



Michael L. Thurmond  
Chief Executive Officer

## DeKalb County Zoning Board of Appeals

Department of Planning & Sustainability  
330 Ponce De Leon Avenue, Suite 300  
Decatur, GA 30030



Wednesday, December 12, 2018 at 1:00 PM

### Planning Department Staff Analysis

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**N.5 Case No: A-18-1242986 Parcel ID(s): 18-015-01-022**

**Commission District: 04 Super District 07**

**Applicant:** Misrak Wolde  
4583 Rockbridge Road  
Stone Mountain, Georgia

**Owner:** Shao Jon  
8730 Islesworth Court  
Duluth, Georgia 30097

**Project Name:** 4583 Rockbridge Road

**Location:** The property is located on the southside of Rockbridge Road, approximately 494 feet east of Allgood Road, at 4583 Rockbridge Road, Stone Mountain, Georgia.

**REQUEST:** An appeal to an administrative decision regarding Section 27-9.1.3 of the DeKalb County Zoning Ordinance related to a proposed establishment selling hookah products beer and wine until midnight; appeal concerns the definition of Late Night Establishment, that which requires a Special Land Use Permit.

**Staff Recommendation:** **“AS THE BOARD DESIRES”**

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## **STAFF FINDINGS:**

**Table 1: Surround Zoning and Land Use**

	<b>Adjacent Zoning</b>	<b>Adjacent Land Use</b>
North	City of Pine Lake	
East	City of Pine Lake	
South	R-75	Detached single family homes
West	City of Pine Lake	
Northeast	City of Pine Lake	
Northwest	City of Pine Lake	
Southeast	R-75	Detached single family homes
Southwest	City of Pine Lake	
Street Type	Minor Arterial	

Site Location: The property is located on the southside of Rockbridge Road, approximately 494 feet east of Allgood Road, at 4583 Rockbridge Road, Stone Mountain, Georgia. The site is currently developed as a shopping center. The property fronts Rockbridge Road which is classified as a minor arterial street.

Appeal request: The applicant is requesting a reversal of an administrative decision regarding Section 27-9.1.3 of the DeKalb County Zoning Ordinance as it pertains to proposed hookah and beer and wine sales until midnight appeal concerns the definition of Late Night Establishment, that which requires a Special Land Use Permit.

Appeal Analysis: Applicant proposes an establishment that operates the sales and consumption of tobacco products as the primary use in a C-1 district (allowed by right) with accessory uses of limited food sales and alcohol for consumption on site no later than 12:30a.m.

Two separate codes address this set of uses – Chapter 16, Division 2.-Clean Indoor Air and Chapter 27 of the DeKalb County Zoning Ordinance. Each has distinct definitions and limitations for selling alcohol for consumption and the operations of restaurants.

Within to Chapter 27, there exists no provision that cleanly aligns with the provisions of Chapter 16. Chapter 16 prohibits smoking in “restaurants”. However it explicitly exempts “free standing bars” from this prohibition, as long as food sales are less than the total receipts of alcohol. That is, hookah is allowed in “free standing bars” and free standing bars allow some food sales (if less than 50% of receipts).

Chapter 27 has no provision for a “free standing bar” or limited-hours of operating a bar; it provides for **either** restaurants with alcohol, **or** “late night entertainment” for selling alcohol until 2:30 a.m. Since the code is silent on early closing, the Director determined a) applicant is prohibited by zoning to sell alcohol with her hookah establishment without a SLUP, and b) she cannot prepare and serve food if there is smoking as apparently intended by Chapter 16

Applicant is appealing the determination that she is a “Late Night Establishment”, and if her appeal is successful therefore does not need a SLUP because she is proposing to close by 12:30. Further, she asserts her business is not a restaurant because her sales will come from Hookah and prepared foods, as allowed by Chapter 16 for “free standing bar.” She further requests that she be allowed to sell a limited amount of food, and will meet the threshold allowed by Chapter 16 to demonstrate she is NOT “primarily devoted to the serving of food” by : a) restricting food sales to less than 50% of total receipts and b) she will not have a dining area but lounge area for hookah smokers.

For reference, we have provided three Attachments to this report: 1) the complete Chapter 16; 2) a memo from the legal department pertaining to a separate establishment that was determined to in fact operate as a restaurant (although a different case, it may offer a relevant reasoning that may assist the ZBoA in its deliberation), and 3) a public notice to all hookah establishments raising awareness of Chapter 16.

Associated definitions and restrictions from Chapter 16 and 27 respectively:

*Chapter 16, Division 2.-Clean Indoor Air-*

**Freestanding bar** means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and which derives at least fifty (50) percent of its total annual gross food and beverage sales from the sale of beverages, including but not limited to taverns, nightclubs, cocktail lounges, and cabarets.

**Restaurant** means any establishment or area which is primarily devoted to the serving of food to the public or guests and which contains a dining area. The term "restaurant" shall not include a cocktail lounge or tavern if said cocktail lounge or tavern is a freestanding bar area as previously defined. The term "restaurant" shall include any dining area located within a health care, educational, or childcare facility. Food courts within enclosed shopping malls shall be treated as restaurants under this division.

*Sec. 16-103. - Prohibited smoking-*

*Except as allowed in this division, smoking is prohibited in all public places, outdoor recreational public places, common areas, and places of employment.*

*Sec. 16-106. - Exceptions*

*(a) The smoking prohibition **shall not apply** in the following areas: (1) "**Freestanding bar**" areas; (2) Retail tobacco stores; (3) Adult entertainment establishments, as defined by this Code; (4) Private residences, including private residences which may serve as an office workplace, except if used as a childcare, an adult day care or a health care facility; (5) Any property owned or leased by municipalities, the State of Georgia, or the federal government; (6) Designated smoking rooms in hotels and motels rented by guests provided that such designated smoking rooms shall not comprise more than twenty-five (25) percent of the total number of rooms available for rent; and (7) Outdoor areas of places of employment, except where an owner or employer declares that the outdoor area is a smokefree environment, as provided in this division.*

*(b) Notwithstanding any other provision of this division, any owner, operator, manager or other person who controls any establishment described in this division may declare that the entire establishment is a non-smoking establishment*

*Chapter 27 Section 27-9.1.3 Definitions-*

**Late-night establishment:** Any establishment licensed to dispense alcoholic beverages for consumption on the premises where such establishment is open for use by patrons beyond 12:30 a.m.

**Special land use permit:** The approval of a use of land that the board of commissioners is authorized to decide as specified within a zoning district pursuant to the procedures and criteria contained in article 7 of this chapter.

**Restaurant:** An establishment where food and drink are prepared, served, and consumed primarily within the principal building.

**FINAL STAFF ANALYSIS:**

The Zoning Board of Appeals is charged with hearing appeals of administrative decisions and variances when adherence to the strict requirements of the Zoning Code would result in exceptional and undue hardship upon the owner of such property. Usually, the ZBOA is prohibited from allowing a structure or use not listed as a permitted use or a special use in the applicable zoning district or a density of development that is not authorized within such district. However, this prohibition does not apply to any variance from the supplemental regulations of Article 1 of this Zoning Ordinance or from any other accessory feature or characteristic of a permitted or special use, unless said variance is otherwise prohibited by the regulations of this chapter. The Department of Planning and Sustainability recommends that the application be considered "As the Board desires".

**STAFF RECOMMENDATION: "As the Board desires"**

*Attachments:*

1. *Chapter 16. Article VI.-Offenses Against Public Health-Division 2.-Clean Indoor Air Ordinance*
2. *Memorandum-Therapy Lounge Hookah Clean Air Act Opinion*
3. *Pubic Reminder Notice*

## DIVISION 2. - CLEAN INDOOR AIR<sup>[4]</sup>

### Footnotes:

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**Editor's note**— Ord. No. 41-02, Pt. I, adopted Dec. 19, 2002, deleted former Ch. 16, Art. VI, Div. 2, in its entirety and enacted new provisions as Ch. 16, Art. VI, Div. 2, as herein set out. Former Ch. 16, Art. VI, Div. 2, §§ 16-100—16-106, pertained to smoking in public places and derived from Ord. No. 92-32, § 1, adopted Nov. 10, 1992.

**Cross reference**— Smoking prohibited in certain areas of airport, § 6-52; smoking in vehicles for hire, § 15-391; MARTA passengers prohibited from smoking, § 16-47.

### Sec. 16-100. - Title.

This division shall be known, cited, and referred to as the DeKalb County Smoke-Free Air Ordinance.

(Ord. No. 41-02, Pt. I, 12-19-02 ; [Ord. No. 12-17, Pt. I, 10-23-12](#) )

### Sec. 16-101. - Findings and purpose.

- (a) The DeKalb County Board of Commissioners does hereby find that:
  - (1) Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution, and that breathing secondhand smoke is a cause of disease in healthy non-smokers, including heart disease, stroke, respiratory disease, and lung cancer.
  - (2) Secondhand smoke is particularly hazardous to elderly people, individuals with cardiovascular disease, and individuals with impaired respiratory function, including asthmatics and those with obstructive disease. Children exposed to secondhand smoke have an increased risk of asthma, respiratory infections, sudden infant death syndrome, developmental abnormalities, and cancer.
- (b) Accordingly, the DeKalb County Board of Commissioners finds and declares that the purposes of this division are:
  - (1) To protect the public health and welfare by prohibiting smoking in public places and public and private places of employment; and
  - (2) To guarantee the right of non-smokers to breathe smoke-free air; and
  - (3) To recognize that the need to breathe smoke-free air shall have priority over the desire to smoke.

(Ord. No. 41-02, Pt. I, 12-19-02)

### Sec. 16-102. - Definitions.

Words or phrases not defined in this division, but defined in applicable state law or the Code of DeKalb County, as Revised 1988, shall be given that meaning. All other words or phrases shall be given their common ordinary meaning unless the context requires otherwise. The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them below except where the text clearly indicates a different meaning:

*Child care facility* means any institution, society, agency, or facility, whether incorporated or not, which either primarily or incidentally provides full-time care for children under seventeen (17) years of age outside of their own homes, subject to such exceptions as may be provided in rules and regulations of the State Board of Human Resources, as defined by O.C.G.A. § 49-5-3, as amended.

*Common area* means only those outdoor areas of apartments, condominiums, townhomes, residential subdivisions, rooming houses, retirement facilities, nursing homes, personal care homes, and other multi-unit residential property that are either commonly used or owned by its residents and intended for the common enjoyment of its residents, or accessible to residents of more than one (1) dwelling located on the property. Common areas include, but are not limited to, outdoor recreational areas within a development, and common open space that is the central organizing feature of a development.

*Dining area* means an interior or exterior (such as porch, patio or courtyard) area containing a counter or tables upon which food is served.

*E-cigarette* means any electronic oral device, such as one composed of a heating element, battery, and/or electronic circuit, that creates a vapor of nicotine and simulates smoking. This term includes any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, or under any other product name or descriptive name.

*Employee* means any person who is employed by any employer in consideration for direct or indirect monetary wages or profit.

*Employer* means any person who employs the services of an individual person.

*Enclosed* means closed in by a roof and at least three (3) sides with appropriate openings for ingress and egress. It includes areas commonly described as public lobbies or lobbies when they are in an area that is enclosed as defined herein.

*Establishment* means any business, store, office or other place where goods or services are sold or provided as part of a commercial venture. The term "establishment" includes but is not limited to the following:

- (1) Automobile dealerships, furniture or other showrooms for the display of merchandise offered for sale;
- (2) Grocery, pharmacy, specialty, department and other stores which sell goods or merchandise;
- (3) Service stations, stores or shops for the repair or maintenance of appliances, shoes, motor vehicles or other items or products;
- (4) Barbershops, beauty shops, cleaners, laundromats and other establishments offering services to the general public;
- (5) Video arcade, pool hall, and other amusement centers;
- (6) Offices providing professional services such as legal, medical, dental, engineering, and architectural services;
- (7) Banks, savings and loan offices, and other financial establishments;
- (8) Hotels and motels and other places that provide accommodations to the public; and
- (9) Restaurants and cafeterias.

*Freestanding bar* means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and which derives at least fifty (50) percent of its total annual gross food and beverage sales from the sale of beverages, including but not limited to taverns, nightclubs, cocktail lounges, and cabarets.

*Health care facility* means any licensed general or specialized hospital, institutional infirmary, public health center, or diagnostic and treatment center, as defined by O.C.G.A. § 31-7-1(2), as amended.

*Intermediate care (nursing) home* means any long-term custodial care facility that provides for the physical and mental welfare of the aged.

*Outdoor recreational public place* means any outdoor area of a place to which the public is invited or in which the public is permitted that is used, or intended for use, as a recreational area, regardless of any fee or age requirement. The term "outdoor recreational public place" includes but is not limited to, parks, picnic areas, playgrounds, athletic or sports fields, golf courses, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pool facilities, aquatic areas, water parks, skateboard parks, amusement parks, stadiums, amphitheaters, beaches, lakes, and outdoor areas of roller- and ice-skating rinks, concert venues, sports pavilions, gymnasiums, health spas, boxing arenas, bingo facilities, video arcades, pool halls, bowling facilities, amusement centers, and theaters.

*Personal care home* means a residential facility having at least twenty-five (25) beds and providing, for compensation, protective care and oversight of ambulatory, nonrelated persons who need a monitored environment but who do not have injuries or disabilities which require chronic or convalescent care, including medical, nursing, or intermediate care. Personal care homes include those facilities which monitor daily residents' functioning and location, have the capability for crisis intervention, and provide supervision in areas of nutrition, medication, and provision of transient medical care. Such term does not include old age residences which are devoted to independent living units with kitchen facilities in which residents have the option of preparing and serving some or all of their own meals, or boarding facilities which do not provide personal care. Personal care homes shall also mean residential care facilities for the elderly.

*Place of employment* means any enclosed area under the control of a public or private employer which employees frequent during the course of employment including, but not limited to, work areas, restrooms, hallways, employee lounges, cafeterias and snack bars, conference and meeting rooms, lobbies and reception areas. A private residence is not a place of employment unless it is used as a childcare facility, an adult day care facility, or a health care facility. The dining area of a restaurant shall be treated as a place of employment under this division.

*Playground* means any outdoor area that is used or designed to be used by children for recreation, including areas containing play or sports equipment or designated or landscaped for play or sports activities if such outdoor area is located in a common area, or on public or private elementary or secondary school grounds, or on property owned, leased, or operated by DeKalb County. A playground in the outdoor area of a private residence is not a playground regulated by this division.

*Public place* means any enclosed area to which the public is invited or in which the public is permitted, including but not limited to, restaurants, stores, waiting rooms, lobbies, reception areas, hallways, concession areas, public transit, restrooms, shopping malls, elevators, service lines, service stations, offices providing professional services, banks and other financial institutions, educational, recreational and health care facilities, childcare facilities, auditoriums, enclosed facilities in outdoor recreational public places, theaters, arenas, meeting rooms, repair shops, automobile dealerships, convention halls, and polling places. Porches, courtyards or decks with a contiguous connection to a public place shall be considered a public place. A private residence is not a public place unless it is used as a childcare facility, an adult daycare facility or a health care facility.

*Restaurant* means any establishment or area which is primarily devoted to the serving of food to the public or guests and which contains a dining area. The term "restaurant" shall not include a cocktail lounge or tavern if said cocktail lounge or tavern is a freestanding bar area as previously defined. The term "restaurant" shall include any dining area located within a health care, educational, or childcare facility. Food courts within enclosed shopping malls shall be treated as restaurants under this division.

*Retail tobacco store* means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental.

*Service line* means any indoor or outdoor line at which one (1) or more persons are waiting for or receiving service of any kind, whether or not the service involves the exchange of money, including but not limited to ATM lines, concert lines, food vendor lines, movie ticket lines, and sporting event lines.

*Smoking* means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, e-cigarette, oral smoking device, or pipe, or any other lighted or heated tobacco intended for inhalation, in any manner or in any form.

(Ord. No. 41-02, Pt. I, 12-19-02 ; [Ord. No. 12-17, Pt. I, 10-23-12](#) )

Sec. 16-103. - Prohibited smoking.

Except as allowed in this division, smoking is prohibited in all public places, outdoor recreational public places, common areas, and places of employment.

(Ord. No. 41-02, Pt. I, 12-19-02 ; [Ord. No. 12-17, Pt. I, 10-23-12](#) )

Sec. 16-104. - Prohibition of smoking applicable to county property.

Smoking shall be prohibited in all common areas, public places, places of employment, outdoor recreational public places, parking lots, and vehicles owned, leased, or operated by DeKalb County.

(Ord. No. 41-02, Pt. I, 12-19-02 ; [Ord. No. 12-17, Pt. I, 10-23-12](#) )

Sec. 16-105. - Reasonable distance.

(a) Smoking shall be prohibited within:

- (1) Twenty (20) feet of any outside entrance, operable window, or ventilation system of a common area, public place, place of employment, or outdoor recreational public place;
- (2) Twenty (20) feet of outdoor seating or serving areas of restaurants; or
- (3) Twenty (20) feet of any service line.

(b) Smoking shall be allowed in the parking lot(s) of a common area, public place, place of employment, or outdoor recreational public place owned, leased or operated by anyone other than DeKalb County, except in the following situations:

- (1) Smoking in such parking lot(s) is prohibited if it occurs in an area of the parking lot that is within twenty (20) feet of any outside entrance, operable window or ventilation system of a common area, public place, place of employment, or outdoor recreational public place.
- (2) Smoking is prohibited in the parking lot(s) of a common area, public place, place of employment, or outdoor recreational public place if the owner, operator, manager, employer, or other person who controls the common area, public place, place of employment or outdoor recreational public place has posted in the parking lot(s) "No Smoking" signs that comply with the requirements of this division.

(Ord. No. 41-02, Pt. I, 12-19-02 ; [Ord. No. 12-17, Pt. I, 10-23-12](#) )

Sec. 16-106. - Exceptions.

(a) The smoking prohibition shall not apply in the following areas:

- (1) "Freestanding bar" areas;
- (2) Retail tobacco stores;
- (3) Adult entertainment establishments, as defined by this Code;
- (4) Private residences, including private residences which may serve as an office workplace, except if used as a childcare, an adult day care or a health care facility;
- (5) Any property owned or leased by municipalities, the State of Georgia, or the federal government;



- (6) Designated smoking rooms in hotels and motels rented by guests provided that such designated smoking rooms shall not comprise more than twenty-five (25) percent of the total number of rooms available for rent; and
- (7) Outdoor areas of places of employment, except where an owner or employer declares that the outdoor area is a smokefree environment, as provided in this division.
- (b) Notwithstanding any other provision of this division, any owner, operator, manager or other person who controls any establishment described in this division may declare that the entire establishment is a non-smoking establishment.

(Ord. No. 41-02, Pt. I, 12-19-02)

Sec. 16-107. - Employers' responsibility.

- (a) It is the responsibility of employers to provide a smoke-free workplace for all employees of public places, and places of employment but employers are not required to make expenditures or structural changes to create a smoke free work area.
- (b) Each employer having an enclosed place of employment located within unincorporated DeKalb County is encouraged to adopt, implement, make known and maintain a written smoking policy that incorporates the smoking prohibitions of this division.
- (c) The written smoking policy should be provided to all employees.

(Ord. No. 41-02, Pt. I, 12-19-02)

Sec. 16-108. - Posting of signs and notification.

- (a) At every entrance to every place where smoking is prohibited by this division, "No Smoking" signs or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly and conspicuously posted by the owner, operator, manager, employer or other person having control of such building or area.
- (b) In every area where smoking is prohibited by this division, all ashtrays shall be removed by the owner, operator, manager, employer or other person having control of the area.
- (c) A copy of the DeKalb County Smoke-Free Air Ordinance shall be given to each applicant for a DeKalb County business license.

(Ord. No. 41-02, Pt. I, 12-19-02 ; [Ord. No. 12-17, Pt. I, 10-23-12](#) )

Sec. 16-109. - Enforcement.

- (a) Any police officer, as defined by Georgia law, may issue a citation for any violation of this division.
- (b) Any citizen who desires to register a complaint under this division may initiate enforcement with the chief of police or designee.
- (c) Any owner, operator or manager of any establishment regulated by this division shall inform persons whom they witness violate this division of the appropriate provisions, and request compliance. In the event persons violating this division refuse to comply with this division after being informed by such owner, operator, or manager, the person smoking, and not the owner, operator, or manager, shall be subject to an action for violation of this division.

(Ord. No. 41-02, Pt. I, 12-19-02)

Sec. 16-110. - Nonretaliation.

No person or employer shall discharge, refuse to hire or in any manner retaliate against any employee, applicant for employment, or customer because such employee, applicant, or customer exercises any right to a smoke-free environment as afforded by this division.

(Ord. No. 41-02, Pt. I, 12-19-02)

Sec. 16-111. - Violations and penalties.

Any person who violates any provision of this division shall be subject to the following penalties:

- (1) A fine not exceeding fifty dollars (\$50.00) for a first violation;
- (2) A fine not exceeding seventy-five dollars (\$75.00) for a second violation of this division within one (1) year; and
- (3) A fine not exceeding one hundred dollars (\$100.00) for each additional violation of this division within one (1) year.

(Ord. No. 41-02, Pt. I, 12-19-02)

Sec. 16-112. - Other applicable laws and disclaimer.

This division shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws. By regulating smoking the county is assuming an undertaking only to promote the general health and welfare of its citizens. By this enactment, neither the county, its officers nor its employees are liable in money damages to any person who claims that any breach of this division caused injury.

(Ord. No. 41-02, Pt. I, 12-19-02)

Secs. 16-113—16-199. - Reserved.

## Planning and Sustainability Department Public Reminder Notice

May 4, 2018

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Recently there has been an increase in the number of Hookah establishments throughout DeKalb and Metro Atlanta.

This is a reminder of the County's Clean Indoor Air ordinance, Chapter 16 Article VI, which prohibits the smoking of tobacco in all enclosed places that are open to the public. The ordinance specifically includes "restaurants" as a type of establishment where smoking is prohibited. However, the ordinance exempts "freestanding bars" and "retail tobacco stores" so the smoking of tobacco is allowed in these types of establishments. For the purposes of this ordinance:

- A **restaurant** is defined in Code Section 16-102 as any establishment or area which is primarily devoted to the serving of food to the public or guests and which contains a dining area"
- A "**retail tobacco store**" is defined in Section 16-102 as a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental. For the purposes of this code, the department allows either on site or off site consumption.
- A "**freestanding bar**" is defined in Section 16-102 as an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises.

Please visit the Business License Office at 330 W. Ponce de Leon Avenue, 2<sup>nd</sup> Floor, Decatur, to validate that your license reflects your current business operation and that you are in compliance with the County's Clean Indoor Air Ordinance. It is anticipated that enforcement of the ordinance will occur in upcoming weeks. Violations of this ordinance can result in the issuance of citations, suspension and/or revocation of licenses.

Please consult the DeKalb Clean Air Ordinance for the specific requirements and compliance. The ordinance is posted on the Planning & Sustainability Department's Website at: <https://www.dekalbcountyga.gov/planning-and-sustainability>