

TOWN OF CARY
ZONING BOARD OF ADJUSTMENT QUASI-JUDICIAL HEARING
May 1, 2017

APPEAL WORKSHEET

IN THE MATTER OF:

CASE NO. 16-AA-02

TOWN OF CARY

STATE OF NORTH CAROLINA

APPLICANT NAME:

Jihad "Jay" Libbus, President, on behalf of Libbus Enterprises Corporation

ADDRESS OF SUBJECT PROPERTY:

5016 Commons Hill Drive
Cary, NC 27519

PROPERTY OWNER NAME/ADDRESS:

Highcroft Commons, LLC
5400 Highcroft Drive
Cary, NC 27519

STAFF REPRESENTATIVE:

Contact: Debra Grannan, Senior Planner
Phone: (919) 460-4980
Email: debra.grannan@townofcary.org

DECISION THAT IS BEING APPEALED ("Decision"):

Violation #1 in the Notice of Zoning Violation 16-ZV-013 issued by Ann M. Reishus, Development Compliance Officer of the Town of Cary on October 25, 2016 ([Exhibit 4](#)) regarding the operation of a UHAUL business for property located at 5016 Commons Hill Drive.

REQUEST: The petitioner appeals from the issuance of the Notice of Zoning Violation and contends that no violation of the Land Development ordinance has occurred pertaining to section 5.2.3 (Q) Motor Vehicle Sales/Rental. The applicant's initial appeal to Violations 2, 3 and 4 in the same Notice of Violation were officially withdrawn by the applicant.

LOCATION

5016 Commons Hill Drive

THE APPEAL PROCESS is provided as required by N.C.G.S 160A-388 and Section 3.21 of the Cary Land Development Ordinance ("LDO").

The Board may, by majority vote and by written resolution, reverse or affirm, wholly or partly, or may modify the Decision appealed from, and shall make any order, requirement, decision, or determination that ought to be made. To this end the Board shall have all the relevant powers of the officer from whom the appeal is taken. The Board shall not reverse or modify the Decision unless it finds that the administrative officer erred in the application or interpretation of the terms of the Ordinance or related policies adopted by the Town. If the Board reverses or modifies the Decision, all subsequent actions

taken by administrative officers with regard to the subject matter shall be in accordance with the reversal or modification granted by the Board.

[Exhibit 1:](#) Vicinity Map

[Exhibit 2:](#) Highcroft Commons Phase I Layout Plan, Approved 2007

[Exhibit 3:](#) Book of Maps 2008 Page 2195

[Exhibit 4:](#) Notice of Zoning Violation 16-ZV-013, issued by Ann M. Reishus, Development Compliance Officer of the Town of Cary, dated October 25, 2016

[Exhibit 5:](#) Appeal Application 16-AA-02, dated November 28, 2016

[Exhibit 6:](#) Applicant's Responses to Notice of Violation dated February 13, 2017

[Exhibit 7:](#) Email from Jay Libbus to Debra Grannan Withdrawing Appeal of Violations 2, 3 and 4, dated February 14, 2017

[Exhibit 8:](#) Land Development Ordinance Sections: 5.2.3(Q); 12.3.4(M)(1);

[Exhibit 9:](#) N.C.G.S. 20-4.01(23) (definition of "motor vehicle")

BACKGROUND:

1. The subject property is described as follows:
Site Address: 5016 Commons Hill Drive
Cary, NC 27519
Wake County PIN Number: 0734769814
Zoning District: General Commercial (GC)
Acreage: 5.93 +/-
2. A Development Plan for the subject property allowing the site to be used as a convenience store, service station, and car wash was approved by the Town of Cary in 2007 ([Exhibit 2](#))
3. The subject property is recorded in Wake County Book of Maps 2008 Page 2195 ([Exhibit 3](#))
4. The owner of the subject property is Highcroft Commons LLC.
5. Jihad "Jay" Libbus is the President of Libbus Enterprises Corporation, doing business as "Dolphins" convenience store, which operates on the subject property.
6. In August 2016, Ann M. Reishus and Danyel Brown, Development Compliance Officers for the Town of Cary, visited the subject property.
7. Several meetings were held between Mr. Libbus and Town staff after this visit to discuss numerous violations of the Land Development Ordinance that were found during the site visit.
8. On November 16, 2016, Ann M. Reishus and Danyel Brown, Development Compliance Officers for the Town of Cary, hand-delivered a Notice of Zoning Violation (16-ZV-013, "NOV") dated October 25, 2016 ([Exhibit 4](#)) to the applicant, Mr. Jay Libbus.
9. The NOV identified four violations of the Land Development Ordinance ("LDO"), and required that the violations be corrected on or before December 1, 2016.
10. On November 28, 2016, Mr. Libbus filed an appeal of the NOV. ([Exhibit 5](#)).
11. The filing of the appeal stopped all enforcement actions related to the NOV.
12. **Violation #1** consisted of an unpermitted UHAUL business operating in a General Commercial ("GC") zoning district, in violation of LDO Section 5.2.3(Q). ([Exhibit 8](#))
13. Approximately 15 UHAUL rental vehicles were parked at the subject property at the time of the August site visit.
14. LDO Section 5.2.3(Q)(1) ([Exhibit 8](#)) permits motor vehicle sales/rental uses in the GC district as of right if the rental office is located within a tenant space in a general shopping center use, and if certain other requirements are met. The subject property does not contain a general shopping center use and therefore this section of the ordinance does not apply.
15. Motor vehicle sales/rental use is also permitted as a Special Use in the GC district (Section 5.2.3(Q)(2)). The Town of Cary has no records of a Special Use Permit application ever being requested for the subject property.
16. The LDO section 12.3.4 (M)(1) defines "motor vehicle sales/rental" as "The storage, display, sale, lease or rental of motor vehicles as defined by G.S. 20-4.01, ([Exhibit 9](#)) including automobiles, vans,

and light trucks. Such businesses may also include sales and/or rental of mopeds. This shall not include salvage operation or scrap operations.” [\(Exhibit 8\)](#)

17. G.S. 20-4.01 defines “motor vehicle” as “Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. Except as specifically provided otherwise, this term shall not include mopeds or electric assisted bicycles.” [\(Exhibit 9\)](#)
18. On February 13, 2017 the applicant submitted an additional response to the NOV stating that three out of the four violations have either been resolved or are in the process of being resolved and stating that Chapter 5.2.3 (Q) Motor Vehicle Sales/Rental [\(Exhibit 7\)](#) does not pertain to his U-Haul Rental operation. [\(Exhibit 6\)](#)
19. On February 14, 2017 the applicant submitted an email to Debra Grannan, Senior Planner withdrawing the request to appeal Violations 2, 3 and 4. [\(Exhibit 7\)](#) Also on this date, Danyel Brown, Development Compliance Officer, visited the site and observed approximately 14 UHAUL rental vehicles on the property.
20. All documents and exhibits constituting the record upon which the action appealed from is taken are part of the record and have been provided to the applicant and the property owner.
21. Notice of the Administrative Appeal has been provided as required by law.

As stated in Policy Statement 167, Quasi-Judicial Hearing Procedural Guidelines, an appeal of an administrative decision presents a question of law which the ZBOA considers *de novo*. “De novo” means the ZBOA is not bound by the interpretation of the LDO by Town staff that led to the issuance of the NOV. In appeals, both party has the burden of proof, and neither party has any right to any affirmative decision.

The issue before the ZBOA in this case is whether the Town correctly interpreted the LDO when it identified and cited the applicant for four violations of the LDO The Board must determine whether to:

1. Affirm, reverse, or modify the Town’s determination that the applicant is operating a motor vehicle sales/rental use, in violation of LDO Section 5.3.2(Q);

The Board may do this in one motion, or may make separate motions for each item. Suggested motion language is provided below.

If you are inclined to [AFFIRM](#) the Decision and [DENY](#) the APPEAL:

For the reasons discussed, I MOVE that we AFFIRM the Decision.

If you are inclined to [REVERSE](#) the Decision:

For the reasons discussed, I MOVE that we REVERSE the Decision.

If you are inclined to [MODIFY](#) the Contested Action:

For the reasons we discussed, I MOVE that we MODIFY the Decision as follows:

1. _____
2. _____

(Note: Based on the action taken by the Board of Adjustment, staff will prepare a Resolution to be presented to the board at a future meeting for ratification.)