Board of Adjustment

Staff Report

CASE NUMBER:	**BA16-072** (PLN2016-00846)
STAFF PLANNER:	**Gordon Sheffield, AICP CNUa - Zoning Administrator**
City's Legal Counsel:	**Mesa City Attorney's Office - Mary Grace McNear, Esq.; Charlotte McDermott, Esq.; Dickinson Wright PLLC - David J. Ouimette, Esq.; Mitesh V. Patel, Esq.; Vail C. Cloar, Esq.**
LOCATION/ADDRESS:	**Citywide**
COUNCIL DISTRICT:	**All**
APPELLANT:	**Divot Partners,**
Appellant's Legal Counsel:	**Pew and Lake, LLC - Reese L. Anderson, Esq.; W. Ralph Pew, Esq.; Berry Ridell LLC - Jeffery D. Gross, Esq.**

REQUEST: An appeal of a Zoning Administrator interpretation of the mailed public notice requirements for processing a major modification to an approved Development Master Plan (DMP) adopted as part of a Planned Area Development (PAD) overlay district.

SUMMARY OF APPLICANT'S REQUEST

The issue being appealed involves the mailed notice required when an applicant appeals an interpretation made by the Zoning Administrator (ZA). The appellants disagree with the ZA's determination that the owners of property in the entire land area of a DMP, plus the owners of property in a 500-ft radius outside of the boundaries of that same DMP, should receive mailed letters of notification. Based on the reasons stated in their letter of October 19, 2016 (See Board materials), the appellant contends that either: 1) no mailed notice is needed; or 2) that mailed notice should be limited to a 500-ft radius around the proposed development site (driving range).

STAFF RECOMMENDATION

It is recommended that the Board uphold the decision of the Zoning Administrator to require mailed notice to all owners of land located within the boundaries of the Red Mountain Ranch PAD, and to those owners of property located within a 500-ft radius of the exterior boundaries of the Red Mountain Ranch PAD.

EXPLANATION OF CITYWIDE APPLICABILITY

While the mailed notice requirement for appeals of zoning administrator interpretations was raised because of a particular appeal, this case is being advertised without reference to a specific site or location, because the outcome will affect the entire city. The intent of this 'citywide' advertisement is to clarify notification requirements on a general basis, and particularly mailed notice requirements when associated with appeals of ZA interpretations and the determination of the exterior boundary of the property when it is located within a PAD. As a citywide interpretation, the Board's decision will affect similar future appeals of ZA interpretations associated with changes to a PAD.

STAFF SUMMARY AND ANALYSIS:

Summary of Zoning Administrator's Notice of Appeal Interpretation

This case involves an appeal of a ZA decision regarding the notice requirements related to an applicant's appeal of a ZA interpretation (referred to as "Initial Interpretation" which is to be heard by the Board of Adjustment in the future). The Initial Interpretation deals with the process to modify a PAD and a condition on a zoning case. The appellant disagrees with the ZA's decision on the mailed notice required for the appeal of the Initial Interpretation. The ZA determined that the notice requirement for the Initial Interpretation was governed by MZO § 11-67-5B.

There are two questions involved in this hearing:

1. Is mailed notice of the Board's appeal hearing on the Initial Interpretation required?
2. If mailed notice is required, what is the proper geographic scope of the mailed notice?

Question #1: Is mailed notice required?
There are two provisions of the zoning ordinance that discuss what type of notification is needed with regard to a Board of Adjustment public hearing involving an appeal of a ZA decision.

- MZO §11-67-5.B Common Procedures - Notice of Public Hearings - Governs notice requirements involving ZA interpretations.
- MZO §11-77-4.C Appeals-Procedures-Public Notice- Applies to appeals of "final decisions" made by the ZA.

With regard to public notice as specified in §11-67-5, this notice includes the standard notice requirements specified by state law for any Board of Adjustment case (A.R.S. § 9-462.06F), which includes, at a minimum, mandatory notice published in a local newspaper a minimum of 15-days in advance of the Board hearing date, and a posting placed on the property that is the subject of the case. This section also requires:

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.

The public hearing of an appeal of final decisions to the Board of Adjustment is discussed in §11-77-4. This section addresses notice for several types of appeals, including appeals to the Historic Preservation Board, the City Council, Design Review Board, the Planning and Zoning Board or appeals to the Planning and Zoning Board from the Planning Hearing Officer. This section assumes that a previous public hearing has been held, and the decision made at the previous public hearing is what is being appealed. Notice requirements for each of these appeals differs a bit to address the unique nature of each review body. As such, the appeal provisions in §11-77-4 requires the following public notice:

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.*

The intent of "provided in the same manner" is to avoid different notice requirements for the appeal versus the notice requirements required for the public hearing because each governing body has different notice provisions specifically tailored to its particular public hearing process. For example, if a case is decided by the Design Review Board (DRB), and is appealed to City Council, under §11-77-4, notice of the appeal hearing is the same as the notice required for the initial Design Review case, which is governed by §11-71-4 (Design Review: Public Notice). In this example, the DRB meeting process requires standard public meeting notice (which differs from public hearing notice requirements), and mailed notice to owners of property within 300-ft of the site 15-days in advance of the meeting.

Contrast the DRB example with an appeal of a Planning and Zoning Board (P&Z) decision to City Council. The initial hearing held by the P&Z Board requires the same statutory requirements of posting and newspaper publication (11-67-5A), and makes mandatory every case has a 500-ft notice radius from the boundaries of the case site. Section 11-

77-4 allows an appeal of the "final decision" to utilize the same notice requirements as the initial decision.

In this appeal, the ZA issued the Initial Interpretation as an administrative interpretation. As such, there was no posting of the property, no published notice in the newspaper, and no mailed notice that an interpretation was being considered. The ZA issues administrative interpretations at the request of an applicant who has asked for the ZA to clarify a standard or criteria in the zoning ordinance. These interpretations are issued without a public meeting or hearing.

If the appellant's argument were correct, then the other notice requirements of §11-67-5.B would also not be required. This means that there would be no published notice, no posted notice and no mailed notice. The appellant's position, therefore, violates state law. Under A.R.S. §9-462.06F ANY public hearing of the Board of Adjustment requires notice of the hearing by both publication in the newspaper and posting of the notice. Mesa's Zoning Ordinance §11-67-5.B adds additional mailed notice requirements to the State notice requirements.

It is important to note that the Mesa City Council adopted a public policy of open meetings and transparency in deciding matters of interest to its citizens. Resolution 7283, adopted in 1998, states that the Council 'affirms its support for the concept of early and productive involvement all interested parties in the development process' and has encouraged staff to expand public participation whenever possible.

This addition of mailed notice is consistent with the Council's idea of operating in public forum with complete transparency, and a desire that its citizens be aware of requests that may affect citizen interests. Based on Council's adopted policy of public participation and awareness, the logic of notice requirements becoming applicable when a public hearing is required, and the fact that Section 11-77 only applies to final decisions and applying it in this instance would preclude the appellant from providing any notice, the ZA determined that mailed notice was required, in addition to posting notice of the appeal at the case site, and publication of appeal in the local newspaper.

Question 2: What is the proper geographic scope of the required mailed notice?
The second disagreement with the ZA's determination of notice requirements relates to the individuals who should receive notice. The appellant contends that in the event that the Board agrees that some mailed notice is required, then mailed notice should be limited to property owners located within 500-ft of the driving range. The ZA has interpreted the code to require mailed notice to those who own property in the Red Mountain Ranch PAD and those within 500 feet of the exterior boundary of the PAD. The ZA has two rationales for this interpretation.

First, there is no separate parcel for the driving range. In fact, the driving range and the golf course are one parcel. The appellant is proposing to change a land use within the golf course parcel. The golf course parcel extends throughout the entire Red Mountain Ranch PAD. Because the property is configured this way, the ZA interpreted 11-67-5B2b to require mailed notice to property owners within 500 feet of the PAD boundary.

Second, **the request to determine *how* to modify a long adopted plan**, and allow development of a property previously planned for golf course use (considered private open space), is a **procedural question of process**. It is **not a question of modifying the land use plan of development** for a specific parcel of land for a different land use. Changing the procedures for altering or modifying a DMP could potentially affect each and every property owner in the same DMP. Each property owner has notice of the adopted DMP, the location of various land uses within the geographic area of the DMP, and the procedures and processing requirements for revising the DMP. If the revision procedures and process are altered or modified in any way, it affects how **any** owner of property located within that DMP may request a similar modification in the future. For these reasons, notification of requests to interpret how to modify the DMP are a concern of owners within the entire DMP, and not just the immediate location of the specific request.

Further, the impact of altering a **procedure or process** to consider a land use change differs from the impact of the

direct request for the land use change itself. Revising the processing procedure for revisions differs in that it affects not only the application to make a procedural change in the short term, but also any similar requests of similar scale that may be considered at a future date.

Because the Initial Interpretation relates to process, and the not the possibility that other properties within the same development master plan may also seek revisions to the DMP's land use plan, all the owners of property within the DMP deserve notice of a case that affects their property interests.

Included in the Board's materials is a letter sent to the appellant on October 18, 2016, in response to objections they raised regarding notice to be mailed to affected property owners regarding pending Board of Adjustment case BA16-049. That case is being continued in order allow the Board to decide this question and clarify notice requirements. Also included are the appellants' letters of October 4 and 19, 2016, and a letter from the ZA dated September 27. The October 4 and October 19 letters makes known the appellant's objections.

SUGGESTED FINDINGS:

1.1 The Red Mountain Ranch DMP was adopted initially by City Council in 1983, and has been revised several times since then. There is another appeal of a ZA interpretation currently being processed which relates to this case.

1.2 The Red Mountain Ranch DMP is located in its entirety within a specific PAD overlay district. Each property located with this PAD overlay is subject to the requirements of the adopted plan and its revisions.

1.3 The Initial Interpretation decides how a request for new development on a site located within a PAD overlay zoning district should be reviewed. The appeal of the Initial Interpretation will be heard at a later date (case BA16-049), once the mailed notice requirements (and the subject of this specific case) are decided.

1.4 This appeal has two parts. First, it asks whether mailed notice should be sent as a part of the notification procedures for the appeal hearing on the Initial Interpretation. Second, if mailed notice is required, then what is the proper geographic scope of the mailed notice?

1.5 Because this appeal relates on a general basis to any notice requirement that may arise from a question relating to how to determine the correct process for reviewing a development request that may or may not modify an adopted plan, the decision of the Board may be applied generally to any future request of a similar scope and nature. Therefore, this appeal involves an interpretation of the zoning ordinance that may be applied citywide, potentially to any development proposal with similar circumstances located anywhere within Mesa.

1.6 The ZA interpretation regarding notice was an administrative action of the ZA and completed without holding a public hearing. It specified that mailed notice must be sent to each owner of property within the area governed by the PAD overlay zoning district as expressed by the Red Mountain Ranch DMP, and the owners of land within a 500-ft radius of the Red Mountain Ranch DMP. No public hearing was held in making this interpretation, as it fell within the day-to-day responsibilities and duties of the ZA as stated in MZO Sec 11-66-7.B.2.

1.7 Final decisions of the ZA are distinct from interpretations of zoning ordinance made by the ZA.

1.8 MZO Section 11-67-5 sets the requirements for public notice of the appeal of the Initial Interpretation (described in Finding 1.2) because the notice requirement set by the ZA for the Initial Interpretation was an interpretation and not a final decision.

1.9 PAD overlay districts are often utilized to plan future land uses of properties located within the boundaries defined by the adopted DMP linked to the PAD overlay district. Changes to the adopted plan, particularly changes associated with procedural questions of processing new development proposals, are of interest to each owner of property located within the boundaries governed by the PAD overlay district and its associated DMP.

1.10 The entire area governed by a DMP with a PAD overlay district is affected by a change to a process or procedure for modifying an adopted DMP. As such, when a request is received to determine the process and procedures for revising a plan, the area to be considered for sending notice of that request is set as the entire area governed by that same DMP.