+ people in attendance were eating, talking, watching basketball, playing games, and using Wii. He has

never been charged a fee for these gatherings. Some of these events include Hymowitz family members, children, non-GCOM members, and some are for celebrations like birthdays.

On cross-examination, Mr. Bacigalupo again explained that he has GCOM events at his house. He notifies people by personal email and GCOM Yahoo Group emails. His invitations from the Hymowitzes do not come from the GCOM Yahoo Group emails. He also described the three types of membership. Associate members, the largest category, do not pay membership fees. Non-members are encouraged to attend GCOM events. It is up to the host to ask for donations to help pay for food and sometimes people bring food. Admission fees are only charged for large gaming events like the GCOM summer picnic and Euroquest events. No one may represent an event as a GCOM event without Board sanction. On re-direct, Mr. Bacigalupo stated there is a very big overlap between friends who get together at each other houses and GCOM membership.

Testimony of Ann Rudolph

Respondent witness Ann Rudolph testified on April 25, 2013 to being friends with the Hymowitzes and attending social gatherings at their house. She currently attends gatherings about once a month. Michelle Hymowitz emails her personally when she wants to have people over on a specific date. Sometimes Ms. Hymowitz sends a group email to the friends she invites. The activities include gossiping, gaming, watching sports, and hanging out. Food is served and there are 15-20 persons attending, including Michelle Hymowitz's family. There was a big birthday party. She felt concern when a neighbor across the street put out a garbage can to reserve a space and shouted at her when she parked behind it. She believes she is an

associate member because she has attended GCOM events, but is not paying dues. She usually attends Friday night gatherings because she can stay overnight instead of driving home to Pennsylvania.

Testimony of Michelle Hymowitz⁵

Michelle Hymowitz testified on June 27, 2013 to being a high school math teacher who likes to entertain family and friends in her home. Prior to receiving the December 12, 2012 notice of violation, she frequently entertained in home. Sometimes she advertised these activities on the GCOM website, to which she belongs. She did so because GCOM is a club promoting bringing people together and it would be a great way to meet people. When a person attended a GCOM-advertized and sponsored games event at her house, they could use it toward GCOM membership. GCOM requires persons to attend three GCOM-advertized and endorsed events to be eligible for membership.

She was aware of neighbor issues, particularly with one neighbor, Mr. Ruzicka, before December 12, 2012. He appeared to be upset about people parking in front of his house. He never complained about anything happening inside her house. A couple of times other neighbors came over. She is unaware of any parking restrictions on her street. In response to the parking issue, she has asked her guests to park on Adcock Street, where two houses with wide side lawns would not interfere with the resident parking.

⁵ The April 25, 2013 testimony of Eric and Michelle Hymowitz was not recorded, the recording system having been turned off, apparently, during a break. Because all appeals of Hearing Examiner code enforcement orders are on the record and require a transcript, a new hearing was set in on June 27, 2013 to take their testimony, as well as DPZ rebuttal testimony.

Upon receiving the notice of violation, she removed her residence as a GCOM host site (asking the webmaster to take it off the GCOM website), and has since invited people over through via non-GCOM emails and a different group email list.

She asked DPZ what she was allowed to do and testified that Inspector Frank informed her that any time she had people over to play games was a club meeting. She was not told how often or how many people she could have over without it being considered a meeting (club event). She also spoke to Inspection Supervisor LaRose, who told her she could occasionally have people over without it being a violation, but he would not define "occasionally." In response to the violation, the Hymowitzes sent DPZ a letter explaining what actions they had taken to comply with the alleged violation, including removing the location from the GCOM web page. DPZ did not respond to the letter.

Discussing further the means by which she electronically invited person to GCOM events when her home was a host location, she described using a GCOM group email account and her own personal distribution list. She now invites people over through their personal email accounts, through a Google group email account, which only she can access to update or change email information. Since receiving the notice of violation, she has not been holding events on a regular schedule, as she did when she held GCOM events. Such events included her birthday and her husband's, St. Patrick's Day, and other holiday events. Some of the people who attend are GCOM members. Ms. Hymowitz described the activities at these events as getting together to talk, hang out, watch sports games, and play Wii and European board games. She does not charge people to attend her gatherings and did not do so when she held

GCOM events. Illegal activities have ever taken place at her home. Ms. Hymowitz testified to being a GCOM board member, that no board meetings have ever been held at her residence since December 12, 2012. Instead, they are held at the home of another board member. The current gatherings are not insured by GCOM.

Ms. Hymowitz also related two occasions when neighbors placed flyers on her guest's cars, asking them not to park on the street. One neighbor got into a verbal spat with a guest about parking. It was not until Mr. Ruzicka moved in that any major complaints started. Once or twice, a neighbor would come over to ask guests not to park in front of their house.

On cross-examination by DPZ counsel, Ms. Hymowitz testified that her home had been listed as a GCOM site, which meant that people got together to play board games. Other GCOM events involve a summer picnic and a convention held at a hotel. At one GCOM site in Laurel, Rodney Bacigalupo's home, people watch sporting events on TV. Regarding her distribution list, she explained that someone at the Baltimore Science Fiction Society originally helped her set up a Yahoo group for her with addresses she supplies and she now controls the group list. Regarding her board position as GCOM vice-president, she testified also to having been an officer for several years.

Concerning the present events at her home, she testified on cross-examination to holding them on weekends, generally, and typically on Fridays nights, but also on Saturdays and Sundays. Sometimes these events start at noon or at 7:00 p.m. and end at 10:00 p.m. or later, with about 20 people. The people she invites do not change but those who attend do. Some of

the people who attended the GCOM events attend her personal gatherings. Some people bring a dip, or side dish or dessert. They may also bring games.

The Hearing Examiner questioned Ms. Hymowitz about GCOM membership. She explained that a person must attend three GCOM events and submit their attendance record to a host or a board member. The board does not meet to discuss potential associate members, but a board member or host may discuss membership with an interested person. No dues are required for associate membership. There is a process for terminating an associate membership, but it has yet to be used. Supporting members pay \$20.00 in annual dues, which entitles these members to vote on GCOM board members. The fee is used to operate the club and to fund an annual picnic and two conventions. No associate member has a voice in determining how the fees are spent. A patron member pays a \$100.00 in annual dues. There are no criteria for evaluating any potential members, no interview, and no background check. Persons who wish to end their membership may contact any GCOM board member to end club emails, other communications and to be removed from the website. With respect to the Hearing Examiner's questions about any real estate controlled by GCOM, Ms. Hymowitz testified that the club owns no real property and leases no facilities. They do rent rooms in hotels for the twice-yearly conventions. GCOM does not use Howard County community centers and she is unaware of GCOM using any church in Howard County for games club meetings. There is a games club meeting every Friday night in a Silver Spring restaurant.

The Hearing Examiner also queried Ms. Hymowitz about what she described as an altercation between a member and a neighbor. She explained the dispute was verbal. On one

occasion, Howard County Police came to her door and informed her that a neighbor across the street wanted her to know he had called the police about one of her guests intentionally knocking over one of his trashcans, which was in the street. They advised her to instruct guests not to park on the street in front of the neighbor's house. No ticket was issued.

Testimony of Eric Hymowitz

In reference to DPZ Exhibit 2, pages from the GCOM website, and specifically a page still listing his Elkridge residence as a GCOM location, Eric Hymowitz, the GCOM webmaster, testified to closing his residence as a host location through a centralized database update. He believed that he had to update the page later because the automatic update did not alter this page. That it continued to appear on the website until he made the change was simply a mistake. After December 12, 2012, there were no links to his residence as a GCOM site.

On cross-examination, Mr. Hymowitz was questioned about a flyer that lists his Elkridge residence as a GCOM website and is still available on the website. The flyer should have been updated, but it was not. It should not be on the flyer as of today (June 27, 2013).

The Hearing Examiner questioned Mr. Hymowitz about DPZ Exhibit 2, Page 39, the Games Club of Maryland flyer listing the Hymowitz as a GCOM site on October 2012. Mr. Hymowitz explained it was the flyer in issue, which should have been changed. If it hasn't, he will change it.

Recall Testimony of Michelle Hymowitz

On recall, Ms. Hymowitz testified the Games Club of Maryland flyer is distributed at events. She is charged with updating the flyer, which she did in December 2012. The Hymowitz

residence is no longer listed on the flyer.

DPZ Witness – Rebuttal Testimony of Inspector Frank

On rebuttal, Inspector Frank disagreed with Ms. Hymowitz's testimony about the number of times people could come to her house without it being considered a club. Inspector Frank stated she told Ms. Hymowitz DPZ would consider more than two such events a month to be a club.

She testified that by DPZ policy, any regular meeting with the same types of people activity and regularity would be considered a club. When asked if DPZ would consider a book club meeting more than twice a month to be a club, Inspector Frank said it would.

On cross-examination, Inspector Frank testified that if the same people came over with the same frequency and the same regularity and for the same activity, DPZ considers it a club. She does not consider people coming over on Sundays three times a month to watch football to be a club. When asked to explain difference between the Hymowitz events and people regularly watching football, the Inspector replied that people watching football are partaking in the same event. With the Hymowitz situation, everyone is doing his or her own thing. Some people are playing a board game in one room, others are playing another game in another room—it's not the same group of people doing the same event. If ten people came over to a house and some people were in one room watching basketball, other people in another room watching tennis and so on, it would be a club, in DPZ's interpretation. She met with her supervisor and the bureau chief and this is DPZ interpretation. When asked the rationale for this interpretation,

she said it would be considered a sporting club. What the Hymowitzes are doing is considered a private club because not everyone is partaking in the same game at the same time.

When asked if it is relevant that such activity be organized under any rubric, the Inspector said DPZ goes by the language of § 103.A: "Except as provided for in Section 101 herein, terms used in these regulations shall have the definition provided in any standard dictionary, unless specifically defined below or in any other provision of these regulations."

She read into the record three dictionary definitions of "club":

- 1) a group or association of people with common aims or interests (dictionary source not identifiable);
- 2) association of persons for some common object (the Free Dictionary);
- 3) an association or corporation which is organized and operated exclusively for educational, social, paternal, patriotic, political or athletic purposes and not for profit (merriam-webster.com).

Applying these definitions, she stated that DPZ considers a club to be a common activity of participants, the regular activity of meetings/parties or whatever they are calling it and the frequencies of parties. Thus, the activities at the Hymowitz residence, at the time the notices of violation were issued and afterward, are a club--the same people, the same activities, etc.

When asked if DPZ has a number cutoff, more than two a month or three a month, the Inspector stated this number is not in the Zoning Regulations, but is DPZ policy. When asked if DPZ would consider a recurring play date of 3-years old coming over 3-4 times a month, where some play outdoors in a play structure and some play indoors with a play kitchen and others watch TV, Inspector Frank replied she would meet with her supervisors and handle issues on a case-by case basis.

When asked by the Hearing Examiner for the source of the "twice-monthly" club meeting limitation policy came from, the Inspector replied it came from a December 2012 meeting with her supervisors Tony LaRose and Cindy Hamilton before the notice of violation was sent out. When asked how it was determined that meeting more than twice a month would constitute a private club, she stated she could not answer the question. The Hearing Examiner also asked her if there is any language in the Zoning Regulations relating to the accessory use of a dwelling for a private club meeting more than twice a month. The Inspector's response was that she is not aware of anything in the regulations regarding a permitted accessory use of a dwelling limited to a certain number per month.

On redirect, Inspector Frank stated the twice-monthly meeting limitation imposed on the Hymowitz's use of their residence was tailored to the code enforcement case. It was given to provide some guidance to Ms. Hymowitz. No two cases are alike. Her answer would change depending on the type of club in a code enforcement case.

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 Zoning Regulations, 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. DPZ's Interpretation of "Private Club"

THE GCOM website (DPZ Exhibit 2) identifies the organization as the "Game Club of Maryland." GCOM is a 501(c)(3) non-profit, tax-exempt organization under the Internal Revenue Service. It has a board of directors, by-laws, and different membership types. Regular GCOM activities are held in either a "Host Location" or "Limited Host Location," by a GCOM Supporting member or someone recommended by a GCOM supporting or patron member. Many of these locations are the homes of supporting or patron members. GCOM provides general liability insurance coverage to all official GCOM locations. The record indicates that on December 12, 2012, the Hymowitz residence was an official GCOM (limited) host location.

Upon reviewing the GCOM website, Inspector Frank decided the use was a "gaming club" and prohibited by the Zoning Regulations. She met with her Supervisor Tony La Rose to present the results of her investigation and discuss the activities at issue. Together they decided that GCOM was a private club because it was non-profit, membership dues based, and gives out treats and prizes during games. Supervisor LaRose applied a common definition of "club" to these activities: "a group of people who get together for a common interest or activity." He also determined the use was potentially approvable under the non-profit club conditional use category in § 136.N.6, which regulates "Non-Profit Clubs, Lodges, Community Halls and Camps," but that it could not meet the locational use standards.

Inspector Frank also testified to DPZ applying a dictionary definition of "club" pursuant to §103.A as part of the department's assessment of the activities at the Hymowitz residence.

"Except as provided for in Section 101 herein, terms used in these regulations shall have the definition provided in any standard dictionary, unless specifically defined below or in any other provision of these regulations." Per this definition, a "club" is an association or corporation which is organized and operated exclusively for educational, social, paternal, patriotic, political or athletic purposes and not for profit (merriam-webster.com).⁶ When DPZ issued the Hymowitzes notices of violation for a private gaming club, it did so, in part, by applying the common and dictionary definitions of club and considering it under the aegis of the "Non-Profit" club conditional use category in §136.N.6. DPZ argued in closing, through counsel, that the department's common definition of a "private club" is consistent with the common definition upheld in *United Cerebral Palsy Ass'n of Philadelphia and Vicinity v. Zoning Bd. of Adjustment*, 382 Pa. 671, 114 A.2d 331 (1955): "A 'club,' of which there are many different types, is, in substance, merely an organization or association of persons who meet or live together for the purpose of social intercourse or some other common object such as the pursuit of literature, science, politics or good fellowship."⁷ Counsel further argued "private club" is a well-defined, broadly used term in the federal tax code, in civil rights public accommodations law, in the county code's public accommodations provisions and in the state code's human rights provisions.

⁶ The Hearing Examiner does not consider the Inspector's first definition because the source was not provided or was unintelligible. The online Free Dictionary is not a standard dictionary, so the Hearing Examiner does not consider the second definition. A standard dictionary is one widely recognized or employed as a model of authority or excellence.

⁷ The Hearing Examiner does not consider the definition of club in the second case counsel cited, *Nelson v. Pierce*, 117 N.Y.S.2d 61 (1952), the term being statutorily defined. This code enforcement case is narrowly concerned with the interpretation of an undefined use.

Great weight is to be accorded to an agency's consistent and long-standing construction given 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)). No deference is due where the conclusions reached by that body are based on an erroneous interpretation or application of the zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute. See *Belvoir Farms Homeowners Assoc., Inc. v. North*, 355 Md. 259, 267-68, 734 A.2d 227, 232 (1999) (citing *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569, 709 A.2d 749, 753 (1998)). Only once before has DPZ interpreted "private club"--not in the context of a Zoning Regulation code enforcement action. We therefore review DPZ's interpretation that the activities at 6025 Augustine Avenue constitute an unlawful private club under the HCZR.

Pursuant to HCZR §103.A a term not defined in the Zoning Regulations is to be defined in accordance with any standard dictionary. This directive is a statutory rule of interpretation derived from common law doctrines or canons of interpretation intended to aid us in constructing the meaning of statutes. The application of a dictionary definition to a undefined term is one such canon, an extrinsic aid to interpreting statutory text premised on the assumption that legislatures use words in their ordinary sense when not legislatively defined. Applying this rule, DPZ consulted a standard dictionary for a definition of "club."

When viewing together DPZ's common and dictionary definitions, it appears that DPZ focused on the definition of the term "club" and not the phrase "private club." The canons

recognize that words "travel in packs."⁸ When one word in a phrase is more general, it will be limited and qualified by the special word. Respondents heeded this canon when they defined "private club" in their memorandum of law. "Private" ": intended for or restricted to the use of a particular person, group, or class <a *private park*>" <http://www.merriam-webster.com/dictionary/private>, definition (1)(a), and "club" ":an association of persons for some common object usually jointly supported and meeting periodically; *also* : a group identified by some common characteristic <nations in the nuclear *club*>. <http://www.merriam-webster.com/dictionary/club>, definition (3)(a).⁹ The Hearing Examiner therefore examines the phrase "private club" in its common and approved usage.

The oft-cited *Montgomery County v. Merlands Club, Inc.*, 202 Md. 279, 96 A.2d 261 (1953) concerned boards of appeal decisions to deny an application to use property for a private club, finding in part that the proposed use, while non-profit, was a private business venture and not a private club. On final appeal, the Maryland high court affirmed the circuit court's ruling that Merlands was indeed a private club, seeing nothing in the record "that would rationally permit a finding that the applicant was not a private club." It found:

The applicant [was] set up as a non-profit organization, exempt from federal income tax, had a charter, a constitution, and by-laws substantially identical with other well-known clubs in the area, such as the Chevy Chase Club, the Columbia Golf and Country Club, the Kenwood Golf and Country Club, the Edgemoor Club and the Prince Georges Golf and Country Club. It was to be managed by a board of trustees and its members were such trustees and such other persons as were to be elected to membership. Family memberships were to be limited to seven hundred fifty in number and single

⁸ Eiusdem generis.

⁹ Respondents' application of this phrase in the motion to dismiss is discussed in Part III.

memberships to five hundred. The initial initiation fee for family membership was \$150 and single membership was \$100. Dues have been set at \$150 a year for family membership and \$100 a year for single membership. Payment of the initiation fee and dues entitle members to all privileges and the use of all facilities of the club. There was to be a clubhouse, a swimming pool, tennis courts, outdoor fireplaces, horseshoe pitching areas, picnic and playgrounds, softball grounds, badminton greens, and shuffleboard equipment. Mr. Messall was to sell the property to a group who would then lease it for five years (with an absolute right to buy) to the corporation which was to conduct the club.

Merlands, 96 A.2d at 291.

In later years, the courts would apply these characteristics of a private club and others to establish the phrase's common, well-defined usage in the context of disputes over the private club status of a facility or organization for the purposes of enforcing the public accommodations requirements of Title II of the Civil Rights Act of 1964.¹⁰ As DPZ counsel alluded to in closing, the State of Maryland prohibits discrimination in places of public accommodation, and exempts private clubs. Md. Code Ann., State Government § 20-301 et seq. Howard County does likewise. Howard County Code, Sec. 12.210 et seq. Because Title II and its state and local counterparts, do not define "private club" (with limited exception), the courts are the arbiters of its meaning.

In *Nesmith v. Young Men's Christian Ass'n of Raleigh, NC*, 397 F.2d 96 (4th Cir., 1968), the Fourth Circuit in a case of first impression stressed the importance of examining a number factors of when determining whether an establishment is in fact a private club under Title II.

¹⁰ The Civil Rights Act prohibits "any place of public accommodation" from "discriminati[ng] or segregati[ng] on the ground of race, color, religion, or national origin." Title II exempts "a private club or other establishment not in fact open to the public" from the coverage of the statute. 42 U.S.C. Sec. 2000a(e).

The factors leading the court to conclude that a particular YMCA's health and athletic facilities were not genuinely private included membership selectivity (limited or open-ended), membership meetings, organizational size and funding, and the use of public facilities. The court also relied on the absence of limitation on membership size, no prescribed or regularly used qualifications for membership, no particular rules or regulations governing the membership committee's activities and no membership meetings.

In *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 797 (E.D. Pa. 1989), *affd*, 894 F.2d 83 (3d Cir. 1990), the Third Circuit reviewed the by then considerable case law on Title II private club exemption disputes to derive eight relevant factors applied to its analysis of swim club seeking Title II exemption unsuccessfully.

1. The genuine selectivity of the group in the admission of its members
2. The membership's control over the operations of the establishment
3. The history of the organization
4. The use of the facilities by nonmembers
5. The purpose of the club's existence
6. Whether the club advertises for members
7. Whether the club is profit or non-profit
8. The formalities observed by the club, e.g., bylaws, meetings, membership cards

The court concluded Lansdowne had not met its burden to establish itself as a private club. Weighing in favor of the club was its nonprofit status; indirect shareholder member control of the club through their election of the Board of Directors and their ownership of shares; a purpose statement in club incorporation papers (to maintain a private club for civic and social enjoyments of a moral, educational and legal nature) and an absence of facility advertising. Weighing against the club was the absence of membership selectivity and

nonmembers use of the facility in a number of ways. These last two factors the court found was convincing evidence that the facility was not a private club, the countervailing factors notwithstanding.

Although the courts in Title II cases have modified the "Lansdowne factors" for specific cases, they continue to apply them when adjudicating whether a club is distinctly private in the context of public accommodation statutes lacking a statutory definition of "private club." See *Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 825 A.2d 480 (2003). While not exhaustive, and absent clear evidence that DPZ applied a common or dictionary definition of "private club" to the dispute in this case and not just the component term "club," the Lansdowne factors are a valuable guide in evaluating whether DPZ's determination that GCOM's organizational structure and the use of the Hymowitzes' home is a private club, in accordance with the common and established use of the phrase.

1. Genuine selectivity of membership, including membership size. Membership in GCOM is unquestionably unselective, there being no defined membership admission procedures, other than a potential associate member demonstrating attendance at three GCOM sanctioned, advertized events and submitting their attendance record to a host or GCOM member. There are no associate member dues. To become a supporting member, a person pays \$20.00 in annual dues. Patron members pay \$100.00 in annual dues. GCOM has no criteria for evaluating potential members, there is no membership interview process and no background check by which GCOM's members can gauge whether the person's interest in

GCOM and GCOM's organizational interests are harmonious. That there are about 600 GCOM members only reinforces the non-selective quality of the membership.

2. Membership control over the operations of the organization/establishment. With respect to GCOM, the GCOM by-laws, Article VII., addresses four types of meetings.

- 1) Board Member meetings. Only board members vote. Supporting and Patron members may attend, but the board may allow others to attend.
- 2) General meetings where Supporting and Patron members may vote, all members may attend and the board may allow others to attend.
- 3) Committee meetings. Only committee members may vote. Others may attend if allowed.
- 4) Election meetings. All Supporting, Patron and Honorary members may attend.

(DPZ Exhibit 2, HE page 7.) At the December 19, 2012 Board meeting, the Board discussed club operations, including a location update about the closing of the Elkridge location (the Hymowitz residence). Only one supporting member attended. Respondent Exhibit 1.

Under the "Use of gaming resources" GCOM webpage (DPZ Exhibit 2, HE p. 13) is the statement that GCOM owns various organizational and event resources, which members may borrow for official GCOM events or GCOM-sponsored events. These include a canopy, two card tables, electrical cords, paper flyers, folders, envelopes and other stationary, logo banners, sign holders, cash box, cooler and plastic utensils. It would also appear the GCOM has a game library, which Mr. Bacigalupo maintains, apparently at his residence, a GCOM Host location. It appears from the extensive photographs introduced into evidence (DPZ Exhibit 8) that many persons attending the disputed activities at the Hymowitz residence bring their own board games. GCOM provides active GCOM members with GCOM game box labels for labeling personal game collections (DPZ Exhibit 2, HE p.12).

With respect to the Hymowitz residence as a GCOM Host location, DPZ Exhibit 2, HE pgs. 18-21 describes seven requirements for becoming a host location. Per the first requirement, an interested Host must be a GCOM supporting member or have been recommended by a GCOM supporting or patron member. Once GCOM has received the requisite location information, the GCOM website will be updated.

As the Hearing Examiner weighs this factor, neither the membership nor the organization itself appears to exert any significant control over GCOM. This is consistent with GCOM's self-identification of itself as a "group of gaming enthusiasts that provides many services to the gaming community and the general public." DPZ Exhibit 2, HE p. 9. As set forth in Article II of the GCOM bylaws, the club's purpose is:

1. To have fun, learn, share, grow, and play.
2. To provide open gaming environments for the general public throughout the State of Maryland and beyond.
3. To provide services for and to promote the playing of games of all kinds, including but not limited to the following: board games, card games, role-playing games, and miniatures games.
4. To promote the games hobby by providing a communication network for gaming enthusiasts, sponsoring and supporting events, and raising public awareness of the hobby.

(DPZ Exhibit 2, HE p. 9)

3. The history of the organization. The purpose statement addressed in Factor 2 indicates the organization's intention to be an open forum for the games hobby for both members and the public.

4. Use of organization facilities by non-members. Non-members are encouraged to attend GCOM events. The GCOM FAQ page states "GCOM is open to the General Public.

Membership is not required to pay at a gaming session at a regular GCOM location. Ms. Hymowitz joined GCOM because it promotes bringing people together and it would be a great way to meet people.

There are some attendance restrictions for "Limited" locations, such as the Hymowitz residence when it was a GCOM host location. Based on the information in DPZ Exhibit 2, HE p. 18), a Host location appears to have "Limited" status to ensure some level of control over attendees. Nonetheless, the evidence indicates that among the attendees are games enthusiasts, friends and family members.

5. The purpose for the club's existence. The purpose statement addressed in Factor 2 indicates the organization's intention to be an open forum for the games hobby for both members and the public.

6. Club advertising practices. Individuals usually find out about a GCOM event from the GCOM website. Undeniably, DPZ's reliance on the organization website when issuing the notices of violation and civil citations is indicative of GCOM's public presence. The website itself is a form of self-advertisement, available to anyone who accesses the site. GCOM distributes flyers at events and non-GCOM conventions. Importantly, until closed as a Host location, the Hymowitz residence was advertised as such. The organization distributes flyers to attract board gamers.

7. Does the club maintain nonprofit status? GCOM is a 501(c)(7) non-profit, tax-exempt organization with the Internal Revenue Service. When the Hymowitz residence was a Limited

GCOM location, attendees sometimes made a donation to help defray the costs of snacks and beverages.

8. Club formalities. DPZ Exhibit 2, pages from the GCOM websites, is evidence that the club has bylaws and a formal expulsion procedure. Membership cards are available, but the record is silent as to their use or value to the club as a private entity. The by-laws call for a General Meeting, where all members may attend, but only Supporting and Patron members may vote. The by-laws establish membership fees, where applicable. These are not especially substantial.

9. Use of Common electronic address lists (email addresses and group emails)

Lastly, the Hearing Examiner considers DPZ's reliance on common email lists or groups as a determinative factor in the private club status of both GCOM and the disputed activities at the Hymowitz. Assuming arguendo that, subsequent to receiving the notice of violation or the civil citation, Ms. Hymowitz has used the same group email lists to invite people to her home for a "gathering," the Hearing Examiner believes this factor does not weigh in favor of the gathering as an impermissible club event. Email lists are fluid things. It is common practice, in the Hearing Examiner's view, to import, export, copy or incorporate email addresses from a variety of sources depending upon the need.

Weighing all these factors and evaluating DPZ's interpretation of private club, the Hearing Examiner concludes DPZ's interpretation is unreasonable. GCOM is not a private club. Membership is unselective and widely available and the relatively low cost of membership dues are not a bar to becoming a member. GCOM activities are open to the public, including, to a

lesser extent, the Hymowitz residence when it was a Limited Host location. DPZ has not met its burden of proof that GCOM or the now closed Hymowitz Host location is a private club use prohibited in the R-12 zoning district.

II. A Necessary Consideration of the Disputed Activities as an Accessory Use

The sole HCZR reference to "private club" appears in the §103.A.21 definition of the "Charitable or Philanthropic Institutions: Offices and Educational Program," a conditional use category under §131.N.12.

Charitable or Philanthropic Institution: A private, nonprofit organization whose primary function is to provide health, social, environmental conservation, religious or benevolent services. This term does not include any commercial operation, or any organization whose purpose is to operate a trade or business or to promote the economic advancement of its members, such as a professional or trade association or a labor union. In addition, this term does not include any use defined or listed in these regulations, such as a child day care center, day treatment or care facility, residential care facility, nursing home, *private club or lodge*, private school, retreat center, museum or hospital. (Emphasis added.)

As we know, the HCZR do not define "private club. Neither is "private club" listed in the regulations. Applying the common and dictionary definitions of "club," DPZ reviewed the regulations and determined the "club" has the characteristics of a nonprofit club. The Nonprofit Clubs use is one of four in §131.N.36, a conditional use category regulating Nonprofit Clubs, Lodges, Community Halls and Camps, and authorizing a conditional use for "non-profit clubs, including health or athletic clubs, and similar organizations."

These uses have a common land use/zoning context. They are all assembly uses. The HCZR does not differentiate assembly uses from non-assembly other uses directly, with limited

exception.¹¹ In the Hearing Examiner's view, treating the activities at issue under the umbrella of "assembly use" fits with the group of uses potentially allowed under §131.N.36 and is a reasonable approach for evaluating the core issue in this code enforcement action.

Because the regulations do not define "assembly," we initially consult a standard dictionary: "[a] company of persons gathered for deliberation and legislation, worship, or entertainment. <http://www.merriam-webster.com/dictionary/assembly>, or as "[t]he concourse or meeting together of a considerable number of persons at the same place. Black's Law Dictionary, <http://thelawdictionary.org/assembly>.

Applying this definition to the §131.N.36 uses, an essential characteristic of a nonprofit assembly like a club, lodge, community hall, health or athletic club and similar organizations is assemblage, persons gathering together for organizational meetings, events, and activities in furtherance of the organization's purpose. Owing to the potential adverse impact of such assemblages on communities, Howard County has determined that Nonprofit Clubs, Lodges, Community Halls and Camps, health or athletic clubs, and similar organizational assemblies are permitted only by conditional use in the R-12 and other residential districts. Although the Hearing Authority has decided few conditional use applications under §131.N.36, the granting of a Masons lodge conditional use application in Board of Appeals Case No. 11-035C (decided March 12, 2012), offers a good overview of a nonprofit lodge assembly use. As approved, the

¹¹ The exceptions include §133, which sets off-street parking and loading facilities standards for regulated uses, and imposes parking standards for several types of assembly uses. Section 131.N.15.1, the Guest House Conditional Use category expressly states "[a]ccessory limited outdoor social assembly uses are not permitted."

conditional use site is the lodge's permanent headquarters. Several different types of meetings will be held there. Light meals made from food brought in by members will be reheated and served during these meetings. The lodge facility itself includes the main meeting room, a library, a reheating kitchen, storage and record-keeping rooms. There would be an occasional outdoor barbeque. The lodge would likely rent space to other lodges. The facility may be used for multiple purposes at the same time. This is the approved principal use of the nonprofit lodge.

The disputed activities at the Hymowitz residence are alleged to be in violation of HCSR 109.B&C and 101.O. Neither DPZ nor Respondents briefed the activities at issue as a principal or accessory use to any extent, if at all, hence the Hearing Examiner's independent analysis here. The conditional uses potentially approvable under §131.N.36 are for a principal use of a site, the primary use. The principal use of the Hymowitz property is residential, per §109.B.

Section 109.C authorizes the accessory use of a principal, residential use in the R-12 district if the accessory use as a listed permitted use or a use normally and customarily incidental to the residential use. Having closely reviewed the record of the case, the Hearing Examiner finds that the activities at issue are an accessory assembly use. The nature of the use has varied. Some assemblies were GCOM-sanctioned assemblies, where GCOM members and non-members played a variety of board games. GCOM board meetings were once held at the Hymowitz residence. One of the assemblies was a birthday party, which a neighbor believed had the same impact as a GCOM assembly. Other assemblies included gatherings personally organized by Ms. Hymowitz where people played board games, watched sports on TV, played

Wii, ate and chatted. Sometimes these assemblies lasted several hours, sometimes a whole day, and once, for four days. These assemblies were held 3-7 times a month, sometime more, according to a neighbor.

The notices of violation instruct Respondents to abate the disputed activities and bring the property into compliance within 30 days by ceasing the use of the property for a private gaming club and providing DPZ with the club's new location and a copy of the lease. At some juncture, DPZ verbally informed the Hymowitzes of an alternative manner complying with the applicable provisions of the HCZR, limiting the frequency of the disputed activities, although Ms. Hymowitz recalls being told that any occasion on which she had people over to play games was a club meeting. Inspector Frank testified that DPZ would consider the contested activities to be a club if the Hymowitz held them more than two a month. DPZ developed this "twice-monthly" club meeting policy during a meeting attended by the inspector and supervisors Tony LaRose and Cindy Hamilton and convened before issuing the notice of violation, apparently. The Inspector could not explain why meeting more than twice a month would constitute a private club, only that the limitation was tailored to the code enforcement case to provide some guidance to Ms. Hymowitz. On the general matter, Supervisor LaRose testified to there being a difference between the irregularity of "friendly" games (like Bunko) versus games played at a private club.

The Hearing Examiner observes here initially that neither the notices of violation nor the civil citations inform Respondents they could abate the violation by conforming to a twice-monthly "meeting" schedule. To deter arbitrary or discriminatory enforcement, administrative

due process requires code enforcement notices of violation to instruct alleged violators of the actions they must take to bring the property into compliance with applicable codes, ordinances, and regulations. DPZ's failure to amend the notices of violation or to issue a second notice informing Respondents of this alternative compliance method is itself grounds for dismissing the citations.¹²

Turning directly to the general issue of DPZ's imposition of a frequency or numerical limitation on what DPZ considered to be impermissible activities, the Hearing Examiner notes DPZ did not directly apply the accessory use language of §109.C, apparently in setting twice-monthly "meeting" limitation, based on the testimony of record. Doing so here, the Hearing Examiner understands the "frequency" limitation as a DPZ policy decision deeming the restriction to be a normal and customary incidental accessory use to the principal, residential use of the Hymowitz property. To DPZ detriment, the record is devoid of any rational basis for DPZ's judgment that twice-monthly meetings are normal and customary but three or more are not, thus Respondents' counsel reasonable question to the Inspector as to whether a recurring play date for three-year olds would be a reasonable club use. The testimony indicates only that

¹² The Hearing Examiner distinguishes this conclusion from that in Code Enforcement Case CE10-051(a). In that case, DPZ applied new policy limiting the area of accessory structures to 600 sq. ft. The Order required Respondent to reduce the accessory structure area to 600 sq. ft. She explained at the compliance hearing that the area limitation was to provide some level of certainty that the accessory use/structure would remain subordinate and secondary to the alleged primary, residential use and was not an application of DPZ's new policy. In July 2012, the Council adopted new comprehensive zoning, including text amendments limiting accessory structure use to specific square footage and use areas.

the Inspector or DPZ would evaluate of the permissible frequency of a club related code enforcement action on a case-by-case basis.

The Hearing Examiner is equally discomforted with DPZ's policy assessment that any regular meeting with the same types of people and activity would be considered a club, even, when asked, a book club meeting more than twice monthly. This same discomforts extends to any policy that would impose an attendee cap restriction or a limitation of the variety of activities permitted, absent an explicit, supportable rational basis.

Conclusion

The preponderance of evidence warrants the conclusion that the DPZ's exercise of its discretionary authority to bring this enforcement action based on an unsupportable policy decision that an assembly use convening more than twice a month is a "club" or even "private club", as applied to the facts of this case, is arbitrary and capricious, being the imposition of use regulations by policy implementation—not by legislative standard—and with no discernible guidance or broad examination of what is a customary accessory assembly use in relation to a principal residential use. The potential impact of such individualized assessments of is a real concern, as it could lead to discriminatory enforcement.

III. Respondents' Memorandum of Law

Respondents submitted an untimely Motion to Dismiss, which the Hearing Examiner

accepted during the hearing as a memorandum of law, absent objection from DPZ.¹³ The memorandum contends Respondents' above referenced standard dictionary definition of "private club" is so broad as to make it impossible to discern what DPZ is actually referring to, with the result that it unfairly gives DPZ officials overbroad determination (described as an internal, inherently discretionary standard on what constitutes a private club) about how many people, which types of people, and for what purpose a group of people may congregate in a private home.

The memorandum's legal argument frames the enforcement action as a violation of fundamental Constitutional rights of free speech and association and cites to case law involving facial challenges to zoning regulations. The Hearing Examiner explained at the hearing that the code enforcement action concerns not a facial challenge, but an as-applied challenge.¹⁴ In an as-applied challenge, a constitutional challenge to a statute, or as here, to a new interpretation of a zoning ordinance raising constitutional concerns, is intertwined with the need to consider evidence and render findings. *Eanes v. State*, 318 Md. 436, 569 A.2d 604, 623 (1989)(internal citations omitted). Such constitutional concerns are initially resolved in the administrative

¹³ The Hearing Examiner acknowledged that her policy of expediting code enforcement hearings limits the window for drafting and submitting a timely motion. Hearings are now scheduled to accommodate the preparation of motions for timely filing.

¹⁴ A facial challenge to a zoning ordinance provision contests the provision's lawfulness. In *Pack Shack, Inc. v. Howard County*, 377 Md. 55, 832 A.2d 170 (2003), cited in the memorandum, the court overturned a Howard County zoning regulation placing restrictions on the location and operation of adult businesses because several phrases gave county officials considerable room in determining whether applicants met necessary licensing requirements. The court found that the officials could impose their own interpretation on the applicable requirements, producing results incongruous with the legislature and violative of constitutional freedoms. An as applied challenge depends on the development of a factual record. The Hearing Authority has no jurisdiction to "declare" any part of a zoning ordinance unconstitutional. See *Eanes v. State*, 318 Md. 436, 569 A.2d 604 (1989).

proceeding, which was done here. Having determined error of interpretation by DPZ, the Hearing Examiner shares Respondents' constitutional free speech and association concerns.¹⁵

IV. Neighbor Concerns

The Hymowitzes' neighbors are displeased with the parking problems associated with gatherings at the Hymowitz residence and to a lesser extent, perhaps, the frequency of these gatherings. The Hearing Examiner acknowledges their concerns. This decision makes no determination that the Hymowitzes accessory use of their residence somehow trumps neighbors' interest in "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."¹⁶

¹⁵ The Hearing Examiner's informal Google search of "Howard County club" and "Howard County private club" produced a varied list of clubs comporting with DPZ's interpretation of private club and meeting with some frequency in private residences, or in districts where it could be reasonably argued the use would not be considered a customary and incidental accessory use. These include political clubs, amateur hobby clubs, citizens service clubs, associations, pet clubs, and flower or horticultural clubs. The Hearing Examiner presumes club and other meetings in county Starbucks facilities are, in the 21st century, a customary and incidental accessory use of the principal use.

¹⁶ The quote is from *Village of Belle Terre et al. v. Boraas et al.* 416 U.S. 1 (1974), where the U.S. Supreme Court upheld a zoning ordinance definition of "family" as one or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit [or a] number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit. It concluded the law abrogated no fundamental, when keeping quietness of a community is a legitimate interest asserted in the ordinance.

ORDER

It is therefore this 2nd day of August 2013, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the March 18, 2013, Code Enforcement civil citation CE-12-139(a), issued to Michelle Lynn Hymowitz, and the March 18, 2013, Code Enforcement civil citation CE-12-139(b), issued to Eric Brian Hymowitz are **DISMISSED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaivre

NOTICE TO RESPONDENTS: The 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.