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December 1, 2016

Board of Adjustment
City of Mesa
City of Mesa Planning Division
55 N. Center Street
P.O. Box 1466
Mesa, AZ 85211-1466

Re: BA16-072 Red Mountain Ranch-Divot Partners Interpretation Appeal

Dear Members of the Board of Adjustment:

We represent Divot Partners, the owner of the Red Mountain Ranch Golf Course ("Golf Course"), which is the party appealing interpretations by the Zoning Administrator ("ZA") related to development of the driving range at the Golf Course. The purpose of this letter is to summarize our position, which we will explain in more detail at the hearing on December 7, 2016.

I. INTRODUCTION.

Divot Partners has proposed to develop the driving range of the Golf Course with single family homes. The Golf Course is zoned RS-9 (PAD), and is 829 acres in size. The driving range is about 11.43 acres – less than 1.5% of the entire Red Mountain Ranch community. In response to our inquiries about developing the driving range with RS-9 uses, on June 29, 2016, the ZA issued an interpretation of the Zoning Ordinance that would require Divot Partners to go back through an entire new zoning process, even though underlying zoning allows the proposed residential use and even though the rest of the Golf Course will remain. We appealed that interpretation to the Board, which as you know decides appeals of ZA interpretations.

After we filed our appeal of the June 29 interpretation, the ZA issued a second interpretation, which addressed the following points: (1) we must notify all 3,350 property owners within Red Mountain Ranch and within 500 feet of Red Mountain Ranch, which comprises a two square mile area, of the Board hearing involving the 11.43 acre driving range; (2) the City would publish a biased description of the nature of the appeal in a newspaper; and (3) City would post large 4' x 4' signs around Red Mountain Ranch containing the biased description of the Board hearing. This second interpretation was contained in letters dated September 27, 2016 and October 18, 2016. We also appealed the second interpretation. We have attached relevant correspondence for your convenience.

The December 7, 2016 hearing does not involve the June 29 interpretation, and will only address the issues in the second interpretation regarding notice. The primary issue to be addressed on December 7 is: what public notice must be provided for the Board hearing on our appeal of the June 29 interpretation – (1) mailed notice to all owners within 500 feet of Red Mountain Ranch,

or (2) published and posted notice or, at most, mailed notice to owners within 500 feet of the driving range.

Our position is that the only notice is publication and posting the property. However, if mailed notice is required, it must be provided only to property owners within 500 feet of the driving range, not within the entire Red Mountain Ranch community and 500 feet beyond it. Further, the language describing the appeal of the June 29 interpretation must be neutral. Ultimately, our position is that the City is making this process so difficult and burdensome that it violates Divot Partners' due process rights.

Once we have a final decision on what notice is required, we will proceed with the appeal of the June 29 interpretation that Divot Partners must go through entire zoning process to use the driving range property for its permitted RS-9 use.

II. THE ZONING ORDINANCE DOES NOT REQUIRE MAILED NOTICE TO ALL 3,350 PROPERTY OWNERS WITHIN RED MOUNTAIN RANCH AND 500 FEET FROM THE BOUNDARY OF RED MOUNTAIN RANCH.

A. The ZA Acts Administratively, Without A Public Hearing (As In This Case), Or As A Hearing Officer With A Public Hearing.

As you are aware, the Board decides appeals from the ZA's interpretations of the Zoning Ordinance. The Board acts as a quasi-judicial body, meaning you consider the appeal "de novo," without deference to the ZA, and you reach your own interpretation of the meaning of the Zoning Ordinance based on the material presented to you at the hearing. *See* Zoning Ordinance § 11-66-3.C.1 ("The Board of Adjustment shall . . . Hear and decide appeals from the action of the Zoning Administrator . . . in the interpretation of the provisions of this Ordinance"); § 11-77-4.D.1 (hearing is de novo).

As you also know, the ZA has authority to issue legal interpretations about the meaning of ordinances. In Mesa, the ZA can decide to go through an administrative process, or he can act as a "Hearing Officer." The Zoning Ordinance does not set out any rules for deciding which path to take, but if the ZA decides to act as a Hearing Officer, he must go through a public hearing process. Section 11-66-7 of the Zoning Ordinance provides that the ZA shall:

> "2. Interpret the Zoning Ordinance to the public, City Departments and other branches of government, subject to the supervision of the Planning Director and subject to general and specific policies established by the City Council. In consultation with the Planning Director, the Zoning Administrator may determine *which requests for interpretations may be decided through an administrative process, or reviewed and decided through a public hearing process as described in Item 6*, below."

In this case, the ZA did not hold a public hearing. The ZA acted through an administrative process – he wrote a letter with his interpretation that we need to go back through the entire zoning process to develop the driving range consistent with the underlying RS-9 residential use.

B. The ZA's Interpretations Are Appealed To The Board Pursuant To Chapters 66 And 77 Of The Zoning Ordinance.

Whether acting as a Hearing Officer or administratively, the appeal of the ZA's decision goes to the Board. Here is what §11-66-3.D of the Zoning Ordinance says about appeals from the ZA acting *as a Hearing Officer*:

"D. Appeals to the Board of Adjustment.

1. Appeals to the Board shall be made in conformance with ARS § 9-462.06.

2. Appeals to the Board may be submitted by an aggrieved person, as defined by Chapter 87, or by officers, department or Board of the City *affected by any decision of the Zoning Administrator, when acting as a Hearing Officer*, within 30 days by filing with the Zoning Administrator a written notice of appeal specifying the grounds. No fee is required for this appeal. The Zoning Administrator shall transmit to the Board all the papers constituting the records upon which the action appealed from was taken.

* * *

4. The Board shall fix a reasonable time for the hearing of the appeal and *give notice thereof to the parties in interest and the public by publication in a newspaper of general circulation* at least 15 days prior to the public hearing and by *posting the property which is the subject of the application*, in conformance with ARS § 9-462.04, at least 5 days prior to the hearing. It shall be the responsibility of the applicant to maintain the posting once erected until after the hearing."

Section 11-66-7.D of the Zoning Ordinance also provides that appeals from the ZA acting in his *administrative* capacity shall be referred to this Board:

"D. Appeals to the Zoning Administrator.

* * *

4. The Zoning Administrator may refer any matter on which he is authorized to rule directly to the Board of Adjustment.

5. Appeals based on a decision made by the Zoning Administrator, *acting in an administrative capacity, such as those involving interpretations of the Zoning Ordinance*, shall be referred directly to the Board of Adjustment."

Section 11-66-7 then refers to the process in Chapter 77 for appeal of any ZA decision to the Board:

> "Any person aggrieved *by a decision of the Zoning Administrator* may appeal this decision to the Board of Adjustment within a period of 30 days from the time that the decision is made *in the manner specified in Section 11-67-11,[1] and Chapter 77*."

To recap: if the ZA acts as a Hearing Officer, an aggrieved party may appeal to the Board within 30 days, and public notice is provided by publication and posting. If the ZA acts administratively, the same 30 day period applies to appeals to the Board, but the appeal is processed under Chapter 77. So what does Chapter 77 provide? First, it creates "uniform procedures" for all appeals, including appeals from the "Zoning Administrator" (not acting as a Hearing Officer) and the "Zoning Administrator Hearing Officer."

> "11-77-1: Purpose and Applicability
>
> This chapter establishes *uniform procedures* for appeals of final decisions by the Historic Preservation Officer, Planning Director, *Zoning Administrator, Zoning Administrator Hearing Officer*, Board of Adjustment, Planning and Zoning Board, Planning Hearing Officer, Design Review Board, and the Historic Preservation Board."

If there was any question that the appeal process in Chapter 77 applies to both the Zoning Administrator and the Zoning Administrator Hearing Officer, § 11-77-4.B reiterates:

> "11-77-4: Procedures
>
> B. Filing of Appeals.
>
> 1. Appeals of Specified Decisions. *All decisions* of the Historic Preservation Officer, Planning Director, *Zoning Administrator, Zoning Administrator Hearing Officer*, Planning and Zoning Board, Planning Hearing Officer, Design Review Board, and Historic Preservation Board may be appealed to the appropriate body as specified in Chapter 67 by filing a written appeal accompanied by payment of the appropriate fee.[2] The notice of appeal shall set forth, in concise language, the following:
>
> a. Date of appeal . . ."

Therefore, the process in Chapter 77 clearly applies to appeals from both the ZA acting administratively, without a hearing, *and* as a Hearing Officer. The notice requirements for appeals

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[1]Section 11-67-11 concerns revocation of a permit and does not apply here.

[2] The "appropriate body" to hear appeals of the Zoning Administrator or the Zoning Administrator Hearing Officer is this Board. Zoning Ordinance § 11-677-12.

from the Zoning Administrator or the Zoning Administrator Hearing Officer to the Board are expressly spelled out in § 11-77-4.C:

> "C. Public Notice. Notice of an appeal heard by the City Council, Planning and Zoning Board, *Board of Adjustment*, Design Review Board, or Historic Preservation Committee shall be:
>
> 1. Provided in the *same manner required for the action that was the subject of the appeal*, and
>
> 2. Provided to all persons who spoke on the matter at any prior hearings on the same matter, if such persons provided their names and addresses at the time they spoke at the prior hearing."

What does this language mean? It means that notice of the Board hearing is the same as the notice that was given for the ZA interpretation. In this case, the ZA was acting administratively and did not hold a public hearing; therefore, the "action that was the subject of the appeal" did not involve mailing notice to anyone. The only notice that must be provided for the Board hearing is the notice that state law requires, which is publication and posting of the "property affected" by the appeal. A.R.S. § 9-462.06.

C. The ZA's Decision That § 11-67-5.B Controls The Notice That Must Be Given Is Wrong.

The ZA's interpretation is that notice is governed by § 11-67-5.B, and that Chapter 77 only applies to ZA decisions in his capacity as Hearing Officer. That is wrong. Section 11-67-5.B only applies: (a) to applications directly *to* the Board or *to* the ZA Hearing Officer; and (b) for interpretations the ZA determines require a public hearing:

> "B. *Applications to the Board of Adjustment or Zoning Administrator Hearing Officer*. Any variances, Special Use Permits, Development Incentive Permits (DIPs), Substantial Conformance Improvement Permits (SCIPs), *and interpretations determined by the Zoning Administrator to require a public hearing*, shall provide
>
> 1. The same notice of public hearing as required by ARS § 9-462.06 (F); and
>
> 2. Additional notice sent a minimum of 14-days before the scheduled hearing date by first class mail to all owners of property located within the following distances of the *exterior boundary of the property that is the subject of the application*, based on the last assessment:
>
> a. For any single residence, duplex, or single lot RV or manufactured home: 150-feet.
>
> b. For any other request: 500-feet."

Again, § 11-67-5.B only applies to interpretations that the ZA decides require a public hearing. Here, § 11-67-5.B does *not* apply because the ZA did not require a public hearing. The ZA could have held a public hearing as a Hearing Officer; recall that § 11-66-7.B gives the ZA authority to determine "which requests for interpretations may be decided through an administrative process, or reviewed and decided through a public hearing process." If the ZA had held a public hearing on our first interpretation, he would have required mailed notice. He chose instead to act administratively, so mailed notice was not provided. Therefore, § 11-77-4.C, which provides for notice "in the same manner required for the action that was the subject of the appeal," does not require mailed notice in this situation, just publication and posting.

Further, Chapter 77 clearly applies to decisions of the ZA, either in his administrative capacity or as Hearing Officer. There is no other reasonable way to interpret the language of Sections 11-77-1 and 11-7-4, which on their face apply to appeals of decisions by the Zoning Administrator and Zoning Administrator Hearing Officer. Since the "uniform procedures" apply to both, the notice in § 11-77-4.C also applies. That notice is the same as the notice provided for the ZA interpretation, which did not include mailed notice.

Our interpretation is not novel. In fact, before we filed the appeal, City Planning Director John Wesley agreed and directed us to file the appeal under Chapters 66 and 77, not 67, although he misinterpreted the appeal period as 15 days. Here is his email:

Reese Anderson

From:	John Wesley <John.Wesley@mesaaz.gov>
Sent:	Wednesday, June 29, 2016 2:15 PM
To:	Reese Anderson
Subject:	Code Interpretation for Red Mountain Ranch
Attachments:	Zoning Administrator Interpretation w signature- Red Mountain Ranch 6-29-16.pdf

Reese-
Gordon Sheffield has prepared the attached code interpretation regarding converting the Red Mountain Ranch Country Club practice range to a residential use. He is out of the office today and asked that I send this interpretation to you for him.

Should you wish to appeal his decision you will need to consult and follow the requirements of the Zoning Ordinance in Chapters 67, Common Procedures, and 77, Appeals. Chapter 77 gives you the specific information about appeals, including the requirement that appeals must be filed within 15 calendar days of the action being appealed. Section 11-77-4 B provides a list of the information that should be included with the appeal.

Let me know if you have any questions.

John D. Wesley, AICP
Planning Director
City of Mesa
480-644-2181

That decision changed after the City apparently decided that requiring mailed notice to everyone within a two square mile area in and around Red Mountain Ranch would be more onerous for Divot Partners.

D. At Most, Mailed Notice Is Only Required To Property Owners Within 500 Feet Of The Driving Range.

Even if 11-67-5 applies, it only requires mailed notice to owners of property within 500 feet around the property that is the subject of the application. The only property that could be the subject of any "application" is the driving range. That is also the way the City has interpreted the notice requirement in the past for master-planned communities and accords with common sense – the only property being affected is less than 1.5% of Red Mountain Ranch, so why notice a two square mile area? While we dispute that any mailed notice is required, in the alternative, we ask that the Board rule that the notice is a 500-foot area around the driving range, and that signs need only be posted on the perimeter of the driving range, not the perimeter of the entire Red Mountain Ranch community.

III. THE NOTICE LANGUAGE IS NOT NEUTRAL, AND THE SIZE OF THE POSTED SIGNS IS UNPRECEDENTED.

We will explain at the December 7 hearing why the language the City proposes to put in the publication and on the posted signs is biased, not neutral, and unprecedented in scope. The neutral language we believe adequately conveys the issues the Board will consider is as follows:

> "Consider an appeal of an interpretation of the Zoning Administrator regarding the method of processing a request to develop a single family subdivision in the location of the driving range for the Red Mountain Ranch Golf Course."

We will also explain why the signs the City proposes to post (and in fact has posted) are larger than signage that is typically posted, and perhaps larger than signage that has *ever* been posted, for a Board hearing. Finally, by requiring mailed notice for such a large area, using biased language and oversize signs, and making Divot Partners go through an entire zoning process to use a small portion of its property for a permitted use, the City has treated Divot Partners much differently than other property owners and has violated Divot Partners' equal protection, procedural due process and substantive due process rights as guaranteed by the Arizona and United States Constitutions.

IV. CONCLUSION.

In conclusion, we ask that the Board overturn the ZA's interpretation, and rule as follows:

1. That mailed notice is not required for the appeal of the ZA's administrative interpretation involving development of the driving range;

2. In the alternative, that the mailed notice is limited to property owners within 500 feet of the driving range;

3. That the City shall use Divot Partners' proposed language in publications, postings and notices for the appeal;

4. That the signs posted on the property providing notice of the appeal be the same size as typical for Board hearings, and the posting be on the perimeter of the driving range, not the perimeter of Red Mountain Ranch.

Thank you for your consideration. We look forward to discussing these issues with you at the December 7, 2016 hearing.

Sincerely,

BERRY RIDDELL LLC

Jeffrey D. Gross

PEW & LAKE, PLC

Reese Anderson

JDG/lk

cc: David Ouimette
Phyllis Smiley

Reese Anderson

From: John Wesley <John.Wesley@mesaaz.gov>
Sent: Wednesday, June 29, 2016 2:15 PM
To: Reese Anderson
Subject: Code Interpretation for Red Mountain Ranch
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Let me know if you have any questions.

John D. Wesley, AICP
Planning Director
City of Mesa
480-644-2181

Zoning Administrator
Interpretation

To: Reese Anderson, Pew & Lake, P.L.C.

Through: John Wesley AICP, Planning Director

From: Gordon Sheffield AICP CNUa, Zoning Administrator

Date: June 29, 2016

Subject: Interpretation regarding converting the Red Mountain Ranch Country Club practice range to a residential use

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In response to Divot Partners, LLC ("Divot") intent to submit a proposal to convert the existing Red Mountain Ranch Country Club practice range to a residential use (the "Proposed Development"), as outlined in the May 3, 2016, letter to the City, we are providing the following interpretation of the City of Mesa Zoning Ordinance ("Ordinance").

Among the issues considered is the applicability of the previously approved Development Master Plan ("DMP") for Red Mountain Ranch and whether the proposed conversion is a significant change that requires a modification to a condition of the zoning. As we understand the inquiry, Divot's position is that the Proposed Development requires only a Site Plan Review before the Planning and Zoning Board, in which the Board may only apply the criteria established under Ordinance Section § 11-69, exclusive of any other considerations and without review by the City Council. After reviewing the facts pertaining to the Proposed Development and the underlying zoning of the property, the conditions imposed during the zoning case, and the previously approved site plan, the City respectfully disagrees with Divot's position. Although the following analysis is not intended to be exhaustive, we believe it is responsive to the questions Divot has raised to date.

I. Introduction and Summary

On its face, the Proposed Development does not comport with the approved site plan and the stipulation imposed by the City Council when it approved Case No. Z89-36, which required "[c]ompliance with the basic development as shown on the site plan and elevations submitted."

An interpretation that the Ordinance only requires a Site Plan Review for the Proposed Development would effectively ignore the stipulation attached by the City Council as a condition to zoning of the property, and would defeat the purpose of the zoning limitation. As you are no doubt aware, the City Council imposes conditions / stipulations in almost every zoning case in an effort to protect and promote the public interest. Conditions requiring compliance with an approved site plan are specifically designed to provide predictability to, and protect the interests of, current and future property owners and residents in the area.

Because the Proposed Development is a significant change from the approved site plan, the Ordinance requires Divot to file and process a "new application." This application process (which requires the City Council to adopt a new ordinance revising or deleting the previously approved conditions) is a critical element of the planning process. Approval of the Proposed Development is a legislative act that will require the opportunity for public review and comment, and the consideration of all relevant factors by both the Planning and Zoning Board and the City Council.

II. History of Zoning of the Property

On May 2, 1983, the City Council established the base zoning classifications for the approximately 820 acres[1] commonly referred to as "Red Mountain Ranch," with base zones of M-1-PAD and R1-9-PAD in accordance with the Red Mountain Ranch Development Master Plan ("RMR DMP") (Case Z83-034). As a condition of approval, the City Council placed five (5) stipulations on the zoning, including approval of the overall Development Master Plan and City approval of all individual site plan and subdivision plats for all development tracts. The case was approved with the adoption of Ordinance No. 1704, which approved a DMP as described in the "Specific Plan – Red Mountain Ranch, dated March 21, 1983" (the "Specific Plan"). At the same City Council meeting, Council adopted the Specific Plan (Resolution No. 5198). The Specific Plan describes and depicts a mixture of housing types and densities (for residential uses) oriented around a golf course that included a practice range. Inclusion of the golf course with practice range in the Specific Plan illustrates that this amenity was contemplated as an integral feature of Red Mountain Ranch since the property was annexed into the City, and the City Council considered the compatibility of the various uses, and the boundaries of each use, in relation to the golf course amenity when it approved the zoning case.

When the City Council approved the RMR DMP, it also approved the use of a specific portion of the property for golf course purposes. Thus, the golf course use was linked to the approval of the surrounding property for residential development -- a common development practice.

In 1990 the overall RMR DMP was modified in Case No. Z89-36, which established a DMP overlay district with conceptual zoning classifications of O-S, C-2, R-2-PAD, R-4-PAD, R1-9-PAD, and R1-35-PAD for the property. This rezoning case established the current zoning on the property (see Ordinance No. 2486). The City's understanding is that Case No. Z89-36 was filed by the property owner -- and approved by the City Council -- in order to rezone and modify the original development concepts with respect to certain undeveloped parcels, and to modify zoning boundaries to account for changed market conditions. Additionally, the property owner requested conversion of certain multi-family and commercial land uses to single-family residential use. During the rezoning, the owner/applicant did not seek to assign any Dwelling Units to the golf course or the practice range. The approved 1983 RMR DMP allowed a total of 2,570 Dwelling Units at an overall density of 3.1 Dwelling Units/Acre (4.7 Dwelling Units/ Net Acre of residential use), and the 1990 rezoning reduced the overall density by 286 units, all based upon specific dwelling unit allocations to specific parcels. The rezoning process was required by the City in order for the property owner to modify the zoning condition requiring compliance with the existing RMR DMP. We have been unable to locate any place where the owner / applicant

[1] The descriptive language for Red Mountain Ranch changed at some point after the 1983 zoning from "820 acres" to "829 acres."

asserted that the change required only a site plan review, and at no point did the Specific Plan (or RMR DMP) ever assign residential units to the golf course area.

Further, during the 1990 rezoning case, the property owner reiterated in both the project summary and in the site plan that Red Mountain Ranch was an 829-acre mixed use planned community centered on a golf course amenity. A site plan was submitted during the case (the "1989 Site Plan"), which was approved by the City Council with the adoption of Ordinance No. 2486. The City Council conditioned its approval of the rezoning case upon the following stipulation: "[c]ompliance with the basic development as shown on the site plan and elevations submitted." That Plan reflects the existence, location and footprint of the golf course, which always included a practice range at its current location.

III. Stipulations Imposed in Connection with a Zoning Change

Under its inherent police powers, a municipality may impose reasonable conditions on a rezoning case to serve the public interest.[2] Such conditions are a tool commonly used when the governing body of the municipality has concerns that the proposed changes may have impacts to the overall development.[3] The Ordinance explicitly allows the City Council to impose conditions and stipulations on zoning changes as a condition of approval,[4] and Mesa has employed such stipulations for more than three decades. These conditions are critical to protecting the community from potentially adverse or unforeseen impacts from a proposed use or development, to ensure the property owner abides by City development requirements/standards, and to avoid an unacceptable change for the neighborhood.[5]

Attached to this correspondence is the 1989 Site Plan that the City Council approved in Case No. Z89-36. The 1989 Site Plan depicts the various areas within Red Mountain Ranch that are to be used for residential, open space, and golf course purposes. The condition which the City Council placed on the zoning (*i.e.*, compliance with the development as shown on the site plan) is a fairly standard condition imposed by the City Council in zoning change cases to protect residents and to ensure the property owner develops the property as contemplated. In this instance, the City Council sought to ensure that the property owner developed the property -- with a mix of commercial and residential uses around a golf course facility -- in compliance with the approved site plan for the community. The golf course use was a central feature of the development. As a result of the legislatively imposed zoning condition, any development on the property that is inconsistent with the 1989 Site Plan must go through the legislative process to amend or eliminate the condition. Indeed, absent that process, the surrounding property owners most directly affected by a proposed change in use would be denied the opportunity to express their views in the manner and forum contemplated before their elected representatives.

The golf course and practice range were built and exist today as generally depicted on the 1989 Site Plan. Divot's proposal to replace the existing practice range with a single-family residential use was not contemplated in 1990 when the City Council approved the zoning and does not comply with the 1989 Site

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[2] *See, e.g., Transamerica Title Ins. Co. v. City of Tucson*, 23 Ariz. 385, 388, 533 P.2d 693, 696 (App. 1975) *citing to Ayres v. City Council*, 34 Cal.2d 31, 207 P.2d 1 (1949); *Scrutton v. County of Sacramento*, 275 Cal.App.2d 412, 79 Cal.Rptr. 872 (1969).

[3] McQuillin Mun. Corp. § 25:103 (3d ed. 2009).

[4] Mesa City Zoning Ordinance § 11-76-6(B).

[5] *Chrismon v. Guilford County*, 322 N.C. 611,618, 370 S.E.2d 579, 583 (1988).

Plan. As a matter of policy and practice, once a use is in place and relied upon for a period of time, it should not be readily upset.[6] In any event, the determination whether to modify the use rests in the discretion of the City Council, the elected representatives of the people, after opportunity for public comment. It may well be that the public and the City Council will be supportive of Divot's proposal; but that can only be determined through the rezoning process.

IV. Modifying or Removing Stipulations Imposed as a Condition of a Zoning Change under Mesa's Zoning Ordinance.

Careful review of the Proposed Development and the requirements in the Ordinance make it clear that Divot must file an application to modify or remove a condition, to deviate from the 1989 Site Plan and modify the Red Mountain Ranch Specific Plan and DMP. Permitting such a substantial modification through the administrative Site Plan Review process would be a violation of the Ordinance.

Ordinance § 11-3 requires that the City classify property into different districts, overlays or zones. The boundaries of each of these zoning districts, however, are not specified in the Ordinance, but are supplied by the Official Supplementary Zoning Map ("Zoning Map"). The Zoning Map was adopted by the City Council and incorporated into the Ordinance by reference (along with any amendments previously or thereafter adopted). [7]

The City Council amended the Zoning Map (and ultimately the Ordinance) when it adopted Ordinance No. 2486. That is why the ordinance indicated "[t]hat Section 11-2-2[8] of the Mesa City Code is hereby amended by adopting the Official Supplementary Zoning Map dated January 22, 1990, for Zoning Case Z89-36, signed by the Mayor and City Clerk, which accompanies and is annexed to this ordinance and declared a part hereof." As discussed above, the City Council approved the rezoning case subject to certain stipulations, which are also incorporated into the adopted Zoning Map.[9] Under Ordinance § 11-67-10 (B), <u>any modification to an approved site plan</u> that does not comply with a condition of approval must be treated as a new application, unless the Zoning Administrator determines the change to be "minor." No such determination has been made, or is appropriate, in this case.

V. <u>Determining if a Change to a Plan is a Major or Minor Modification</u>

The Proposed Development does not comply with the development as depicted in the 1989 Site Plan. The question is whether the proposed change in use and development requires a "minor" or "major" modification to the DMP? The Ordinance authorizes -- indeed requires -- the Zoning Administrator to make this discretionary determination.[10]

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[6] McQuillin Mun. Corp. § 25:75 (3d ed. 2009).
[7] Mesa Zoning Ordinance § 11-3-2.
[8] Mesa Zoning Ordinance § 11-2-2 is now § 11-3-2 in Mesa's Updated Zoning Ordinance.
[9] Mesa Zoning Ordinance § 11-3-2 (B).
[10] Mesa Zoning Ordinance § 11-67-10 (B).

Minor Modifications

Mesa distinguishes between minor and major modifications -- as do many other jurisdictions. Minor modifications are typically those changes that are consistent with the original findings and conditions approved by the decision making body, that are fundamentally equivalent to what was approved, and that do not intensify any potentially detrimental effects on the property.[11] These changes are often handled administratively or through a Site Plan Modification.

Examples of minor modifications include small changes to setback requirements that still meet the minimum standards, rotating buildings, changes to aesthetic features of an approved elevation, and changes to the development resulting in same use/intensity.

Major Modification

In reviewing the Proposed Development, the City Zoning Administrator considered the findings from the zoning case, the stipulations on the zoning, the 1989 Site Plan, and reviewed the Planning Department's zoning file. The Zoning Administrator finds that a practice range is not fundamentally equivalent to single-family residential homes. Such an alteration would significantly change the use of the property and alter the anticipated density within the parcel.

Additionally, the residents who bought homes in Red Mountain Ranch reasonably anticipated a golf course and practice range (and any other uses ancillary to a golf course) in the area designated for golf course use, likely understood the impact of such areas of restricted use on property values, community amenities, etc., and likely contemplated living near such uses when they purchased their properties. These residents could reasonably expect that the area designated for golf course use on the 1989 Site Plan would remain devoted to such use, unless and until the plan and condition were modified by a rezoning. Whether the requested change is nonetheless appropriate in the circumstances is a legislative determination to be made by the City Council, with public input and a public hearing process.

The Zoning Administrator has determined the Proposed Development requires a major change to the 1989 Site Plan; therefore, Divot can only proceed by requesting that the City Council modify or remove the condition which requires the Proposed Development comply with the 1989 Site Plan.

VI. Effect of the New Zoning Ordinance on Previously Approved Projects

Furthermore, there is express language in the updated Zoning Ordinance, made effective by the City Council in September 2011, which supports the City's position. During the process of updating the Ordinance, the City Council was concerned about the impact of the new ordinance on previously approved projects. The City Council clearly articulated that it wanted to preserve the City's ability to enforce the stipulations the City Council had imposed in prior zoning cases, especially projects located in an existing DMP or Planned Area Development ("PAD") Overlay Zoning District. The following language was added to the zoning ordinance to address these concerns:

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[11] Mesa Zoning Ordinance § 11-67-10.

> **"Development of Projects Located within an Existing PC District, or within a PAD, DMP or BIZ Overlay Zoning Districts.** A lot or parcel located within the Planned Community (PC) District, or within overlay districts such as Planned Area Development (PAD), Development Master Plan (DMP, under the zoning ordinance in effect prior to September 3, 2011), or Bonus Intensity Zone (BIZ), subject to a preliminary development plan, standards and/or with conditions of approval, and adopted prior to the effective date of the Zoning Code, **shall be developed in accordance with the approved preliminary development plan, standards, and/or conditions of approval** . . . ."[12]

(Emphasis added). The Proposed Development is not in accordance with the 1989 Site Plan or the conditions of approval. As outlined above, Divot is required to comply with these requirements or the City Council would at a minimum have to adopt a new ordinance, with explicit language revising or deleting the previously approved condition(s).

VII. Mesa's Process Compared to Other Cities

Mesa is not unique in how it reviews and processes requests to modify stipulations imposed as a condition of zoning. Other Arizona municipalities consider such modifications to be legislative acts subject to the process outlined in their zoning ordinances for significant modifications.[13] Similarly, other municipalities evaluate a request to modify a condition of approval to determine if it is major, minor, or administrative,[14] and their zoning ordinances outline assignment of the authority to determine this classification and the appropriate review and approval process for each.[15] For example, we believe that the City of Tempe would require a nearly identical procedure to approve the Proposed Development, because its Zoning and Development Code states that a modification or removal of a condition can only be made by utilizing the same procedure that was used to impose the condition.[16]

VIII. Conclusion

The DMP overlay zoning on the property includes the Specific Plan, the plan narrative, the modifications adopted in 1985 and 1990, and the 1989 Site Plan. These documents show a "golf course" use on the property where Divot desires to construct residential housing. Deviation from the designated and approved use constitutes a major change to the 1989 Site Plan and, therefore, requires the City Council to amend, revise or delete the previously approved condition. A contrary conclusion -- *i.e.*, that the Proposed Development merely requires Site Plan Review -- would render the stipulation meaningless.

---

[12] Mesa Zoning Ordinance § 11-1-6 (E).

[13] *See, e.g.*, City of Tempe, Zoning and Development Code, Chapter 6, see also, City of Phoenix Zoning Information Guide *Planning Hearing Officer Public Hearing Process*. Revised May 29, 2015; City of Tucson, Unified Development Code Section 3.5.4.

[14] *See, e.g.*, City of Tempe, Zoning and Development Code, Chapter 6; City of Tucson, Unified Development Code Section 3.5.4.

[15] *See* City of Tempe, Zoning and Development Code, Chapter 6.

[16] City of Tempe, Zoning and Development Code, § 6-605.

Pursuant to the Zoning Ordinance, Ordinance No. 2486 can only be amended by Divot's submittal of a new application in accordance with the procedures outlined in § 11-76.[17] Under Mesa's City Charter, the only way to amend or repeal an ordinance is by the City Council adopting another ordinance.[18] Thus, the new application must state Divot's desire to amend Ordinance No. 2486, and this legislative act will require public hearings by both Planning and Zoning and the City Council.

By: _____
Gordon Sheffield
Zoning Administrator

[17] Mesa Zoning Ordinance § 11-76-1.
[18] Mesa City Charter, Article 2, § 210(D).

Reese Anderson

From: Gordon Sheffield <Gordon.Sheffield@mesaaz.gov>
Sent: Monday, July 11, 2016 12:17 PM
To: Reese Anderson
Cc: John Wesley; Charlotte McDermott; Jim Smith; 'Jeff Gross'
Subject: RE: Code Interpretation for Red Mountain Ranch

Reese,
I will send over a pdf attachment of the 1989 adopted site plan for the Red Mountain Ranch DMP to you later today. I wanted to get an answer to you regarding filing deadline and appeal application fee.

As far as the appeal deadline, it is close of business August 1, 2016 (a Monday). The 30-day appeal window would end on July 29, but that day is a Friday, a non-business day for the City of Mesa, so the appeal filing deadline is extended to the next business day.

As to the fee, the total fee is $624.00. Formally, filing the appeal would be classified as a request for an interpretation from the Board of Adjustment.

Gordon Sheffield, AICP CNUa
Zoning/Civil Hearing Administrator
City of Mesa, Planning Division
PO Box 1466, 55 N Center
Mesa, AZ 85211-1466

T 480.644.2199
F 480.644.2757

From: John Wesley
Sent: Monday, July 11, 2016 7:09 AM
To: Gordon Sheffield <Gordon.Sheffield@mesaaz.gov>
Subject: FW: Code Interpretation for Red Mountain Ranch
Importance: High

We need to provide the information requested by Reese.

From: Reese Anderson [mailto:Reese.Anderson@pewandlake.com]
Sent: Friday, July 08, 2016 5:35 PM
To: John Wesley <John.Wesley@mesaaz.gov>
Cc: Jim Smith <Jim.Smith@mesaaz.gov>; Charlotte McDermott <Charlotte.McDermott@mesaaz.gov>; 'Jeff Gross' <JG@berryriddell.com>
Subject: RE: Code Interpretation for Red Mountain Ranch

Sorry John, 1 more thing, on page 3 of the Sheffield 6-29-16 letter, he writes: "Attached to this correspondence is the 1989 Site Plan . . ." But, nothing was attached to the version I received via email. I believe I have a copy of Z89-36 site plan, but to make sure we are all operating from the same place, could you please send the referenced site plan from the letter?

So, the 3 questions pending are (1) need a copy of the Z89-36 site plan, (2) what is the correct appeal deadline, and (3) what, if any, is the appeal fee?

Thank you.

Reese L. Anderson
Pew & Lake, PLC
1744 S. Val Vista, Suite 217
Mesa, Arizona 85204
Office: 480-461-4670
Facsimile: 480-461-4676
E-mail: reese.anderson@pewandlake.com

From: Reese Anderson
Sent: Friday, July 08, 2016 3:05 PM
To: 'John Wesley' <John.Wesley@mesaaz.gov>
Cc: 'Jim Smith' <Jim.Smith@mesaaz.gov>; 'Charlotte McDermott' <Charlotte.McDermott@mesaaz.gov>; 'Jeff Gross' <JG@berryriddell.com>
Subject: RE: Code Interpretation for Red Mountain Ranch

John

Regarding the time period for the appeal deadline, could you or one of the City attorneys please clarify for us what the appropriate appeal period should be? Is it 15 days or 30 days?

We ask because we are looking at the very last sentence of Section 11-66-7(D) of the Zoning Ordinance, which reads: "Any person aggrieved by a decision of the Zoning Administrator may appeal this decision to the Board of Adjustment within a period of 30 days from the time that the decision is made in the manner specified in Section 11-67-11, and Chapter 77." This sentence appears to be exactly on point, but is also contrary to Section 11-77-3, which is discussed below.

Section 11-77-3 (Time Limits), states that "Unless otherwise specified in State or federal law, all appeals except of Board of Adjustment decisions shall be filed in writing within 15 calendar days after the date of the action being appealed. Appeals of Board of Adjustment decisions shall be filed within 30 calendar days of the Board rendering its decision. Calendar days are inclusive of all business days, non-business days, weekends and holidays. In the event the time limit for appeals ends on a non-business day, holiday or weekend, the time limit shall be extended to the close of business of the next business day."

So, at first blush to us, they seem to be in conflict. But, in applying the statutory construction rule that the specific governs over the general, it seems to us that the 30 day deadline found in 11-66-7(D) is more on point and specific since it addresses ZA decions over the 15 day general deadline in 11-77-3.

Anyway, and simply put, the question we have is whether the appeal deadline should be 15 days or 30 days?

Finally, we note your office is closed today and that you will need to consult with the City Attorney's office before answering. Accordingly, we look forward to hearing from you at your earliest convenience.

Thank you.

Reese L. Anderson
Pew & Lake, PLC
1744 S. Val Vista, Suite 217
Mesa, Arizona 85204
Office: 480-461-4670
Facsimile: 480-461-4676
E-mail: reese.anderson@pewandlake.com

From: Reese Anderson
Sent: Friday, July 08, 2016 2:19 PM
To: 'John Wesley' <John.Wesley@mesaaz.gov>
Cc: Jim Smith <Jim.Smith@mesaaz.gov>; Charlotte McDermott <Charlotte.McDermott@mesaaz.gov>; Jeff Gross <JG@berryriddell.com>
Subject: RE: Code Interpretation for Red Mountain Ranch

Thank you Sir. Sure appreciate it. Have a great weekend.

Reese L. Anderson
Pew & Lake, PLC
1744 S. Val Vista, Suite 217
Mesa, Arizona 85204
Office: 480-461-4670
Facsimile: 480-461-4676
E-mail: reese.anderson@pewandlake.com

From: John Wesley [mailto:John.Wesley@mesaaz.gov]
Sent: Friday, July 08, 2016 1:41 PM
To: Reese Anderson <Reese.Anderson@pewandlake.com>
Cc: Jim Smith <Jim.Smith@mesaaz.gov>; Charlotte McDermott <Charlotte.McDermott@mesaaz.gov>; Jeff Gross <JG@berryriddell.com>
Subject: Re: Code Interpretation for Red Mountain Ranch

Reese,
Our office is closed today. Rather than speculate, I will verify the deadline for the appeal and the fee and will provide that information you on Monday when I am back in the office.

John

Sent from my Sprint Phone.

------ Original message------
From: Reese Anderson
Date: Fri, Jul 8, 2016 1:27 PM
To: John Wesley;
Cc: Jim Smith;Charlotte McDermott;Jeff Gross;
Subject:RE: Code Interpretation for Red Mountain Ranch

Hello John,

I hope you are well. I have added the City Attorneys to this email for the obvious reasons.

My question is what is the appeal fee for this matter? I cannot locate a specific appeal fee in the Schedule of Fee and Charges. Of course, I find the ZA and BofA section, but I cannot locate a direct correlation for an appeal of the ZA Interpretation. I see other types of appeals, such as Building Board Appeals, but not this type. Could you please advise us. Perhaps there is no fee. I just want to make sure we get it correct.

Also, as I count the days, the appeal deadline is July 14th. Do you disagree?

Thank you.

Reese L. Anderson
Pew & Lake, PLC
1744 S. Val Vista, Suite 217
Mesa, Arizona 85204
Office: 480-461-4670
Facsimile: 480-461-4676
E-mail: reese.anderson@pewandlake.com

From: John Wesley [mailto:John.Wesley@mesaaz.gov]
Sent: Wednesday, June 29, 2016 2:15 PM
To: Reese Anderson <Reese.Anderson@pewandlake.com>
Subject: Code Interpretation for Red Mountain Ranch

Reese-
Gordon Sheffield has prepared the attached code interpretation regarding converting the Red Mountain Ranch Country Club practice range to a residential use. He is out of the office today and asked that I send this interpretation to you for him.

Should you wish to appeal his decision you will need to consult and follow the requirements of the Zoning Ordinance in Chapters 67, Common Procedures, and 77, Appeals. Chapter 77 gives you the specific information about appeals, including the requirement that appeals must be filed within 15 calendar days of the action being appealed. Section 11-77-4 B provides a list of the information that should be included with the appeal.

Let me know if you have any questions.

John D. Wesley, AICP
Planning Director
City of Mesa
480-644-2181

Pew & Lake, P.L.C.
Real Estate and Land Use Attorneys

W. Ralph Pew
Certified Real Estate Specialist
Sean B. Lake
Reese L. Anderson

July 26, 2016

***VIA EMAIL* (john.wesley@mesaaz.gov)**
& HAND DELIVERY

Mr. John Wesley, AICP
Planning Director
City of Mesa
55 N. Center Street
Mesa, Arizona 85201

***VIA EMAIL* (gordon.sheffield@mesaaz.gov)**
& HAND DELIVERY

Mr. Gordon Sheffield, AICP CNUa
Zoning Administrator
City of Mesa
55 N. Center Street
Mesa, Arizona 85201

Re: Notice of Appeal of Zoning Administrator Interpretation Regarding Red Mountain Ranch Driving Range

Dear Messrs. Wesley and Sheffield:

As you know, this office, together with Jeffrey Gross, of Berry & Riddell, represents Divot Partners, the owner of the Red Mountain Ranch Golf Course. Through this letter, and under Sections 11-67-7(D) and 11-77-4 of the Mesa Zoning Ordinance, we hereby give notice of our appeal of the Zoning Administrator Interpretation dated June 29, 2016 relative to the rights of a property owner to develop consistent with its underlying zoning district site plan review of a portion of the Red Mountain Ranch Golf Course driving range pursuant to its underlying zoning of RS-9. We further request a hearing before the Mesa Board of Adjustment relative to the decision reached by the Zoning Administrator in his June 29, 2016 letter. For your convenience, we have included copies of our previous letters outlining our position on this matter.

We reserve the right to supplement this appeal letter by submitting additional materials once the appeal hearing date has been set before the Board of Adjustment. Included with this letter is our appeal fee check in the amount of $624.

As required by Section 11-77-4(B), we provide the following information:

a. The date of this appeal is the date of this letter: July 25, 2016.

b. The name of person filing the appeal is: Reese L. Anderson. The individuals representing Divot Partners in this appeal are: Reese L. Anderson, and W. Ralph Pew of Pew & Lake, PLC, and Jeffrey Gross, of Berry & Riddell, 6750 E. Camelback Rd., Scottsdale, Arizona 85251.

c. The address to which notices shall be sent is: Pew & Lake, PLC, Attn: Reese L. Anderson, 1744 S. Val Vista, Suite 217, Mesa, Arizona 85204, with copies in all cases to Jeffrey Gross, Berry & Riddell, 6750 E. Camelback Rd., Scottsdale, Arizona 85251.

d. The contact information, telephone number and e-mail addresses of the appellant to be contacted regarding the appeal is:

Appellant:	Reese L. Anderson or W. Ralph Pew Pew & Lake, PLC 1744 S. Val Vista, Suite 217 Mesa, Arizona 85204 Office: 480-461-4670 Facsimile: 480-461-4676 Email: reese.anderson@pewandlake.com
With a copy to:	Jeff Gross at: jg@berryriddel.com

e. The action or decision being appealed is the Zoning Administrator's Interpretation dated June 29, 2016 regarding site plan review for a portion of the Red Mountain Ranch Golf Course driving range pursuant to its underlying RS-9 residential zoning designation.

f. The appellant's requested outcome is that the Board of Adjustment will recognize the rights of the property owner to develop consistent with the underlying zoning of RS-9 as allowed by the Mesa Zoning Ordinance and that the City of Mesa will accept and process a Site Plan Review case, which may be heard by the City Council.

g. The grounds for this appeal are that the property owner has the legal right to develop a conventional RS-9 residential subdivision without the need to process a rezoning application and subject to review of a site plan. Pursuant

to Mesa Zoning Ordinance § 11-22-2, property in a Planned Area Development overlay zone is permitted the same uses and activities as the underlying zoning district, which in this case is RS-9.

h. There is no assigned address, but the property is generally described as the driving range of the Red Mountain Ranch Golf Course. The case number involved and pending with the City of Mesa is Z09-018.

Under Section 11-77-4(D) of the Mesa Zoning Ordinance, we kindly request that the Board of Adjustment conduct a public hearing *de novo*, and review all relevant information, including but not limited to the application, plans, related project materials that were the subject of the June 29, 2016 interpretation. As noted above, we reserve the right to present "additional materials as may be presented at the appeal hearing, and any written correspondence submitted after the appeal has been filed."

Thank you for your attention to this matter. We look forward to hearing from you about a date for the appeal and presenting this appeal to the Board of Adjustment.

If you have any questions or feel that this notice of appeal is deficient in any way, please inform us immediately so that we may remedy any such deficiency.

Sincerely,

PEW & LAKE, PLC

Reese L. Anderson

cc: Mr. Shelby Futch (Divot Partners)
Jeff Gross, Esq. (Berry Riddell)
W. Ralph Pew (Pew & Lake)

EXHIBIT A

Letter to Jim Smith, dated May 3, 2016

Reese Anderson

From:	Gordon Sheffield <Gordon.Sheffield@mesaaz.gov>
Sent:	Tuesday, September 13, 2016 5:08 PM
To:	Reese Anderson
Cc:	Jim Smith; Charlotte McDermott; MaryGrace McNear; John Wesley; Christine Zielonka; Lisa Davis; Kaelee Wilson; Rebecca Gorton
Subject:	Processing Information and Schedule for Appeal of Red Mountain Ranch DMP Interpretation
Attachments:	Neighbor notification letter.doc

Good afternoon Reese,

A few logistical items related to the appeal of the ZA interpretation:

1) Case number assigned to this appeal will be BA16-049.

2) The Board of Adjustment hearing date is set for October 26th, in the Upper Level of the City Council Chambers, 57 East 1st Street. The meeting start time will be set at 5pm.

3) The advertised address will be: *The 3600 through 4400 blocks of North Power Road - west side; the 5600 through 6800 blocks of East Thomas Road - north side; the 6000 through 6200 blocks of East Thomas Road - south side; the 3600 through 4400 blocks of North Recker Road – both sides, and the 5900 through 6700 blocks of East Viewmont Drive, both sides; 820 plus or minus acres [also known as the Red Mountain Ranch Development Master Plan(DMP), which is now referred to as a Planned Area Development(PAD)].*

4) The requested action of the Board of the Adjustment will be advertised as follows: *Consider an appeal of an interpretation of the Zoning Administrator regarding the method of processing a request to convert a portion of the Red Mountain Ranch Golf Course (the driving range) into a single residence subdivision. The Zoning Administrator's interpretation is that the request must be processed as a major modification to the Red Mountain Ranch Development Master Plan's '-PAD' overlay zoning district, as it is considered a significant change that requires the modification or removal of a condition of the zoning. Such requests require public hearings before both the Planning and Zoning Board and the City Council. The applicant believes their request requires only a Site Plan Review, which is typically a single public hearing process through the Planning and Zoning Board.*

5) I will act as the planner managing the Board of Adjustment case. For the purposes of the mailed notice (see number 5, below), please use my contact information below.

6) Notice must be sent by first class mail to all owners of property within the entire Red Mountain Ranch PAD area, plus the owners of property located within a 500-ft radius of the entire Red Mountain Ranch PAD area. The notice is required to be sent 14-days before the hearing date, which in this case translates to sending them by October 12th. We will therefore need the letters to be prepared in full (written, stuffed in envelopes, addressed, stamped and sealed) and then have the fully prepared letters delivered to this office by close of business on October 6th. This is as per the notice

requirement of the Mesa Zoning Ordinance, Section 11-67-5.B. The letter will need to include at minimum the information contained in the attached sample notice letter. A copy of the notice letter is also needed for the case file, as is a complete list of notified property owners, the affected assessor parcel numbers, and the property owners' mailing addresses.

7) As is typical for Board of Adjustment appeals, the City will post notices on the site, and arrange for notice to be published in the Arizona Republic, both occurring a minimum of 15-days before the scheduled hearing date (on or before October 11th). Language for the notice published in the Republic will be sent to the newspaper on October 3rd for publishing on October 8th to comply with Mesa City Charter publishing requirements for legal notices (which requires Saturday or Wednesday for the day of publishing).

8) Any additional written information you wish to be conveyed to the Board, over and above the letter of appeal you filed on July 26th on behalf of your client, will need to be received by this office by close of business October 6th. I'll remind you that no new arguments may be included in this additional information, as your arguments had to be fully included in the July 26th letter of appeal.

9) The staff report with staff recommendation will be sent electronically to the Board of Adjustment members, and therefore become a public document, on or about close of business on October 13th, roughly two weeks in advance of the public hearing date. The staff report will be available publically after 5pm that same afternoon through the agenda posted on the City's Board of Adjustment webpage: http://mesaaz.gov/city-hall/advisory-boards-committees/board-of-adjustment

10) As a heads up, I will be out-of-office between October 3rd and October 6th. As always, City of Mesa offices are closed on Fridays. I'll be back at my desk on Monday, October 10th.

Please let me know if you have any questions.

Gordon Sheffield, AICP CNUa
Zoning/Civil Hearing Administrator
City of Mesa, Planning Division
PO Box 1466, 55 N Center
Mesa, AZ 85211-1466

T 480.644.2199
F 480.644.2757
Offices: Open M-Th, 7am-6pm, and Closed Fridays

BERRY | RIDDELL LLC

6750 E. Camelback Rd., Suite 100
Scottsdale, AZ 85251
480.385.2727
berryriddell.com
jg@berryriddell.com

September 16, 2016

VIA FIRST CLASS MAIL AND EMAIL Gordon.Sheffield@mesaaz.gov
Gordon Sheffield
Zoning/Civil Hearing Administrator
City of Mesa, Planning Division
PO Box 1466, 55 N Center
Mesa, AZ 85211-1466

Re: Red Mountain Ranch Interpretation

Dear Mr. Sheffield:

We are in receipt of your email dated September 13, 2016 to Reese Anderson of Pew & Lake, PLC, regarding the Board of Adjustment appeal in this case. We object to certain items in the email as being outside the terms of Arizona law and the City of Mesa Zoning Ordinance, and a blatant attempt to invent requirements and limitations to tip the playing field in violation of our client's due process rights. We request that the City of Mesa follow the terms of its own Zoning Ordinance and revise its procedures for this matter. Our more specific objections to Items 4, 6 and 8 in your email (reproduced in the boxes below) are as follows.

I. ITEM 4 – DESCRIPTION OF APPEAL.

> 4) The requested action of the Board of the Adjustment will be advertised as follows: *Consider an appeal of an interpretation of the Zoning Administrator regarding the method of processing a request to convert a portion of the Red Mountain Ranch Golf Course (the driving range) into a single residence subdivision. The Zoning Administrator's interpretation is that the request must be processed as a major modification to the Red Mountain Ranch Development Master Plan's '-PAD' overlay zoning district, as it is considered a significant change that requires the modification or removal of a condition of the zoning. Such requests require public hearings before both the Planning and Zoning Board and the City Council. The applicant believes their request requires only a Site Plan Review, which is typically a single public hearing process through the Planning and Zoning Board.*

This description is manifestly biased. It refers to your interpretation and the reasons for it in detail, calling the request a "major modification" resulting in a "significant change" that without question "require public hearings before the Planning and Zoning Board and the City

Council." The applicant's position, in contrast, is portrayed as a mere "belief" that the request requires "only" Site Plan Review, and contains no explanation as to why the applicant takes that position.

Moreover, it is misleading to state that our client is trying to "convert" anything. We are asking the City to allow our client to do what the Zoning Ordinance expressly permits – develop the property consistent with the underlying residential zoning. Nor can you accurately state that it is our client's position that this case should only be heard by the Planning & Zoning Board when we have consistently acknowledged that both the Planning & Zoning Board and City Council will hear this case. While you may disagree with our position, the description must be balanced and neutral, and it is not.

The City is not required (nor is it proper) to include any statement of positions in the advertisement, and you certainly cannot shape the language in the statement to your benefit. The way you have framed the issue on appeal looks to be more of an opening argument than a neutral statement. We believe the entire advertisement should consist of the following single sentence:

Consider an appeal of an interpretation of the Zoning Administrator regarding the method of processing a request to develop a single family subdivision in the location of the driving range for the Red Mountain Ranch Golf Course.

For the foregoing reasons, we request that you replace the biased and misleading description of the appeal in your Item 4 with the above proposed language.

II. ITEM 6 – MAILED NOTICE TO PROPERTY OWNERS.

> 6) Notice must be sent by first class mail to all owners of property within the entire Red Mountain Ranch PAD area, plus the owners of property located within a 500-ft radius of the entire Red Mountain Ranch PAD area. The notice is required to be sent 14-days before the hearing date, which in this case translates to sending them by October 12th. We will therefore need the letters to be prepared in full (written, stuffed in envelopes, addressed, stamped and sealed) and then have the fully prepared letters delivered to this office by close of business on October 6th. This is as per the notice requirement of the Mesa Zoning Ordinance, Section 11-67-5.B. The letter will need to include at minimum the information contained in the attached sample notice letter. A copy of the notice letter is also needed for the case file, as is a complete list of notified property owners, the affected assessor parcel numbers, and the property owners' mailing addresses.

The City of Mesa Zoning Ordinance has three (3) different notice provisions for Board of Adjustment hearings. The first provision, Section 11-66-3.D.4, which is the section that is directly applicable to appeals to the Board of Adjustment, provides:

> The Board shall fix a reasonable time for the hearing of the appeal and give notice thereof to the parties in interest and the public by publication in a newspaper of general circulation at least 15 days prior to the public hearing and by posting the property which is the subject of the application, in conformance with ARS § 9-462.04, at least 5 days prior to the hearing. It shall be the responsibility of the applicant to maintain the posting once erected until after the hearing.

This provision is consistent with the controlling Arizona statute, A.R.S. § 9-462.06(F), which only requires posting and advertisement for appeals to the Board and reads as follows: "The board shall fix a reasonable time for hearing the appeal, and shall give notice of hearing by both publication in a newspaper of general circulation in accordance with section 9-462.04 and posting the notice in conspicuous places close to the property affected."

The second provision of the Zoning Ordinance, Section 11-77-4.C, provides that notice of Board of Adjustment hearings shall be provided "in the same manner required for the action that was the subject of the appeal," and to all persons who spoke on the matter at any prior hearings on the same matter. The subject of the appeal is your interpretation, for which no notice and certainly no mailed notice to adjacent property owners, was given, and no one spoke at any prior hearing.

You suggest, however, that the general notice requirements in the third provision, Section 11-67-5.B, somehow control over the notice that is expressly required for Board of Adjustment appeals by Section 11-66-3.D.4. That is incorrect. Section 11-67-5.B only applies to variances, special use permits, development incentive permits, substantial conformance improvement permits, and "interpretations determined by the Zoning Administrator to require a public hearing." This matter does not involve a variance, SUP, DIP or SCIP. This is a Board of Adjustment appeal of an interpretation, not an interpretation determined by the ZA to require a public hearing. You did not determine that this matter required a public hearing; because *all* board of adjustment appeals require a public hearing this provision does not apply. The only time Section 11-67-5.B applies to interpretations is when the interpretation is being made by the ZA, and the ZA decides to have a public hearing *on his or her own interpretation*. There was no public hearing on your interpretation in this case. Board of Adjustment appeals of interpretations are governed by Section 11-66-3.D.4 or Section 11-77-4.C which, like the statute, do *not* require mailed notice.

Moreover, Section 11-67-5.B.2 only requires notice to properties within 500 feet of "the exterior boundary of the property that is the subject of the application." The only property that

is the subject of the interpretation is the driving range, not the entire Red Mountain Ranch PAD. If any mailed notice were required – and we dispute that the plain language of the Zoning Ordinance requires *any* mailed notice – it would only have to be sent to property owners within 500 feet of the driving range.

These onerous requirements are patently meant to incite residents of Red Mountain Ranch and to impose overly oppressive procedures on our client to make the appeal process as difficult and as least likely to succeed as possible. To achieve that illegitimate result, the City is intentionally misreading its Zoning Ordinance and misapplying state law. If the City insists on continuing this wrongful conduct, our client's procedural and substantive due process rights will be violated.

Based on the foregoing and the unambiguous language of the Zoning Ordinance, we insist that you follow Section 11-66-3.D.4 and A.R.S. § 9-462.06(F), or Section 11-77-4.C, rather than Section 11-67-5.B.2.

III. ITEM 8 – SCOPE AND SUPPLEMENTATION OF ARGUMENTS.

> 8) Any additional written information you wish to be conveyed to the Board, over and above the letter of appeal you filed on July 26th on behalf of your client, will need to be received by this office by close of business October 6th. I'll remind you that no new arguments may be included in this additional information, as your arguments had to be fully included in the July 26th letter of appeal.

There is nothing in the Mesa Zoning Ordinance supporting your statement that no new arguments may be included in the additional information we intend to supply to the Board. The relevant provisions in Section 11-77-4 only require the appeal to contain, in concise language, a description of the requested outcome if the appeal is granted and the grounds for appeal, *if required by this Ordinance*. There is no requirement we can find in the Zoning Ordinance for all arguments in appeals to the Board to be "fully included" in the letter of appeal. To the contrary, the Board is expressly authorized to consider *all* relevant information, *including but not limited to* "*any additional materials as may be presented at the appeal hearing, and any written correspondence submitted after the appeal has been filed*." Mesa Zoning Ordinance § 11-77-4.G.1 (emphasis added).

Furthermore, your interpretation would require planning staff to be the gatekeeper for what constitutes an "argument" and which "arguments" are "new." You do not have that discretion.

Once again, your application of the Zoning Ordinance to restrict our ability to present our case to the Board of Adjustment appears intended to unfairly favor the City's interests in maintaining your incorrect interpretation and to deprive our client of its due process rights. We intend to submit additional material to the Board prior to the hearing. We demand that our additional interpretation be provided to the Board in the exact form we submit it, regardless of whether you think it contains "new arguments."

IV. APPEAL FILING FEE.

Finally, our client paid the fee for the appeal as a matter of courtesy and to expedite the process. We note that under Section 11-77-4.B.1 of the Zoning Ordinance, an appeal may be brought "by filing a written appeal accompanied by the payment of the appropriate fee." However, Section 11-66-3.D.2 clearly states that "No fee is required for this appeal" to the Board. Therefore, the "appropriate fee" in this appeal is zero. Accordingly, we request a refund of the filing fee.

V. CONCLUSION.

Please let us know in writing by September 21, 2016 whether you will: (a) change the description in the advertising as requested; (b) withdraw the mailing requirement and only proceed with advertisement and posting; (c) agree to forward our additional information to the Board in its entirety; and (d) refund the appeal filing fee.

If you would like to discuss these issues, we would be happy to have that discussion in person or on the telephone. We look forward to hearing from you.

Very truly yours,

BERRY RIDDELL LLC

Jeffrey D. Gross

PEW & LAKE, PLC

Reese Anderson

JDG/lk

mesa·az

September 27, 2016

VIA FIRST CLASS MAIL AND EMAIL

Jeffrey D. Gross, Esq.
BERRY RIDDELL LLC
6750 E. Camel Back Rd., Ste. 100
Scottsdale, AZ 85251
jg@berryriddell.com

Reese Anderson, Esq.
PEW & LAKE, PLC
1744 S. Val Vista, Ste. 217
Mesa, AZ 85204
reese.Anderson@pewandlake.com

Dear Jeffrey and Reese,

I received your letter dated September 16, 2016. This letter addresses your four objections.

I. Description of Appeal

After reviewing your proposed language, it is a good starting point for the newspaper advertisement. Your proposed language, however, does not address the subject of the Zoning Administrator's interpretation. Therefore, language is added to your sentence that briefly summarizes the Zoning Administrator's interpretation and the fact that it is being appealed. To that end, the advertised language will be revised as follows:

Consider an appeal of an interpretation of the Zoning Administrator regarding the method of processing a request to develop a single residence subdivision in the location of the driving range for the Red Mountain Ranch Golf Course. The Zoning Administrator's interpretation is that the request must be processed as a major modification to the Red Mountain Ranch Development Master Plan's '-PAD' overlay zoning district, as it is considered a significant change that requires the modification or removal of a condition of the zoning. The applicant is appealing this interpretation.

II. Mailed Notice to Property Owners

Additionally, after reviewing the sections of Mesa's Zoning Ordinance referred to in your letter, my original position still stands. Mesa Zoning Ordinance, Section 11-67-5.B controls the minimum requirements for public notice in this case. This is consistent with how the Zoning Administrator has applied the public notice requirements in previous appeals of Zoning Administrator interpretations and it is consistent with the notice requirements for any matter that involves a public hearing before the Board of Adjustment.

Mesa Zoning Ordinance, Sections 11-66-3.D.4 and Section 11-77-4.C both describe the notice requirements when the Zoning Administrator is acting as a Hearing Officer, not when the Zoning Administrator is acting in an administrative capacity. When the Zoning Administrator issues an interpretation, the Zoning Administrator is acting administratively, therefore these sections do not apply.

Moreover, as stated previously, the subject of the Zoning Administrator interpretation is a modification/removal of a stipulation of the zoning for the entire Red Mountain Ranch area as well as a modification to the entire Red Mountain Ranch Planned Area Development (PAD) overlay zoning district (previously referred to as a Development Master Plan), therefore Mesa's Zoning Ordinance requires that an applicant notify all property owners within the Red Mountain Ranch PAD area as well as the owners of property located within a 500-feet radius of the entire Red Mountain Ranch PAD area.

If you disagree with this interpretation, you may appeal the interpretation to the Board of Adjustment as a separate action. If you do so, this interpretation would need to be decided first, as it affects the notice requirements for the Zoning Administrator's interpretation of your request to develop the driving range.

III. Scope and Supplementation of Arguments

Section 11-77-4 of Mesa's Zoning Ordinance does state that a written appeal must include the grounds for the appeal, "if required by this Ordinance." The intent of this provision is to make sure the grounds for an appeal are stated when the appeal is filed and not after the fact. Because the Zoning Ordinance does not make this clear, the point is conceded, and all additional materials submitted for your appeal will be forwarded to the Board. In future, the language in this section of the Mesa Zoning Ordinance will be amended to clarify that all grounds for an appeal must be filed at the time the written appeal is filed.

IV. Filing Fee

And lastly, your letter cites to Mesa Zoning Ordinance, Section 11-66-3.D.2 as grounds for not having to pay a fee to file your appeal. This section of the Zoning Ordinance, however, does not apply to decisions of the Zoning Administrator acting in an administrative capacity, it only applies to appeals filed when the Zoning Administrator is acting as a hearing officer, which is not the case. You are appealing an interpretation of the Zoning Administrator and these decisions are made by the Zoning Administrator while acting in an administrative capacity. The fee remains required, pursuant to Mesa Zoning Ordinance Section 11-77-4.B.1 and will not be refunded. As mentioned earlier, this determination that a fee is required may also be appealed to Board of Adjustment.

V. Conclusion

The advertisement for this case, assuming there is no appeal of the notice requirements as stated in this letter, will be sent to the newspaper on October 3rd for publishing on October 8th. If you do decide to appeal the notice requirement the City will have to continue the case until the Board of Adjustment rules on this issue.

Sincerely,

Gordon Sheffield, AICP CNUa
Zoning Administrator

BERRY | RIDDELL LLC

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October 4, 2016

VIA FIRST CLASS MAIL AND EMAIL Gordon.Sheffield@mesaaz.gov
Gordon Sheffield
Zoning/Civil Hearing Administrator
City of Mesa, Planning Division
PO Box 1466, 55 N Center
Mesa, AZ 85211-1466

Re: Red Mountain Ranch Interpretation

Dear Mr. Sheffield:

We are in receipt of your letter dated September 27, 2016, in which you continue to erroneously rely on § 11-67-5.B for your interpretation that we must mail notice. We request that you reconsider your decision that mailed notice is necessary for this appeal.

Your reasoning is that Sections 11-66-3.D.4 and 11-77-4.C of the Mesa Zoning Ordinance apply (and do not require mailed notice) only when the Zoning Administrator (ZA) is acting as a "hearing officer," not when the ZA is acting administratively. This is incorrect under your own interpretation of the express terms of the Mesa Zoning Ordinance.

For purposes of this letter we will assume that the Zoning Ordinance separates the ZA into hearing officer and administrative roles. Under this assumption, Section 11-66-7 dictates the powers and duties of the ZA, and creates the processes that the ZA is obligated to follow. Section 11-66-7.D provides that any person aggrieved by "a decision of the Zoning Administrator may appeal the decision to the Board of Adjustment within a period of 30 days from the time that the decision is made the manner specified in § 11-67-11 [which does not apply] or Chapter 77." Section 11-66-7 says nothing about § 11-67-5, nor draws a distinction between appeal of an administrative or hearing officer ZA decision.[1] In other words, appeals from any decision of the ZA, no matter in what capacity, are governed by Chapter 77.

In fact, Chapter 77 establishes "uniform" procedures for appeals from decisions by the ZA and the ZA Hearing Officer – both of the roles you claim to play. *See* § 11-77-1 ("This chapter establishes uniform procedures for appeals of final decisions by the Historic Preservation Officer, Planning Director, *Zoning Administrator, Zoning Administrator Hearing Officer* . . .")

[1] You have already agreed that § 11-66-7.D applies to this appeal in your email of July 11, 2016, in which you conceded the appeal submittal deadline was 30 days rather than 15 days. Thus, you cannot now decide that the notice requirements in this section are inapplicable.

(emphasis added). Section 11-77-4.C requires notice of an appeal to the Board of Adjustment from *any* entity listed in § 11-77-1, including either the Zoning Administrator or the Zoning Administrator Hearing Officer, to be given in the same manner for the action that is the subject of the appeal. You chose not to have a public hearing for your interpretation in this matter, so there was no mailing. By so doing, you also established the notice that must be given of the appeal to the BOA, which does not include mailing.

Although the Mesa Zoning Ordinance may have some internal inconsistencies in other respects, there is no way the provisions can be reasonable read to support your interpretation that § 11-67-5.B, rather than Chapter 77, applies here to create a requirement of notice to all of the Red Mountain Ranch subdivision plus an additional 500 feet. As we have explained, § 11-67-5.B only applies to "variances, [SUPs, DIPs, SCIPs], and *interpretations determined by the Zoning Administrator to require a public hearing*" (emphasis added). Because you did not require a public hearing with your initial interpretation, you cannot insist that § 11-67-5.B applies now. To do so would not only ignore Chapter 77, but would allow you to decide after the fact what notice is required to appeal your own interpretation. You do not get to dictate how notice must be given of an appeal from your decision by self-selecting the hat you supposedly were wearing when making your decision. That is not the express requirement or intent of Zoning Ordinance and is against basic premises of due process.[2]

Section 11-66-7 and Chapter 77 are clear and straightforward. The City clearly is intentionally misreading the notice provisions to make this as burdensome as possible, to create as many hurdles as possible, and to deprive our client of its due process rights.

Moreover, the one-sided description of the appeal still is biased and misleading, and the City illegally charged a fee for the appeal. We again request that the description we provided be used. With respect to the fee, you have conceded Chapter 66 applies to this appeal. Section 11-66-3.D.2 section states, unambiguously, "No fee is required for this appeal."

Finally, your instruction that we must appeal your interpretation of the mailing requirement to the BOA is meaningless, and further violates our client's due process rights. Based on your interpretation, we would have to mail notice of the appeal to the same recipients we claim do not need notice of your initial decision, which would defeat the entire purpose of avoiding the mailing requirement in the first place. Why should we appeal a decision that we have to mail notice when the appeal would require the very same mailed notice? We reserve all rights to challenge this facially incorrect and unfair decision without going through the exercise

[2] Even assuming § 11-67-5.B applied here, which we dispute, the 500 foot notification radius can only apply to the area of the proposed project, *i.e.*, the driving range, since that is the "property that is the subject of the appeal."

of complying with notice requirements that we do not need to comply with in the first place. Indeed, this entire process as you have interpreted it is a due process violation.

If you would like to discuss these issues, we would be happy to have that discussion in person or on the telephone. We look forward to hearing from you.

Very truly yours,

BERRY RIDDELL LLC

Jeffrey D. Gross

PEW & LAKE, PLC

Reese Anderson

JDG/lk

mesa·az

October 18, 2016

VIA FIRST CLASS MAIL AND EMAIL

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reese.anderson@pewandlake.com

Re: Zoning Administrator Interpretation – Minimum Mailed Notice Requirement for Red Mountain Ranch Interpretation

Dear Jeffrey and Reese,

I am in receipt of your letter dated October 4, 2016, in which you have asked me, as the Zoning Administrator (ZA), to reconsider my decisions regarding (1) the method and extent of public notice, (2) the wording of the public notice, and (3) the issue of payment of an appeal fee. My decision remains as stated in my letter dated September 27, 2016. This letter serves to further clarify my position on the minimum notice requirement and the language used to advertise/agendize the appeal.

I. Notice Requirement

Regarding public notice, aside from the state statutory notice requirements, Mesa's Zoning Ordinance requires mailing a written notice to certain property owners. Mesa Zoning Ordinance 11-67-5.B controls the mailed notice requirement for your case.

In your letter you argue that appeals from a Zoning Administrator's decision are governed by Chapter 77 of Mesa's Zoning Ordinance. I respectfully disagree with your position and analysis because it fails to recognize that the Zoning Ordinance must be viewed and applied as a harmonious whole.

The requirement for mailing notice is addressed in both sections 11-67-5.B (Notice of Public Hearings) and 11-77-4.C (Public Notice). Both sections are on point in this case. As the Zoning Administrator, I read both sections and analyzed them in terms of the intent of the code, the intent of the public notice requirement, and how Mesa's Zoning Ordinance has been historically interpreted and applied.

If Section 11-77-4.C governs, as you contend it does, no public notice would be required. As I stated in my previous letter, Section 11-77-4.C does not apply to Zoning Administrator interpretations. Section 11-77-4.C describes the notice requirements when the Zoning Administrator is acting as a Hearing Officer, not when the Zoning Administrator is acting in an administrative capacity. When the Zoning Administrator

issues an interpretation, the Zoning Administrator is acting administratively. It would be illogical, to apply Section 11-77-4.C and not require any public notice to an appeal of a Zoning Administrator decision or interpretation when completed as an administrative function. This would allow appeals of administrative Zoning Administrator interpretations to circumvent the notice requirements of Mesa's Zoning Ordinance, which is not the intent of the Zoning Code or the public notice requirement.

As the Zoning Administrator, I helped draft Mesa's Zoning Ordinance and know that the intent of the code is to require mailed notice to affected property owners. If a dispute arises regarding notice requirements, such as your appeal, the Zoning Administrator interprets the applicability of the notice requirements broadly and in a manner that is fair and transparent.

To take your position would require the Zoning Administrator to construe Mesa's code narrowly to avoid any notice requirement. That is not in keeping with the intent of the code and is not how the Zoning Administrator has historically interpreted the code.

As stated previously, Mesa Zoning Ordinance 11-67-5.B is on point in this case. This Section requires applications to the Board of Adjustment for interpretations determined by the Zoning Administrator to require a public hearing to provide notice to property owners within 500-ft of the exterior boundary of the property that is the subject of the application. This section controls the minimum requirement for public notice in this case. This is consistent with how the Zoning Administrator has applied the public notice requirements in previous appeals of Zoning Administrator interpretations and is consistent with the notice requirements for any matter that involves a public hearing before the Board of Adjustment. Mesa's Zoning Ordinance has always anticipated notice requirements for any requests requiring a hearing before the Board of Adjustment.

Additionally, Arizona's open meeting law favors open meetings and ample notice to ensure the public can attend and monitor the meetings.[1] That is why in 1978 the Arizona legislature enacted 38-431.09 which states:

> It is the public policy of this state that meetings of public bodies be conducted openly **and that notices** and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretation of this article shall construe any provision of this article in favor of open and public meetings. (emphasis added)

The intent of public notice is to give those property owners that would be affected by a decision the opportunity to attend the hearing.[2] It is my job as the Zoning Administrator to construe any notice provisions in the Mesa City Code to favor open and public meetings. To take your approach would require me to narrowly apply the notice provision to your case. For me to come to the conclusion that Zoning Administrator interpretations are excluded from the minimum mailing notice requirements would be

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[1] *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 122-23, 912 P.2d 1345, 1351-52 (App. 1995).
[2] *East Camelback Home Owners Association v. Arizona Foundation for Neurology and Psychiatry*, 18 Ariz. App. 121, 127, 500 P.2d 906, 912 (1972).

contrary to the intent of the Mesa Zoning Ordinance, and would require me to narrowly construe Mesa's code in such a way as to not favor open and public meetings.[3]

In order to comply with Mesa's Zoning Ordinance, your appeal requires mailed notice to property owners within RMR PAD extending 500-ft from the boundaries of the Red Mountain Ranch DMP/PAD and compliance with the mailed notice requirement is a prerequisite to conducting the public hearing.

A. Notice Requirement: 500-ft Notification Radius

Additionally, your letter indicates that assuming Section 11-67-5.B applies, you dispute the boundaries of the 500-ft notification radius. It is your belief that notice should only be provided to property owners who live 500-ft from the driving range. My original position still stands on this issue. Mailed notice is required to each property owner within the Red Mountain Ranch Development Master Plan (RMR DMP), and to owners of properties within a 500-ft radius of the Red Mountain Ranch DMP/PAD. There are several reasons for this decision including the fact that your request effects the entire DMP/PAD, not just the driving range property, and the fact that you are appealing a Zoning Administrator interpretation regarding the requisite procedural processes for a modification to a DMP/PAD which again affects the entire RMR DMP. Assuming that the Board agrees with your determination of how a modification of the RMR DMP should be processed, such an interpretation could affect how any future request of the same DMP is processed, which in turn affects the entire DMP, not just the golf course driving range.

Compliance with Mesa's minimum requirements for notice of a public hearing is a prerequisite to holding the meeting. This means notice had to be sent by 1st class mail by October 13th, 14-days before the scheduled public hearing. Because no mailed notice was provided to the City by October 13, the Board of Adjustment cannot hear the appeal on October 26.

II. Description of Appeal

To satisfy the statutory notice requirements in A.R.S. § 9-462.04, and public advertising requirements of the Mesa City Charter, the advertisement for the October 26th Board of Adjustment meeting was sent to the newspaper on October 3rd, and this notice was published on October 8th in the Arizona Republic. In addition, four signs were posted in the Red Mountain Ranch DMP area, including one adjacent to the golf course driving range. The newspaper notice and posted signs both include the notice language as stated in the September 27th letter. My position on this issue has not changed.

Notice of a public meeting is an essential element of Arizona's public meeting law. Notice of a public hearing is "adequate if it affords an opportunity to any person, by the exercise of reasonable diligence, to determine if his property would be affected and to what extent."[4] As the Zoning Administrator, I believe the language is adequate and reasonable to afford the property owners in Red Mountain Ranch the opportunity to know if their property is affected by the interpretation and to what extent. The language

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[3] Exceptions to the open meeting law "should be narrowly construed in favor of requiring public meetings." *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 484, 803 P.2d 891, 894 (1990); *Johnson v. Tempe Elementary School Dist.*, 199 Ariz. 567, 569-570, 20 P.3d 1148, 1150 - 1151 (App. 2000).

[4] *East Camelback Home Owners Association v. Arizona Foundation for Neurology and Psychiatry*, 18 Ariz. App. 121, 127, 500 P.2d 906, 912 (1972).

published in the newspaper and posted on the signs satisfies the requirements of due process and notice. I do not believe the language is biased, as you suggest. Rather, it simply states the Zoning Administrator's interpretation and that this interpretation is being appealed. Your suggested language is used, but if left alone, does not provide sufficient explanation of the request, so it creates a concern about being too vague and not providing adequate notice to property owners.

III. Appealing the Minimum Notice Requirements

As I indicated previously, your client may appeal the question of how much notice is required. Doing so will stay all proceedings in the matter regarding the initial appeal.

The Board of Adjustment ("Board") is required to act in a public hearing forum. Because of Mesa City Charter requirements, and filing deadlines set by the City's contracted newspaper advertiser, it is past the date to sufficiently advertise a separate appeal of the notice requirements for an October 26th Board of Adjustment hearing in the newspaper. Staff can either cancel the meeting or proceed with the meeting on October 26 when staff will inform the Board that the case must be continued.

Additionally, I wanted to bring to your attention that your letter incorrectly states the notice requirements for the appeal of the minimum notice requirements. In your letter you state that the appeal of the notice requirement would require the same notice as the appeal regarding the determination of processing requirements for your client's request to build a single residence subdivision. This is incorrect. If you decide to appeal the Zoning Administrator's interpretation on the minimum public notice requirements, no additional mailed notice would be required. The appeal of the minimum notice requirements is not associated with a specific geographic territory or parcel -- the effect of the interpretation is City-wide and not limited to the area of Red Mountain Ranch DMP as is the case for your client's appeal filed on July 26th. Again, the question relates to overall process and procedure, and how public notice of an appeal of an administrative interpretation/action of the Zoning Administrator should occur.

If your client does decide to appeal the issue of public notice, a case could be advertised for the December 7th regular meeting of the Board, because the newspaper advertising deadline for the Board's November 2nd regularly scheduled meeting has also passed.

Sincerely,

Gordon Sheffield, AICP CNUa
Zoning Administrator

BERRY | RIDDELL LLC

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October 19, 2016

VIA EMAIL (gordon.sheffield@mesaaz.gov)

Gordon Sheffield, AICP CNUa
Zoning/Civil Hearing Administrator
City of Mesa, Planning Division
PO Box 1466, 55 N Center
Mesa, AZ 85211-1466

Re: Notice of Appeal of the Notification Requirements Relative to Case No. BA16-049

Dear Mr. Sheffield:

As you know, this office, together with Jeffrey Gross, of Berry & Riddell, represents Divot Partners, the owner of the Red Mountain Ranch Golf Course. We are writing for two reasons. First, through this letter, and under Sections 11-66-7(D)(5) and 11-77-4 of the Mesa Zoning Ordinance, we hereby give notice of our appeal of the Zoning Administrator Interpretation/ Decision received by this office and dated September 27, 2016 and October 18, 2016 relative to the Zoning Administrator's decision to require the Appellant to notify ALL of Red Mountain Ranch plus 500 ft. beyond such boundary. Second, we are writing in response to your October 18, 2016 letter and the unresolved issues therein.

Notice of Appeal of Notification Requirements

We further request a hearing before the Mesa Board of Adjustment relative to this decision reached by the Zoning Administrator in the September 27 and October 18 letters. As before, we reserve the right to supplement this appeal letter by submitting additional materials once the appeal hearing date has been set before the Board of Adjustment.

As required by Section 11-77-4(B), we provide the following information:

a. The date of this appeal is the date of this letter: October 19, 2016.

b. The name of person filing the appeal is: Reese L. Anderson. The individuals representing Divot Partners in this appeal are: Reese L. Anderson and W. Ralph Pew of Pew & Lake, PLC, and Jeffrey Gross, of Berry & Riddell, 6750 E. Camelback Rd., Scottsdale, Arizona 85251.

c. The address to which notices shall be sent is: Pew & Lake, PLC, Attn: Reese L. Anderson, 1744 S. Val Vista, Suite 217, Mesa, Arizona 85204, with copies in all cases to Jeffrey Gross, Berry & Riddell, 6750 E. Camelback Rd., Scottsdale, Arizona 85251.

d. The contact information, telephone number and e-mail addresses of the appellant to be contacted regarding the appeal is:

Appellant:	Reese L. Anderson or W. Ralph Pew Pew & Lake, PLC 1744 S. Val Vista, Suite 217 Mesa, Arizona 85204 Office: 480-461-4670 Facsimile: 480-461-4676 Email: reese.anderson@pewandlake.com
With a copy to:	Jeff Gross at: jg@berryriddell.com

e. The action or decision being appealed is the Zoning Administrator's Interpretation dated September 27, 2016 and October 18, 2016 regarding the requirement to notify all of Red Mtn. Ranch plus 500 ft. from the exterior of such community.

f. The Appellant's requested outcome is that the Board of Adjustment will agree with Appellant that no notice is required, and alternatively, that is notice is required, it would only be 500 ft. from the "subject property", which is the driving range portion of the golf course and not the entirety of Red Mtn. Ranch.

g. The grounds for this appeal are that the Zoning Administrator is improperly interpreting the Mesa Zoning Ordinance by selectively choosing the more onerous provisions within the Ordinance in an attempt to cause unnecessary public opposition, violate the Appellant's due process rights, make appeal of the Zoning Administrator's own interpretation as onerous as possible, and cause additional and unnecessary expense to the Appellant.

h. There is no assigned address for the subject property, but the property is generally described as the driving range of the Red Mtn. Ranch Golf Course. The case number involved and pending with the City of Mesa is BA16-049.

i. Because your October 18, 2016 letter did not state an appeal fee was required, we did not include one. If you determine otherwise, we reserve the right to present our objections at that time.

Under Section 11-77-4(D) of the Mesa Zoning Ordinance, we request that the Board of Adjustment conduct a public hearing *de novo*, and review all relevant information, including all prior interpretations of the Zoning Administrator and the notice requirements thereunder. As noted above, we reserve the right to present "additional materials as may be presented at the appeal hearing, and any written correspondence submitted after the appeal has been filed."

We look forward to hearing from you about a date for the appeal and presenting this appeal to the Board of Adjustment. If you have any questions or feel that this notice of appeal is deficient in any way, please inform us immediately so that we may remedy any such deficiency.

Unresolved and New Issues

As noted above, we are in receipt of your letter dated October 18, 2016, in which you continue to erroneously rely on § 11-67-5.B despite the clear language of the City's Zoning Ordinance. Your continued reasoning that Sections 11-66-3.D.4 and 11-77-4.C do not apply does not hold water when the specific Chapter for making appeals is Chapter 77, and is the one that you directed us to in prior communications. Accordingly, we again raise our objection and request that you reconsider.

We further object to notification signs placed by the City of Mesa within Red Mtn. Ranch. Specifically, we object to (1) the very fact that the signs are placed when you knew that we object to this notification requirement, (2) we object to the language used on the signs, which continues to be one-sided and clearly slanted in favor of the City of Mesa, and (3) we object to the size of the signs. As you know, the size of a typical Board of Adjustment notice sign placed on a property is 16" x 20". Yet, in this case, the City unilaterally elected, over our objects to place 4' x 4' signs throughout the entire community. This 720% increase in sign size and is unprecedented, unacceptable and without basis. It is a further violation of our client's due process rights and is exemplary of the lengths the City will go to slant the Board of Adjustment hearing to its side. We again renew our request to immediately remove the notice signs as this issue is clearly prejudicing the Appellant's ability to get a fair hearing and is a violation of due process.

Cancelation of October 26, 2016 BOA Hearing

Finally, this letter confirms that the Appellant is in agreement to cancel the October 26th Board of Adjustment Hearing. We further note that the first available hearing date on the appeal of the notice requirement is December 7th.

We reserve all rights to continue to challenge these facially incorrect and unfair decisions without going through the exercise of complying with notice requirements that we do not need to comply with in the first place. Indeed, this entire process as you have interpreted it is a due process violation.

We further place the City of Mesa on notice that it seems highly improper that the same person whose decision is being appealed is still making the decisions as to what the notice language will be, the size of the signs, the amount of notice required, and on and on. We believe this arrangement is a clear conflict of interest and should be remedied immediately.

If you would like to discuss these issues, we would be happy to have that discussion in person or on the telephone. We look forward to hearing from you.

Very truly yours,

BERRY RIDDELL LLC

Jeffrey D. Gross

PEW & LAKE, PLC

Reese Anderson