

**IN THE ARIZONA COURT OF APPEALS  
DIVISION ONE**

Mirabella at ASU, Inc., et. al.,

Plaintiffs/Appellees,  
v.

Peacocks Unlimited LLC,

Defendant/Appellant.

No. 1 CA-CV 22-0318

Maricopa County Superior Court  
No. CV2021-016159

**BRIEF OF *AMICUS CURIAE* OF  
THE CITY OF TEMPE  
IN SUPPORT OF APPELLANT**

Sonia M. Blain (007697)  
Sarah R. Anchors (025344)  
City Attorney's Office, City of Tempe  
201 East 6<sup>th</sup> Street, Suite 201  
P.O. Box 5002  
Tempe, AZ 85280  
Phone: (480) 350-8227  
*Attorneys for Amicus Curiae City of  
Tempe*

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## **Interest of Amicus Curiae**

Pursuant to Rule 16(b)(1)(B), Arizona Rules of Civil Appellate Procedure, the City of Tempe (the “City”) respectfully submits this brief in support of the Appellant Peacocks Unlimited LLC (“Shady Park”) as it is concerned that the April 11, 2022 ruling by the Maricopa County Superior Court (the “Superior Court”) misunderstood and misconceived the nature of the zoning in the area in such a way that may jeopardize the City’s efforts to strategically foster a growing, thriving, mixed-use downtown, including music venues.

No other group or organization provided financial resources for the preparation of the brief.

## **Argument**

Downtown Tempe is a teeming hubbub of college-age revelry, tourists shopping for ASU gear, hikers trekking up A Mountain, diverse businesses with businesspeople dining at restaurants and residents living in high-rise towers. This is not by chance; the City has worked for decades to cultivate the designated City Center as a diverse and thriving place to live, eat, play and work. The Superior Court’s April 12, 2022 preliminary injunction (Index of Record (“IR”) 96, the “Ruling”) threatens the continuation and success of these efforts by determining there is likelihood of proving that a club’s music is a nuisance based on its erroneous classification of the city center as residential and non-music commercial.

The City Center is a defined area in City Code between Tempe Town Lake on the north, the railroad tracks to the west, University Drive to the south and Rural Road to the East. See [Tempe Zoning Code \(“ZDC”\) § 3-201\(B\)\(3\)](#). The City has endeavored for decades to lift the City Center out of decay and nourish a mixed-use community for people to live, play, dine, enjoy entertainment and work:

By the 1960s, lack of investment led to decay of the city’s central business district. Beginning in 1968 with the decision to locate the new city Hall in the downtown, *the city Council committed to redeveloping the downtown. This was reaffirmed in 1973 with the adoption and federal financial assistance of the University-Hayden Butte Redevelopment Area.* The first decade of redevelopment focused on public and private investment in civic facilities, infrastructure and historic preservation. The 1980s attracted small office, retail and restaurant businesses that flourished, and later relocated to larger facilities. The 1990s brought needed large employment centers and high technology industries that further activated the area. *Now entering its fourth decade of redevelopment, focus has shifted to residential and mixed-use developments that will sustain the live, work, learn, play concept throughout the years,* and throughout shifts in specific markets. The downtown will continue to evolve, but the investment in quality architecture in a unique pedestrian environment will sustain what began nearly a century and a half ago.

[Tempe General Plan 2030, Adopted Dec. 4, 2003](#), at 137 (p. 17 of the PDF) (emphasis added). The City has strived to “create a balance of residential, commercial, recreational and educational uses”, by working to “create quality live, work, learn and play experiences in the built environment.” *Id.*

The City continued in the same vein in its current general plan, General Plan 2040, adopted December 12, 2013, stating that the land use goal is: “Maintaining the downtown/Town Lake/ASU as a central urban core of Tempe and infuse new mixed use development into hubs, by establishing the high density land use to support revitalization with goods, services and activities serving residents daily needs and creating social magnets for residents to gather, and enhancing character and heritage.” [Tempe General Plan 2040](#), at p. 20.<sup>1</sup> The City’s land use planning goal for the City Center is *balance*:

Ensure that land use is balanced to provide work opportunities, housing variety and affordability, along with locations for shopping and services as well as access to recreational opportunities on a multi-modal transportation system. Establish land use and development of distinctive quality and varied density. Activate commercial and employment activity centers as mixed-use hubs with high density cores supplying daily needs and social gathering places. Reinforce the importance of land use and transportation relationships. Support growth and development that results in social, cultural and economic benefits to the community.

*Id.* at 11. Tempe echoed its 2030 goal of creating “sustainable growth and enhances the quality of life where people live, learn, work and play” and establishing higher density cores with mixed-use urban activity. *Id.* at 29. The strategies for encouraging

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<sup>1</sup> For clarity, page numbers of the General Plan are identified by the 249-page PDF, rather than the page numbers of the document itself, which restart for each section.

mixed-use designs, include “encourage housing in close proximity to employment and services”, providing opportunities for flexibility in standards to serve the community, and “provide an interesting pedestrian realm at the ground floor.” *Id.* at 39.

The City has poured resources into developing Tempe Town Lake – at the north end of the City Center – as a recreation and entertainment mecca with boating, and festivals, with mixed-use developments on the shores. The City has also devoted resources into attempting to redevelop the Hayden Flour Mill at the north end of Mill Avenue just south of Tempe Town Lake into a mixed-use development and used its Government Property Lease Excise Tax (“GPLET”) power to develop the Centerpoint on Mill (on the west side of Mill, north of University) as a restaurant, apartment/condo, hotel and retail center. See [Centerpoint Ground Lease](#). Also, to bring people to the City Center and facilitate movement about the area, Tempe, working with other entities, implemented the streetcar that started operations earlier this year. Furthermore, the City welcomes multiple Mill Avenue street festivals, such as the art festival and holiday block parties.

The 2040 plan differentiates between residential areas, such as areas on the west side of Mill Avenue near University, and the City Center zoning, stating a goal to: “Provide a distinct transition between the urban core of Downtown/Town Lake/ASU and its surrounding single family neighborhoods.” [General Plan 2040](#), at

3. The former is “Land that is primarily used for living: sleeping, cooking and other daily activities conducted in a dwelling. This category includes many types of housing such as single family (attached and detached), multi-family and group homes.” *Id.* at 24. The latter is “Land used for a mixture of residential and commercial uses on a site. This category encourages creatively designed developments that create a living environment, reflective of a village or activity hub, in which there is the opportunity to live, work and recreate in the same development or within the area. Basic criteria for development include reasonable scale to the surrounding neighborhood, encouragement of alternative modes of transportation (such as transit, bicycling and walking) and a well-conceived plan with access to and integration of transit facilities.” *Id.* The map in the General Plan depicts the Mill Avenue area north of University Drive as mixed use, with some civic areas. *Id.* at 23. The only residential area (shaded in yellow on the map) are ASU dormitories. Other residential areas are *west* of Mill Avenue and *south* of Apache Boulevard. *Id.*

The ZDC implements the General Plan goals and it describes the desired City development in the City Center:

The CC [*i.e.*, City Center] district fosters employment and livability in Tempe's city center (generally bounded by the Town Lake to the North, the railroad tracks to the West, University Drive to the South and rural road to the East) by providing *retail, offices, moderate-and high-density residential uses, entertainment, civic uses,* and cultural exchange in a



*mixed-use* environment that supports the public investment in transit and other public facilities and *services*. This district may also be considered mixed-use when the design provides a mix of uses for the purposes of implementing the General Plan Land Use;

[ZDC §3-201\(B\)\(3\)](#). The City has specific development standards for the CC zoning district, including allowing buildings 50-feet high, one of the highest limits in the ZDC, [ZDC Table 4-203A](#), and a good deal higher than the 30 or 35 feet allowed in single-family residential districts, [ZDC Table 4-202A](#). The City permits a wide variety of uses in the City Center district, including bars and nightclubs, hotels and motels, live-work, theaters, residential, retail. [ZDC Table 3-202A](#). As compared to residential districts, the ZDC expressly allows in the City Center “live-work”, where a residence serves as both a dwelling and workplace. [ZDC § 3-414](#); [ZDC § 7-113](#). Thus the City’s goal is to foster a City Center that melds businesses such as Shady Park as well as residential enterprises such as Mirabella.

The Ruling misunderstands the nature of City Center. The superior court found that “the character of Shady Park’s surroundings [are] principally residential and non-music commercial.” (IR 96, at 10.) It looked just to the apartments, student housing and hotels, and non-music producing commercial ventures, such as Wells Fargo Bank, Pita Jungle restaurant and Salvation Army near Shady Park (*id.* at 2), without considering the businesses in the City Center that are hosting or playing music. The superior court focused on Shady Park having to conform to the level of

noise expected from residential uses. (*Id.* at 11.) As set forth above, the City Center is not residential and there is no such designation as “non-music commercial.” Rather, the City has expended efforts and seeks to create in the downtown a blended mix of residential, entertainment and business uses, rather than segregating off certain areas for each use. The City is concerned that the Ruling’s misapprehension of the character of the area where Mirabella and Shady Park are located could lead to the City being unable to maintain and foster the type of rich, diverse, live/work/play community it has developed and is continuing to vigorously develop in the City Center due to the noise restriction imposed by the Ruling.

The Ruling further mischaracterized the City’s efforts to maintain a harmonious City Center including enforcing its noise regulations. The Ruling refers to testimony from three police officers who recalled three businesses had been cited for a violation of [Tempe City Code Section 20-11](#) for unnecessary noise. (IR 96, at 7.) However, that reference ignores (1) the many times officers have responded to a noise complaint and investigated and found there was no noise violation, as well as (2) the many times that officers asked businesses to turn the noise down and the business complied, thereby maintaining the appropriate noise levels in the City Center without resorting to citation. Additionally, City officers responded to noise complaints from the nearby hotel and from Mirabella residents about Shady Park, listened to the noise in those spaces and determined in their investigation, did not

find a noise violation by Shady Park. Such efforts are not a “lack of interest” in enforcing the noise ordinance; rather, they show efforts by the City to enforce its noise ordinance at Section 20-11 according to its terms and the factors it lists in determining whether there is noise violative of the Code.

**Conclusion**

The City encourages this Court to reconsider or reverse the Ruling to the extent it is based on the false premise that the area where Shady Park and Mirabella are located is a residential and “non-music” commercial area.

Respectfully submitted this 28th day of September, 2022.

*/s/ Sarah R. Anchors*  
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Sarah R. Anchors  
CITY ATTORNEY'S OFFICE  
*Attorneys for Amicus Curiae*