

## MEMORANDUM

**To:** Board of Adjustment  
City of Mesa

**From:** Dickinson Wright PLLC  
David J. Ouimette  
Mitesh V. Patel  
Vail C. Cloar

**Date:** December 1, 2016

**Subject:** Appeal of Zoning Administrator Interpretation  
Regarding Mailed Notice Requirement  
BA16-072  
Hearing: December 7, 2016 (5:30 p.m.)

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This law firm represents the Zoning Administrator of the City of Mesa (“City”) in connection with the above-referenced appeal of the Zoning Administrator’s interpretation of the mailed notice requirement (“Mailed Notice Interpretation”) applicable to a separate appeal of another Zoning Administrator interpretation. Specifically, the issue which is now before the Board in the above-referenced appeal is what mailed notice is required in connection with appeal (BA16-049) from a Zoning Administrator interpretation regarding the procedure required to amend a Planned Area Development (“PAD”) Master Plan to alter the use of one of the parcels included within the PAD. This memorandum is submitted in support of the Zoning Administrator’s Mailed Notice Interpretation.

Briefly, the Zoning Administrator issued an interpretation that the applicable procedures set forth in the Zoning Ordinance require mailed notice to all owners of property within the subject Red Mountain Ranch PAD, as well as those properties within 500 feet from the exterior boundary of the PAD.

The Appellant, Divot Partners, LLC (“Divot Partners”) the owner of the Red Mountain Ranch Golf Course within the Red Mountain Ranch PAD, requested a Zoning Administrator interpretation of the required procedure to change the use of the current driving range portion of the golf course to residential development (“Initial Interpretation”). The driving range and the golf course at Red Mountain Ranch are located on a single parcel in the development.

In the Initial Interpretation, the Zoning Administrator determined that the proposed change in use of property represents a “major change” to the applicable Site Plan for the PAD and a change to a stipulation of the zoning on the property

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requiring City Council approval. Divot Partners has appealed the Initial Interpretation.

The Zoning Administrator communicated the procedure for the appeal of the Initial Interpretation in an email and informed Divot Partners that notice must be sent to all property owners within the Red Mountain Ranch PAD and the owners of property located within a 500-ft radius of the PAD. Divot Partners disagrees with the Zoning Administrator's notice requirement for the Initial Interpretation. This appeal of the Mailed Notice Interpretation raises the following single issue: What is the extent of the requisite mailed notice to other property owners potentially affected by the proposed change in permitted use.

The Zoning Administrator has, in his discretion, determined that mailed notice of Divot Partners' appeal of the Initial Interpretation should go to all property owners in the PAD, and those within 500 feet of the exterior boundary of the PAD. The Zoning Administrator has determined this range of notice to be appropriate, in part, because the proposed change of use of the property from driving range to residential use would alter the character of an amenity that was included in the PAD Master Plan at the time property owners in the PAD purchased their lots and homes.

The Zoning Administrator has determined that the appropriate scope of mailed notice is as set forth in Mesa Zoning Ordinance § 11-67-5.B, which provides for notice by first class mail to all owners of property located within the property that is subject to the proposed amendment. In addition, where the subject property is not a single residential lot, notice must be mailed to property owners within an additional 500 feet from the exterior boundary of the property. *See* MZO § 11-67-5.B.2.b. In this case, the Zoning Administrator has decided that the property that is the "subject of the application" is not merely the driving range itself, but instead the entire PAD. This interpretation is based in part on the fact that the requested change of use requires an amendment to the Master Plan affecting the entire PAD, and an amenity included therein, and relied upon by all other property owners within the PAD.

Divot Partners has objected to, and appealed from, the Mailed Notice Interpretation, contending that either no mailed notice is required, or that, if required, mailed notice need be provided only to property owners within 500 feet of the driving range itself. Divot Partners has asserted that the mailed notice requirement of Mesa Zoning Ordinance § 11-67-5.B is not applicable, and that instead the applicable provision is to be found at Mesa Zoning Ordinance Chapter 77, § 11-77-4.C.

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If Divot Partners' argument were correct, and Chapter 77 provided the applicable "public notice" requirement for the appeal of the Zoning Administrator's Interpretation to this Board, the result would be illogical, to say the least. The "public notice" section of Chapter 77 does not provide any particular standards for that notice. Instead, the subsection refers to notice "in the same manner required for the action that was the subject of the appeal." That language makes no sense in the present circumstances, because the Zoning Administrator's Initial Interpretation that is the subject of appeal was requested and was made with no public notice or hearing. Arizona Revised Statute § 9-462.06(F) mandates, at a minimum, that all Board of Adjustment hearings provide public notice, both by publication and posting of the property. If Divot Partners' argument is correct, and no notice is required, it would be a violation of the state's mandatory public notice provisions.

The fatal error in Divot Partners' argument is that it fails to recognize that Chapter 77 (as specified in § 11-77-1) is addressed only to the procedures for appeals of "final decisions" of the Zoning Administrator and others. Chapter 77 does not apply to appeals of administrative "interpretations" by the Zoning Administrator, which may also be appealed to this Board but as to which Chapter 77 does not apply. In other words, Chapter 77's "public notice" provision makes it clear that the chapter itself applies only to appeals from "final decisions" of subordinate bodies or officers which have their own separate public notice requirements, but that it does not address appeals of administrative "interpretations," which were issued without notice of public hearing, but which are subject to appeal.

Instead, Chapter 67, § 11-67-5 B provides the notice requirement which is applicable to any "interpretations determined by the Zoning Administrator to require a public hearing." The Board of Adjustment will be making an "interpretation" in the appeal of the Initial Interpretation, BA 16-049, at a public hearing, regarding the procedure required under the MZO to make a change to the PAD Master Plan and/or the zoning and site plan as requested by Appellant. Accordingly, the Zoning Administrator has followed the notice requirements applicable to the hearing regarding the Initial Interpretation.

Indeed, Divot Partners' argument that Chapter 77 controls, and should be interpreted to require no public notice whatsoever of a public hearing before the Board of Adjustment determines the appeal of the Zoning Administrator's Initial Interpretation, is patently contrary to basic public policy. Mesa has expressly embraced a broad, strong public policy of open government and broad involvement of interested citizens and neighbors in zoning and development

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decisions. *See* Resolution No. 7283, “Encouraging Citizen Participation During the Zoning and Development Review Process,” copy attached hereto. The analysis of the appropriate public notice for public hearings before the Board of Adjustment must be informed and directed by this basic policy, which further supports the Zoning Administrator’s determination that mailed notice in accordance with Section 11-67-5.B.2 is appropriate and required in these circumstances.

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Enclosure

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