



# City of Apache Junction

## Development Services Department




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### BOARD OF ADJUSTMENT AND APPEALS PUBLIC HEARING STAFF MEMORANDUM Case BA-1-18

**DATE:** May 13, 2019

**TO:** Board of Adjustment and Appeals

**FROM:** Lawrence J. Kirch, AICP, Development Services Director 

**SUBJECT:** Case BA-1-18, an appeal of the Zoning administrator's decision by Mehmood Mohiuddin (property owner), represented by Aaron Ludwig of Ludwig Law Offices Ltd., appealing notices of violation dated October 31, 2018 (Code Case #COD2018-00723) and November 7, 2018 (Code Case #COD2018-00751).

#### Public Notification

The Notice of Public Hearing of the Apache Junction Board of Adjustment was published in the Mesa Republic Community Classified section on Saturday, January 26, 2019. The applicant posted a public hearing notification sign on the property (2341 N Apache Trail, Apache Junction, AZ, 85119, parcel number 100-25-043C) on January 28, 2019 and submitted an affidavit and photograph as Exhibit F of the application for appeals. The initial date of the public hearing was February 11, 2019 but at the request of the applicant, the public hearing was continued to May 13, 2019.

#### Appeal Request

Attached as **Exhibit 1**, is a copy of the appellant's application for appeal of zoning administrator's decision. The appellant is appealing the two code cases specified above (**see Exhibit 2**) and is seeking a determination from the Board of Adjustment and Appeals as to whether the zoning administrator properly interpreted the zoning code with respect to Section 1-16-13 Development Agreements, Section 1-16-16 Violations, Penalties and Enforcement, Section 1-2 Types of Uses, Section 1-5-3 Non-Residential Use Regulations, and Section 1-7 Parking, Loading, and Circulation Regulations.

There are three (3) questions applicants are required to answer as follows:

1. **Provide the Zoning Ordinance Section Number(s) which you believe have been incorrectly interpreted by the Zoning administrator:**

Applicant Response: "1-16-13 (Development Agreements), 1-16-16 (Violations, Penalties and Enforcement), 1-2 (Types of Uses), 1-5-3 (Non-Residential Use Regulations), 1-7 (Parking, Loading, and Circulation Regulations)"

2. **Describe existing and proposed use of the subject property (if applicable):**

Applicant Response: "Existing use = Full Service Restaurant and Drinking Place (NAICS Code 72) with adequate off-street, on-site parking Proposed Use = same/no change."

3. **Describe your interpretation of the Section Number(s) listed above and provide any other reasoning to support your appeal of the Zoning administrator's decision:**

Applicant Response: "Appellant's use of the parcel (Pinal County APN100-25-043C) as a Full Service Restaurant/Drinking Place with adequate off-street, on-site parking are uses permitted both by right and by the Economic Development Agreement, its amendments, and site plans." "The Zoning administrator's decisions in these cases are arbitrary/capricious as they're based on 1) The City Attorney's arbitrary/capricious decision re: Appellant's use of the parcel and 2) and illegal CUP."

### **Staff Summary**

The appellant is seeking the Board's determination as to whether the interpretation of the zoning administrator of the above noted provisions as they may apply to the property owner was in error. The two code violations cases are violations of the economic development agreement with regard to use of the vacant land to the east of the Hitching Post/Dash-In and bull riding arena. The use of this land area for parking (or any use) is a violation of the *Third Amendment to the Economic Development Agreement Between the City of Apache Junction and Mehmood Mohiuddin* (hereinafter referred to as "EDA") because that area is not depicted on the site plan that was made part of the EDA. Consequently, a violation of the EDA which was prepared pursuant to Section 1-16-13 of the Zoning Code, is a misdemeanor zoning code violation.

The following Sections of Apache Junction City Code, Volume II, Land Development Code, Chapter 1, Zoning Ordinance, are referenced in the appeal application in Question 3 by the applicant. Staff provides the text from the zoning code in **Exhibit 3** and an analysis of the particular section.

**Appellant Code Citation #1: Section 1-16-13 Development Agreements**

Staff Analysis: The applicant states in its appeal "Appellant's use of the parcel (Pinal County APN100-25-043C) as a Full Service Restaurant/Drinking Place with adequate off-street, on-site parking are uses permitted both by right and by the Economic Development Agreement, its amendments, and site plans." The city entered into an EDA with Mr. Mehmood Mohiuddin on February 19, 2009 which was amended on May 8, 2009 (First Amendment) and was further amended on October 7, 2013 (Second Amendment) and again on June 17, 2014 (Third Amendment) (see attached **Exhibit 4**, the EDA and all of the amendments including the amended site plan for the third amendment).

Section 1-16-13 (A) of the city's adopted zoning code states:

"The purpose of the agreement is to specify the standards and conditions that will govern development of the property."

The EDA in Section (3) (B) titled Compliance with Site Plan obligated the developer in the following manner: "shall build the Project and improve the Property in accordance with the Site Plan set forth in Exhibit B." The first amendment did not amend the site plan, however the second amendment included an amendment to the site plan to allow for the bull riding arena. In the third amended EDA, Exhibit B was amended and Section A was added to read: "The Site Plan originally attached to the Second Amendment, is replaced with a new Site Plan and supporting documentation, as set forth in Exhibit A (incorporated by reference and attached hereto)." The obligation in Section (3) (B) to comply with the site plan remained an obligation of the developer.

"Appellant's use of the parcel (Pinal County APN100-25-043C) as a Full Service Restaurant/Drinking Place with adequate off-street, on-site parking are uses permitted both by right **and by the Economic Development Agreement, its amendments, and site plans."**

The EDA clearly obligates the developer to follow the site plan. Using any property related to the Hitching Post/Dash-In not depicted on the EDA's amended site plan is plainly a criminal violation of the *Third Amendment to the Economic Development Agreement Between the City of Apache Junction and Mehmood Mohiuddin*.

The applicant did not provide any evidence or substantiation of how the Zoning administrator misinterpreted Section 1-16-13.

**Appellant Code Citation #2: Section 1-16-16 Violations, Penalties and Enforcement,**

Staff Analysis: The applicant did not articulate what it was appealing pursuant to Section 1-16-16 or provide support for their case related to this code section. Section, 1-16-16 (A) specifies that if a property is used contrary to the zoning code, it is a violation of the code. This supports the zoning administrator's position that a violation exists through non-adherence to the economic development agreement.

The applicant did not provide any evidence or substantiation of how the Zoning administrator misinterpreted Section 1-16-16.

**Appellant Code Citation #3: Section 1-2 Types of Uses**

Staff Analysis: There is no Section 1-2 in the zoning code with this title (refer back to **Exhibit 1**, applicant's application). Since the applicant did not properly cite the appropriate code section, this portion of the appeal should be considered defective. The applicant does not state what their grounds for appeal is for this nonexistent section. The applicant does state that it believes that parking adjacent to the Hitching Post/Dash-In is a permitted use by right. However, the applicant does not substantiate this in their application. Staff is not able to read into the applicant's reasoning for this inaccurate code reference.

The applicant did not provide any evidence or substantiation of how the Zoning administrator misinterpreted the nonexistent "Section 1-2."

**Appellant Code Citation #4: Section 1-5-3 Non-Residential Use Regulations**

Staff Analysis: The applicant did not articulate what it was appealing pursuant to Section 1-5-3 or provide support for their case related to this code section. The applicant does state that it believes that parking adjacent to the Hitching Post/Dash-Inn is a permitted use by right. However, as can be seen in **Exhibit 3** in the pertinent excerpt from Table 5-3 of the zoning code relating to parking in the B-1 zoning district, parking is not a permitted use by right, but rather the table references Article 1-7 which is the parking and loading regulations.

The applicant did not provide any evidence or substantiation of how the Zoning administrator misinterpreted Section 1-5-3.

**Appellant Code Citation #5: Section 1-7 Parking, Loading, and Circulation Regulations**

Staff Analysis: There is no Section 1-7 in the zoning code with this title (refer back to **Exhibit 1**, applicant's application). Since the applicant did not properly cite the appropriate code section, this portion of the appeal should be considered defective. The applicant does not state what their grounds for appeal is for this nonexistent section. If one were to assume that the applicant meant Article 1-7, Parking, Loading, and Circulation Regulations, the applicant still did not provide any evidence or substantiation of how the Zoning administrator misinterpreted this Article or any of its sections.

**Planning Division Summary**

Per Article 1-16: Administration, Section 1-16-1 (B), the zoning administrator is charged with the responsibility for interpreting and administering the Zoning Code. The zoning administrator routinely determines whether a particular land use is allowable in a zoning district. A use can be either a permitted use, a conditional use, a use needing an administrative use permit or prohibited entirely. In making those determinations, it is necessary to apply the entire code not just one particular section.

The zoning administrator determined that a violation of the *Third Amendment to the Economic Development Agreement Between the City of Apache Junction and Mehmood Mohiuddin* occurred when lands not depicted on the site plan that was made a part of the third amendment were used for parking. The EDA calls for the developer to be obligated to follow the site plan. Using property related to the Hitching Post/Dash-In, but not depicted on the EDA's amended site plan, is plainly a violation of the agreement. A violation of the agreement, which was prepared pursuant to Section 1-16-13 of the zoning code, constitutes a zoning violation.

The following summarizes the staff findings:

- 1) The applicant and its Attorney did not provide their required interpretation of the five (5) zoning code sections they cited as directed on the application form for Question 3: **"Describe your interpretation of the Section Number(s) listed above and provide any other reasoning to support your appeal of the Zoning administrator's decision:"** The purpose of Question 3 is to allow the applicant to spell out how their interpretation is the correct interpretation as opposed to the zoning administrator's interpretation. The applicant provided a general statement that they are not in violation of the EDA and that they are either in compliance with the agreement and site plan or in the alternative, that parking is a permitted use by right. The applicant has not made their case for either of these statements.

- 1) The city entered into an EDA which has been routinely violated by the applicant. The applicant was previously notified that parking on the adjacent area east of the Hitching Post/Dash-In was a violation of the 3<sup>rd</sup> amended EDA (**Exhibit 5**). The applicant signed a compliance agreement acknowledging the violation and the city and applicant attempted to remedy the violation with a Conditional Use Permit (see the Compliance Agreement attached **Exhibit 6**). This previous Notice of Violation was not contested by the applicant.
- 2) Section 1-5-3, Table 5-3, which regulates principal uses on business zoned property, does not list parking as a "permitted use by right" in the B-1 Zoning District.
- 3) City staff, has not been arbitrary or capricious. See the attached 17 page chronology of the Hitching Post/Dash-In evolution (**Exhibit 7**). Attached **Exhibit 8**, provides a memorandum from 2014 which articulates that the applicant has routinely been violating city codes and the EDA since 2009.
- 4) The neighboring property owners have submitted evidence that they would like entered into the record regarding this property (see **Exhibit 9**).

The Board is respectfully reminded that they must cite findings of fact to support their decision of approval or denial. Please note that a decision of *denial* of the appeal request means that the Board supports the Zoning administrator's determination; a decision of *approval* of the appeal request means that the Board agrees with the applicant and thereby determining that Zoning administrator erred:

If the Board desires to approve the applicant's request, they should do so with pertinent conditions.

#### **RECOMMENDED MOTION**

Pursuant to AJCC Vol II, Section 1-16-4 (C)(1), I move that case BA-1-18, an appeal to the Board of Adjustment and Appeals, by Mehmood Mohiuddin (property owner), represented by Aaron Ludwig of Ludwig Law Offices Ltd., appealing notices of violation dated October 31, 2018 (Code Case #COD2018-00723) and November 7, 2018 (Code Case #COD2018-00751, an appeal of the Zoning administrator's decision that parking is allowable by the *Third Amendment to the Economic Development Agreement Between the City of Apache Junction and Mehmood Mohiuddin*, be denied, with the following findings of fact:

Findings of Fact:

1. The applicant has not presented evidence nor met the burden of proof to demonstrate that the zoning administrator erred in his interpretation of the zoning code.
2. The zoning administrator was not in error when he determined that a violation of the *Third Amendment to the Economic Development Agreement Between the City of Apache Junction and Mehmood Mohiuddin* occurred when lands not depicted on the site plan which is part of the agreement were used for parking.
3. A violation of the economic development agreement prepared pursuant to Section 1-16-13 of the zoning code does constitute a zoning violation.
4. The appeal application was defective in two specific areas, citing nonexistent zoning code sections.
5. The applicant did not present its own interpretations of the five sections and why their interpretations are correct and the zoning administrator's interpretation is in error.
6. Table 5-3 specifies that parking is not a permitted use by right.
7. The parking on the lots east of the bull riding area was not an allowed use at the time the 3<sup>rd</sup> Amendment to the EDA was executed.
8. (other findings determined by the Board?)

Conditions of Approval (only if appeal is APPROVED):

1. \_\_\_\_\_
2. \_\_\_\_\_

[Any person aggrieved by any decision of the Board of Adjustment and Appeals may at any time within thirty days of said decision file a complaint for special action in Superior Court to review any Board decision pursuant to ARS § 9-462.06.]

Attachments:

Exhibit #1 - Appellants Application For Appeal Of Zoning Administrator's Decision dated 12/3/17

Exhibit #2 - Notices of Violation dated October 31, 2018 (Code Case #COD2018-00723) and November 7, 2018 (Code Case #COD2018-00751)

Exhibit #3 - Excerpts from the city zoning code referenced by applicant

Exhibit #4 - Economic Development Agreement Between the City of Apache Junction and Mehmood Mohiuddin and amendments)

Exhibit #5 - Noncompliance of Dev Agreement (Nov 17, 2016, Nov 28, 2016 and Notice of Violation dated October 5, 2017

Exhibit #6 - Compliance Agreement dated November 27, 2017

Exhibit #7 - Hitching Post/Dash-In chronology

Exhibit #8 - Memorandum from 2014 on Development Agreement Compliance and 2015 memorandums

Exhibit #9 - Neighboring Property owners letter regarding appeal