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

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

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

May 3, 2016

Jim Smith, Esq.
City Attorney
City of Mesa
Mesa, Arizona 85201

Re: City Council Discretion to Evaluate Divot Partners Proposed Development of a Portion of the Red Mountain Ranch Golf Course.

Dear Mr. Smith:

This firm, together with Jeff Gross with Berry & Riddell, represents Divot Partners in connection with the planned development of a small portion of the Red Mountain Ranch Golf Course. As noted in prior materials delivered to you, the driving range portion of the golf course is currently zoned RS-9 and is the location of the proposed single-family, detached, custom home subdivision. This letter is meant to supplement these prior materials and share with you our thought on the issue of whether the Mesa City Council has discretion to deny a Site Plan for the property, when that Site Plan is consistent with the applicable development standards.

We are hopeful that we can work out our differences without the need for litigation. However, should the City deny the proposed Site Plan which we will shortly submit to the City, the owners of the golf course will be forced to sue the City, not only to have the arbitrary action set aside, but for damages from any delay caused by the wrongful denial.

I. Introduction.

Divot Partners plans to develop the driving range portion of the Red Mountain Ranch golf course property with single-family, detached, custom homes. The property is currently zoned RS-9 (DMP), and has been designated as such for several decades. Divot Partners believes it already has met or exceeded all of the standards imposed in the zoning ordinance for development of the property as RS-9. The architecture and design of the homes will be custom in nature and thus they will also meet or exceed the City's requirements.

We acknowledge that the City has the ability under the zoning ordinance to review Divot Partners' Site Plan. While we fully expect that Mesa Planning Staff (including the City Council)

will have some feedback, those suggestions must be based on specific authority in the Site Plan review provisions in the zoning ordinance and not on vague, unenforceable or non-existent standards that go far beyond the City's legal authority. As explained below, the City does not have the power to prevent the use by rejecting the Site Plan or so diminishing the owner's rights under the RS-9 development standards that the project becomes unfeasible or cost prohibitive.

A. The City's Administrative Authority to Approve or Reject a Site Plan Must be Exercised Within the Limits of the Zoning Ordinance.

As I am sure you are aware, approval of a Site Plan is an administrative act that involves the application of established criteria to existing facts. *See, e.g., Pacifica Com. v. City of Camarillo*, 196 Cal. Rptr. 670 (Cal. App. 1983). Unlike a legislative decision, an entity acting in an administrative capacity does not have the ability to exercise discretion if the criteria are satisfied. The criteria must be objective and have sufficient standards to guide the administrative body and to enable landowners to know their rights. *See M Ghent v. Planning Comm.*, 594 A.2d 5 (R.I. 1991) ("Adequate, fixed and sufficient standards of guidance for the commission must be delineated in its regulations so as to avoid decisions, affecting the rights of property owners, which would otherwise be a purely arbitrary choice of the commission); *Cope v. Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Southern Co-op Dev. Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983).

Furthermore, the City cannot deny the Site Plan based on its effect on the surrounding property, since that decision was already made in fixing the zoning, and on the practical side the proposed project is not adjacent to any current homes. Designation of a permitted use "establishes a conclusive presumption that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values or the general harmony of the district." *See TLC Development, Inc. v. Town of Branford*, 855 F. Supp. 555 (D. Conn. 1994) (emphasis added). Nor may the City consider public opposition to the use as a reason to deny the Site Plan. *See East Lake Partners v. City of Dover*, 655 A.2d 821 (Del. Sup. Ct. 1994).

A good discussion of the application of these concepts in the Site Plan context is found in *TLC Development, Inc. v. Town of Branford.* In *TLC*, the property owner submitted a site plan for a 152,000 square foot shopping center that was a permitted use on the property under the zoning regulations. The town rejected the site plan because of concerns over increased traffic and inadequate parking, and the owner sued. The court first reiterated the general rule that if the site plan satisfies the zoning regulations, the zoning commission "has no discretion or choice but to approve it." *Id.* at 855 F. Supp. at 557.

The court then noted that the city could not reject the site plan based on characteristics associated with the use, since the town had already determined the use was permitted. The Court said:

> By articulating the uses permitted in a district, a town has fixed the uses which accommodate all the considerations permitted by the law in adopting a town plan. Once it has done so, a town cannot prevent a permitted use

> based on factors which might have been, or were, considered in deciding the uses permitted in the zoning district. Nor can the town deny approval of a Site Plan on the basis of factors which might only justify its modification.

855 F. Supp. at 558 (emphasis added).

The *TLC* court specifically ruled that the city acted unlawfully by denying the site plan based on its size, because the commission acknowledged that the size was within the zoning specifications. *Id.* Because the city attempted to deny the site plan based on the use, rather than the merits of the plan, the *TLC* court ruled that the commission acted arbitrarily and violated the landowner's due process rights.

This ruling is consistent with the law across the country for site plans and analogous subdivision plats. For example, in *Vick v. Board of County Commissioners*, 689 P.2d 699 (Colo. App. 1984), the county denied a subdivision plat, even though it satisfied all technical legal requirements. The county rejected the plat because of insufficient access, increased traffic noise, and the owner's refusal to dedicate an access easement to nearby wilderness land. The county also found that the plat was incompatible with the surrounding area. The court found that these reasons were arbitrary, capricious and an abuse of discretion because they "can only be described as vague and as having no foundation in any resolution or regulation."

Moreover, in *Carlson v. Town of Beaux Arts Village*, 704 P.2d 663 (Wash. App. 1985), a subdivision plat was denied because it created an "irregular building site" that was inconsistent with the surrounding area, even though the lot met the minimum size requirements. Holding that the town was limited to applying existing land use restrictions, the court found that because no ordinance prohibited irregularly shaped lots, denial based on such a vague standard would put the owner "in the predicament of having no basis for determining how they could comply with the law." Consequently, the *Carlson* court ruled that the action was arbitrary.

As previously shared with you, Mesa Planning Staff indicate that they will recommend denial because of vague standards that are associated with the already approved use or other factors that are inappropriate when reviewing a Site Plan. As the wealth of case law makes clear, rejection on these grounds would be arbitrary, capricious and an abuse of discretion for two reasons: (1) the City cannot deny the Site Plan based on the proposed use, and (2) the City cannot deny the Site Plan based on vague standards.

1. The City Cannot Deny the Site Plan Based on the Approved Use.

First, Site Plan approval is not a legislative act, and even though the City Council will be the final reviewing body, the only discretion it will have is to decide if the Site Plan satisfies the standards in the zoning ordinance, not if the use is acceptable. As discussed in the prior letter, the underlying zoning allows the use. Whether we call the review standard "administrative" or "ministerial," the City can only review the Site Plan under the regulations applicable to site plan

review, and cannot reject the Site Plan based on reasons that have to do with rezoning, such as permitted uses or density. Otherwise, the City would in effect be changing the zoning of the property without going through the mandatory notice and hearing process required by Arizona law. *See* A.R.S. §§ 9-462.01 through 9-462.04.

To the extent either Planning Staff or City Council may not want to see homes on the property, that zoning decision was made long ago. The City may not revisit that decision in the context of Site Plan review. Moreover, should the City take any action that would adversely impact the underlying zoning, Divot Partners would have a Proposition 207 claim against the City for the resulting diminution in the value of the property.

2. The City Cannot Deny the Site Plan Based on its Subjective Definition of "Fit" When all Other Zoning Regulations are Satisfied.

Our client's proposed Site Plan meets all zoning setbacks, coverage requirements and size limits. Despite this fact that the Divot Partners subdivision is legally located on the driving range portion of the golf course and does not back up to any other homes that are located adjacent to the fairways, some in the Planning Staff have suggested that it does not "fit" and its removal of "golf course area" warrants the Site Plan's denial. These concerns/opinions are misplaced because the size of the lots, setbacks, and coverage criteria that dictate the layout of the proposed subdivision were already decided in the zoning ordinance. As in *TLC Development, Inc. v. Town of Branford*, the City cannot effect a legislative zoning change in an administrative Site Plan approval. Yet, this is exactly what Divot Partners is concerned will happen if the Council attempted to change the Site Plan by suggesting that the setbacks were not adequate or that the building heights were too tall or the lots need to be larger. Setbacks, building heights and lot sizes are zoning elements, and cannot be modified administratively. As in the *TLC* case, rejection of the Site Plan on this ground would be arbitrary and unlawful.

Furthermore, any argument toward the concept of "fit," which is not codified in the zoning ordinance, is unenforceable because it gives the City, acting in an administrative capacity, unfettered discretion to decide what "fit" it will accept. Likewise, Divot Partners has no idea how to comply with this unspecified "standard." Divot Partners should not be forced to spend substantial time and expenses preparing and submitting successive plans, guessing what will "fit" on the site under staff's undefined criteria. This is exactly why courts require administrative decisions to be guided by specific and objective standards. In this case, the City has already decided how a building must "fit" on the site through the setbacks, coverage limitations and size restrictions in the zoning ordinance. Staff must apply those standards, which everyone agrees Divot Partners meets, in assessing the Site Plan.

As you know, the City of Mesa Zoning Ordinance sets for the review criteria for site plans in Section 11-69-5(A), wherein its states that the Planning Director and the P&Z Board are guided by ten (10) specific criteria, of which this proposal fully satisfies. We note that in Section 11-69-5(C), there are seven (7) possible conditions of approval that may be used to ensure land use

compatibility during site plan review. It would be contrary to the already established setbacks, heights and other development standard criteria within the RS-9 district to impose additional limitations on this proposed project. Stated differently, if the P&Z Board or the City Council impose additional restrictions on this project above and beyond those standards already set forth in the RS-9 zoning district, such would be an arbitrary and capricious action well beyond the City's authority under this section of the Zoning Ordinance. Additionally, we believe that many of the review criteria are vague enough that specific enforcement of them would be difficult at best especially given the varied nature of prior approvals by the City.

For these reasons, we believe a court would find denial of the Site Plan because of the City's unwritten interpretation of the project's "fit" on the parcel to be arbitrary and capricious action.

B. Golf Course Restriction on Remainder of Course

We note that the question has been posed from the City Staff whether Divot Partners will agree to a restrictive covenant that the remainder of the Red Mountain Ranch Golf Course will remain golf course. As discussed above, the City does not have the power in the context of administrative site plan review to compel Divot Partners to impose such a covenant on its property as a condition of approval, or to deny approval based on Divot Partners' failure to agree to such a condition. Further, and as you know, local governments are limited in what they can require as a quid pro quo for land use approval, especially when it comes to dedications. We would kindly remind you that Arizona law requires cities to comply with the United States Supreme Court decisions in *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In those cases, the Court held that cities must establish a "rough proportionality" between the exaction and the needs created by the development to justify their demands.

Dolan is similar to this case. In *Dolan*, the city required the landowner to dedicate property as a greenway for a permanent recreational easement as a condition for issuance of a building permit. The court found the exaction unlawful because the need for the greenway was not caused by the development:

> If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere ... But that is not the case here.

512 U.S. at 394.

Thus, the suggestion to restrict the remainder of the golf course to only "golf course" uses bears no relation to the needs created by the proposed residential use of this 11.43 +/- acre site. It would be absurd to argue, for example, that the increase in traffic justifies any such restriction.

There simply is no nexus between the proposed use and a restriction on the use of the remaining land. In fact, the City did not require this area to be designated "open space" when the final plat for Red Mountain Ranch was being approved, which is an indication that the development did not create a need for this kind of exaction.

II. Rejection of the Site Plan on the Above Grounds Will Force Divot Partners to Bring a Lawsuit Against the City for Mandamus Relief and Damages.

We believe a court will find that rejection of the Site Plan on the above grounds to be not only arbitrary and capricious action, but also a due process violation. For the former, Divot Partners will be entitled to bring an action to compel the City to approve the Site Plan. For the latter, Divot Partners will also have a cause of action for damages under 42 U.S.C. § 1983. *See Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988). Improper denial of the Site Plan would delay Divot Partners' commencement of construction and the selling of lots, which could cause Divot Partners to suffer substantial damages. In either case, Divot Partners would also be entitled to recover attorneys' fees. A.R.S. § 12-2030; 42 U.S.C. § 1988.

Should Divot Partners be delayed in commencing construction and selling lots by the City's improper refusal to approve the plan, the damages will be enormous. Again, Divot Partners cannot stress strongly enough that it sincerely hopes that these issues can be resolved with the City and that litigation, and the expense that the City could unnecessarily incur in fees and costs, can be avoided. We hope the City will respect Divot Partners' legal rights to build this subdivision. However, if the City chooses to ignore Divot Partners' rights, Divot Partners is fully prepared to ask a court to protect its rights in this case and to be fully compensated for any damages it suffers.

Thank you in advance for your assistance with this matter. If you are interested, Jeff Gross and/or I would be happy to discuss these issues with you at a mutually convenient time.

Pew & Lake, PLC

Reese L. Anderson

cc: Jeff Gross, Esq. (Berry Riddell)

EXHIBIT B

Letter to Margaret Robertson, dated November 23, 2009

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

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

November 23, 2009

VIA HAND DELIVERY

Margaret Robertson, Esq.
Assistant City Attorney
City of Mesa
20 E. Main Street, Suite 850
Mesa, Arizona 85201

Re: Case No. Z09-018 – Parcel 7B Red Mountain Ranch

Dear Margaret:

As you know, this office represents Divot Partners, LLC ("Owner"), the owner and operator of the Red Mountain Ranch Country Club, which includes an 18-hole golf course. This letter is written in support of the Owner's position that it should be allowed to amend its application for Case No. Z09-018 from a rezoning, site plan and preliminary plat case to a site plan and preliminary plat case. The case was originally filed as a rezoning, site plan and preliminary plat case based upon initial discussions with Planning Staff wherein they insisted that it be filed in that manner. Our desire is to remove the zoning element of that original request. In other words, it is our position that a zoning element of the case is not necessary because:

A. The amended application is consistent with the R1-9 (DMP) zoning on the subject property. To clarify, the revised site plan and preliminary plat which we propose to file is a conventional R1-9 subdivision, consistent with all of the applicable zoning, subdivision and development standards, thereby negating the need for a zoning case.

B. Section 11-10-2(A) of the Mesa Zoning Ordinance provides that a DMP overlay does not per se restrict the land uses allowed in the underlying zoning district. In other words, and because the subject property is zoned R1-9, single-family, detached, custom homes are an allowed use.

C. The project does not violate any of the established or "as-built" development standards of the Red Mountain Ranch Development Master Plan ("DMP"), to the extent such are applicable.

This letter is also written in response to your question to us posed as follows: "In the 85 revised DMP the last page is a revised map labeled 'Z85-24 Previously approved DMP'. In the Non –Residential Land Uses, it lists the Golf Course as 160 ac. After you take away the driving range will the golf course still be 160 acres?" The simple answer to this question is no. But, it is not the whole answer for various reasons. First, the 1985 DMP case has been superseded. Second,

we believe the root of the question is focused on a discussion of residential density and open space that we discuss in more detail below.

In addition, we have been asked various other questions pertaining to the proposed project, the development standards of the Red Mountain Ranch development ("RMR") and the underlying zoning cases establishing such development standards. Our goal is to provide you with a comprehensive set of answers to your specific questions and hopefully, to also address other anticipated questions. Of course, our opinion is that the Owner has the legal right to amend its current application and process a site plan case without a zoning element to amend the DMP for RMR.

If you agree with our position, we will amend our application with the Planning Division to remove the zoning element and submit a revised site plan and preliminary plat over approximately 11.41 acres that would comply, without deviation, to the standards established in the R1-9 zoning district and the applicable subdivision rules. The anticipated project would consist of 32, single-family, detached, custom homesites that would generally be built upon the location of the current driving range, which is surrounded by golf course property on all sides consisting of holes 10, 11 and 12. No proposed residential lot would be placed next to any existing residential lot. In other words, the fairway views of lot owners on holes 10, 11 and 12 will not be impacted.

Historical Background

To assist you in your review, we would like to provide you with a brief historical background of the applicable DMP cases affecting RMR. The first zoning case for RMR occurred in 1983 with Case No. Z83-34 (see Exhibit A – Ordinance No. 1704), wherein the Mesa City Council approved a Development Master Plan for RMR. At the time, RMR consisted of 820.5 acres with an overall gross density allowed of 3.13 du/ac, which allowed 2,570 residential dwelling units.

The next overall DMP update occurred in 1985 with Case No. Z85-24 (see Exhibit B – Ordinance No. 1938), which focused on changing a portion of the residentially zoned (R1-9) property to commercial zoning (C-2) and also involved modifications to a good portion of the development plan to recognize the finalization of overall engineering and surveying. There was no significant change to the allowed density and there was no discussion, stipulation or other evidence in the approved staff report or ordinance as to the required minimum amount of open space other than a reference to 12 acres in the conceptual land use plan, which is not part of Ordinance No. 1938, but we have attached it as Exhibit C – Z85-24 Conceptual Land Use Map.

The final overall DMP case for RMR was Case No. Z89-36 (see Exhibit D – Ordinance No. 2486). The major changes in Case No. Z89-36 were the removal of the resort hotel in the southwest portion of the project (as shown on the conceptual site plan attached as Exhibit E – Z89-36 Conceptual Land Use Map, although there was no discussion of it in the staff report) and changes to various residential and commercial zoning areas within the RMR boundaries that occurred in prior zoning cases that did not include overall DMP updates. Resulting from these changes, the density

established in Case No. Z89-36 for RMR is 2,284 units, which equates to a gross density of 2.76 du/ac. Again, there was no discussion of, nor stipulation about, establishing a minimum acreage of required open space.

The following chart summarizes the DMP cases for RMR. For simplicity, and because there has not been similar treatment between the cases, we have calculated density on a gross acre basis. A net density calculation would be difficult to calculate due to shifting land uses over time and the fact that the later cases used gross density with greater clarity. If such a calculation could be made on net acres, the results of the analysis would not change.

	Z83-34	**Z85-24**	**Z89-36**
Acres =	820.5	830	829
Units =	2,570	2,570	2,284
Density =	3.13	3.10	2.76
Open Space =	None Specified	12 acres	None Specified

Since Case No. Z89-36, there have been approximately 20 zoning cases filed and processed within RMR. Including the annexation case, there are approximately 32 case files for projects affecting or within RMR. Despite the number of cases, it is well settled that the last overall DMP update case was and remains Case No. Z89-36. Accordingly, Case No. Z89-36 supersedes the prior two overall DMP cases and is the controlling DMP. One consistent point through each of these DMP cases is that all of the land upon which the golf course and driving range is situated has been zoned R1-9, and remains such today.

While not determinative in this case, it is interesting to note the difference between the RMR golf course and the Las Sendas Golf Course, which retains its historical zoning of R1-90. Stated otherwise, had the original developer of RMR intended the golf course to remain undeveloped forever, it would have proposed, and the City Council at the time would have insisted, that it not be rezoned to R1-9. If it had been otherwise, the golf course would have retained its R1-43 zoning designation that existed at the time of annexation, just as the Las Sendas golf course retains its original zoning designation (R1-90) that it had at the time of its annexation.

A Conventional R1-9 Subdivision Does Not Require a Rezoning

As noted above, we anticipate filing shortly with the Planning Staff a conventional R1-9 subdivision. Because this new plan will be consistent with the applicable zoning district and development standards, a rezoning element is not necessary to be included in the case. It is well settled law that where a site plan is consistent with the underlying zoning, it is not necessary to also file a zoning case unless such is needed for other reasons such as private streets, modifications of development standards, or other similar items. Because the Owner's request will not violate any of the established development standards of either the Zoning Ordinance or the RMR DMP, a zoning case is unnecessary.

The DMP Overlay Does Not Preclude Development of the Golf Course

Our second reason that a zoning element is an unnecessary part of this case is that § 11-10-2(A) of the Mesa Zoning Ordinance expressly states that a DMP overlay does not restrict the uses allowed in the underlying zoning district. As you know, overlay zoning districts are authorized by state statute in A.R.S. § 9-462.01(D). Mesa has adopted several overlay districts in its Zoning Ordinance and as previously noted, the subject property is zoned R1-9 (DMP). Meaning, the subject property is zoned for single-family, detached homes on lots no smaller than 9,000 sq. ft. The property is also subject to the parameters of the RMR DMP as they touch and concern the parcel.

The mere existence of this overlay district, however, does not mean that the subject property must be "rezoned" or that a DMP update case be brought to simply allow custom homes to be developed upon it. Section 11-10-2(A) of the Zoning Ordinance reads:

> The BIZ, PAD and DMP Overlay Zoning Districts are to be used in conjunction with an underlying Zoning District, thereby permitting the same uses as the underlying base zoning district, except those that may be excluded by the City Council." (Emphasis added.)

In other words, unless the applicable zoning ordinance (i.e., Case No. Z89-36) specifically precludes a use or establishes a sole use of such property, the uses found in the underlying zoning district must be allowed without the need to correspondingly process a zoning case.

Thus, in the instant case, and because there is nothing in any of the zoning ordinances that require a golf course, much less a driving range, we believe the analysis should end and we should be allowed to proceed with a site plan case. Nevertheless, and due to your specific question about golf course acreage and several additional questions raised by staff, we will now turn our analysis to whether a reduction in the size of the golf course violates any other requirements of the DMP cases such as density or open space. Our analysis below will also discuss in more detail the treatment of a golf course in the various ordinances.

Golf Course Acreages, Open Space, Density and Golf Course Use

As noted above, the answer to your question whether the golf course will be less than 160 acres after the proposed project, the answer is yes. But that condition already exists today. In reality, the RMR Country Club, i.e., the golf course, driving range, country club complex, visitors center (now the fitness center) and other amenities, are currently situated on 155.45 acres – 4.5 acres smaller than what was listed in the 1985 conceptual land plan.

While this discrepancy in acreage is interesting, it is not critical to the larger question this letter is meant to address because the 1985 conceptual land use map has been superseded, and even if it were not, it is quite common that conceptual land use maps for master planned communities simply make an educated guess as to the actual acres needed for these types of uses. Then, as the development matures, the acreages for these uses become more crystallized and set. Based on our

experiences in these types of projects, we have no doubt that the original acreage listings were nothing more than anticipated, rather than fixed, amounts.

But, the simple answer to your question does not tell the full story. Additionally, your question raises several other anticipated questions that we discuss and hope to answer below. These additional questions generally arise from discussions with Planning Staff that the language in the DMP requires a zoning element to be a part of any case filed.

As noted above, no applicable zoning ordinance restricts the use of the driving range for golf purposes or excludes homes from the golf course area. Additionally, the applicable DMP ordinance (i.e., Case No. Z89-36) does not establish any required minimum amount of open space. In contrast, the ordinance does establish a maximum density of 2,284 residential units, which the proposed project of 32 new homes will not exceed. A question has also arisen whether there is any language in the controlling DMP case that requires a golf course (and more specifically a driving range) to be part of the RMR project and whether there is a minimum amount of acreage required for such. Our careful review of the applicable DMP cases and their respective ordinances leads us to conclude as follows:

(A) There is no requirement that a golf course (much less a driving range) be included or maintained as a part of RMR, and

(B) Assuming arguendo, that a golf course is required, that:

  (i) There is no obligation to maintain a driving range, and

  (ii) There is no obligation to maintain a certain amount of acreage with the golf course/driving range.

Our conclusion is based on our review of the following cases:

Case No. Z83-34

As a part of Case No. Z83-34, and attached to the corresponding Ordinance No. 1704 (see Exhibit A), is the RMR Specific Plan, which conceptually describes the aspects of the RMR project. Relating to the golf course, the RMR Specific Plan says on page 6: "The major formative element in the Land Plan, apart from the housing, would be a golf course, if this proves to be a viable marketing concept. . . . [M]any lots will front on the golf course, which course will double as an open space feature." Then later, on page 18, it reads, "If the golf course proves to be a viable marketing concept, the first nine holes would be constructed as part of the first phase of development." (Emphasis added.) Due to the qualifying statements, it is clear that a golf course was not a required part and that the use of the word "double" does not indicate a promise to provide. Rather, the use of the word "double" in this instance can only be logically interpreted to mean "in addition to" or "included within" rather than a pledge.

In our search of the case file and documents associated with Case No. Z83-34, we cannot find any map that shows with specificity the amount of acres required for a golf course as part of this project. On Page 8 of the Specific Plan, however, it lists a proposed "land use distribution," wherein it lists the amount of acres for residential, commercial, retail, industrial, school, park and the golf course and storm water retention areas. Relative to the golf course and storm water retention areas, it lists such as 147.07 acres, but does not differentiate acreages between the two uses. Notably, the majority of the required storm water retention for RMR is located on the golf course.

Accordingly, the golf course has always included additional, unnecessary acreage to accommodate the required storm water retention for the whole of RMR. Had the original RMR developer or subsequent developers chosen to have individual residential subdivisions provide space for storm water runoff, the golf course could have been reduced from its current size. This could be another reason why the acreage for the golf course has always been in flux. Of course, none of these acreages provided in the list have proven to be accurate nor have they been enforced. In our opinion, this list of acres in the original RMR Specific Plan is an interesting read, but non-binding. Rationally, the original developer had a very large tract of land that was initially segregated into conceptual land uses that would necessarily be refined over time, as is typically the case with large projects of this size. Interestingly, neither Ordinance No. 1704 nor the RMR Specific Plan establish any required minimums of open space.

While we acknowledge that the golf course was built, our point in quoting these sections of the RMR Specific Plan from Case No. Z83-34 is to note that there was no promise to develop a golf course, much less a driving range. In other words, the inclusion of a golf course as part of this project was an aspiration and not a requirement. Assuming, however for the sake of argument that one concludes otherwise; nowhere in the zoning ordinance or the RMR Specific Plan does it require that a driving range be part of the golf course and any attempt to enforce the inclusion of such based on a conceptual drawing from any of the DMP cases, especially ones that have been superseded, would be inappropriate. In short, and relative to Case No. Z83-34, we have not found any evidence in the case files that the establishment and continuous operation of a driving range is mentioned, identified or stipulated.

Case No. Z85-24

As noted above, the next overall DMP update occurred in 1985 with Case No. Z85-24 (Ordinance No. 1938), see Exhibit B. There was no change to the allowed density and there was no discussion as to the required minimum amount of open space other than a reference to 12 acres of open space in the conceptual land use plan (see Exhibit C). Similar to the 1983 case, there is no mention in the Staff Report, the P&Z Board minutes/recommendation, nor the City Council minutes/approval and associated ordinance of a specific acreage that is established or must be maintained for the golf course.

Rather, the only document associated with Case No. Z85-24 that references an acreage amount is the conceptual land use map that lists the golf course acreage at 160 acres (see Exhibit C).

Again, and most importantly, any map attached to Case No. Z85-24 is no longer applicable as it has been superseded by Case No. Z89-36, as discussed in more detail below. However, and assuming for the sake of argument that one did conclude based on this map that a golf course is a required part of the project, there is no evidence found in any of these documents that a driving range is a necessary part of that golf course. Thus, it would be improper to rely on any maps associated with Case No. Z85-24 or to try and infer any required uses or minimum acreages from such map.

Case No. Z89-36

The final overall DMP case for RMR was Case No. Z89-36 (Ordinance No. 2486), see Exhibit D. In our opinion, which we believe Planning Staff agrees, Case No. Z89-36 is the controlling DMP for RMR. No subsequent zoning or site plan case since Case No. Z89-36 has provided, nor has it been required, to complete an overall DMP update for RMR. Of course, several subsequent zoning cases have been processed and approved with the acronym DMP attached to the case. A review of such cases, however, shows that those DMP modifications were only required when varying from the land use concept approved in Case No. Z89-36 and all were specific to that project. Put another way, and by way of example, when a project rezoned from R1-9 to R-2, a DMP modification was required, but only for that property, not RMR as a whole.

As noted above, Case No. Z89-36 established 2,284 as the maximum number of units, which equates to a gross density of 2.76 du/ac. There was no discussion of required open space in either acres or percentages associated with this case. Similar to the prior DMP cases, there is no mention in the Staff Report, the P&Z Board minutes/recommendation, nor the City Council minutes/approval and associated ordinance of a specific acreage that is established or must be maintained for open space in general and for the golf course explicitly. Nor is there a requirement that a driving range be included as a necessary part of the golf course.

The only document found in the case file for Case No. Z89-36 that list acres associated with land uses in RMR is found in the conceptual land plan included in the case file (see Exhibit E). Therein, the golf course (no mention of driving range) is listed at 156.8 acres. It is interesting to note that in addition to the notation for the golf course, the conceptual land plan also lists the country club complex at 7 acres and the visitors center at 1.9 acres, all of which, including the golf course are now owned by Divot Partners, LLC and part of the Red Mountain Ranch Country Club. Together, according to the Z89-36 conceptual land use plan, these uses should equate to 165.4 acres. As noted above, the RMR Country Club, including the golf course, driving range, country club complex, visitors center (now the fitness center) and other amenities, are currently situated on 155.45 acres – 10 acres smaller than what was listed in the 1989 conceptual land plan.

We cannot locate in any of the City's zoning files any land use case that approved these changes but note that such anomalies are not the golf course's alone. A simple comparison of the Z89-36 map to a parcel map today illustrates and highlights the many changes that have occurred – none of which were required to process an overall DMP update case and most were not required to even do an individual DMP case because the proposed project was consistent with the underlying

zoning. Even the subtraction of area used for rights-of-way does not explain the discrepancy in acreages that exist today.

Taken in its totality, we conclude that the reliance on any of these associated maps, especially the 1983 or 1985 maps, to determine an exact or minimum acreage calculation for the golf course is inappropriate and problematic at best. Anyone that insists that the acres established within the conceptual land use plan are fixed misunderstands the purpose of a conceptual land plan and denies the historical enforcement and development of RMR.

Current Development Parameters Under Case No. Z89-36

To clarify the foregoing discussion, we are not of the opinion that there are no development parameters associated with RMR. Indeed, there are some development standards, which we discuss below in more detail. Using Case No. Z89-36 as a baseline, and using the "as-built" conditions of today, we believe the following development parameters for Red Mountain Ranch exist:

Gross Acres	=	829 acres
Allowed Dwelling Units	=	2,284
Dwelling Units per Acre	=	2.76 (gross)
Open Space Required	=	None Prescribed

As-Built Development Data

As the project developed after the 1989 case, and as noted above, many of the land uses, acreages and percentages have changed and the overall DMP was not updated. However, based on a detailed analysis of the current land uses within RMR by both us and Planning Division staff, we believe the current, "as-built", site data to be as follows:

Gross Acres	=	829* acres
Existing Dwelling Units	=	1,595**
Dwelling Units per Acre	=	1.89 (gross)
Open Space Required	=	None Prescribed
Open Space Provided	=	199.4 acres***

* The project is arguably now 697 acres due to the City of Mesa now owning most of the land west of Recker Road, which is identified as Parcels 30-42 on the conceptual land use plan associated with Case No. Z89-36. To clarify further, the City now owns the property west of Recker except for a small private park owned by the RMR Community Association. Notably, a change in the gross acreage does change the ratios, but since the ratios are relative, our argument remains sound as shown in more detail below.

** Our understanding is that this number has been verified by the City of Mesa GIS Department and the Planning Staff.

*** This amount includes all of the golf course, the RMR Country Club and other property owned by the RMR Community Association. No subtraction was made for the clubhouse, fitness center and associated parking lots. The calculation can be made upon request, but will not change the outcome.

So, using the best methods available to us today in attempting to establish some "as-built" development parameters for open space, we calculated the amount of existing land that could be considered open space per the approved number of dwelling units within RMR. While noting that the calculations are a bit cumbersome, no other logical methodology exists. The calculations are as follows:

Maximum Number of Dwelling Units	=	2,284
Open Space Existing	=	199.4 acres***
Open Space per Approved Unit	=	.087 acres (2,284 units / 199.4 acres)
Existing Units + Proposed Units	=	1,627 (1,595 units + 32 new units)
Amount of Required Open Space	=	142.04 acres (1,627 units x .087 acres)
Open Space Remaining post Project	=	188 acres (199.4 - 11.4****)
Density post Project	=	1.96 du/ac (gross)

**** 11.4 acres (gross) is the size of the proposed project.

In short, the density of 1.96 du/ac is much lower than the allowed density of 2.76 du/ac. Taking into account and allowing for the City owned land west of Recker, one can also utilize the following calculations shown in the chart below to illustrate that the proposed project does not violate the "as-built" zoning parameters.

	Approved	**Existing**	**Proposed**
Dwelling Units =	2,284	1,595	1,627
Acres =	697	697	697
Density =	3.27 du/ac	2.29 du/ac	2.33 du/ac
Open Space (acres) =	Unspecified	199.4	188
Open Space (%) =	Unspecified	28.61%	26.97%
Difference =			-1.64%

Bottom line, and under this line of thought, the only argument that Planning Division staff (or anyone else) could make as to why a DMP amendment case should be brought is if the residential density calculations were exceeded. In addition, we have shown that using the "as-built" open space calculations, that the proposed project does not violate these so-called "standards" either. Because some want to enforce the "as-built" open space percentage/acres against the project, we tongue-in-cheek refer to this effort as the "ex post facto" open space requirement. Moreover, our analysis shows that there is not a loss of almost 7% of the open space as claimed by the opposition (see Exhibit F – Opposition Flyer). Rather, the loss of open space is actually 1.64 % of the total land area within RMR, which does not include the City of Mesa owned property. If we used the gross acres of 829, the loss of open space would be 1.38%. Of course, this calculation is

measured against the fictitious "ex post facto" open space requirement that we "backed into" using the most logical methods available and the as-built conditions.

By way of illustration only, typical open space percentages required of master planned communities differ from city to city in Arizona, but generally range from 15% to 20%. Mesa's zoning and subdivision ordinances lack a minimum amount of required open space for master planned communities. However, in our experience working with Planning Staff, Mesa's open space requirements are consistent with those of other jurisdictions in the Phoenix metropolitan area. In this case, taking into account the proposed project, the amount of "open space" within RMR remains above 25%, which percentage is well above the "ex post facto" requirement that we have calculated today.

Accordingly, and where the current proposal is consistent with the underlying R1-9 zoning (single-family, detached, custom homes), the requirement of doing a DMP update on this type of a case would be akin to "selective enforcement" given that: (i) the Owner has the legal right to use the property consistent with the underlying zoning district, and (ii) overall DMP update cases were not required on any other cases within RMR after Case No. Z89-36. If consistent enforcement were applied, then each case after Case No. Z89-36 should have updated the overall land use plan to address density, acres, etc. This type of update, however, has not been done since Case No. Z89-36 and the reason is clear – it was not necessary so long as that case stayed within the parameters established by Case No. Z89-36.

Historical Precedent Has Allowed a Site Plan Only Case to be Filed and Processed within RMR

The majority of zoning cases brought after Case No. Z89-36 were properly filed and processed as zoning cases because they: (i) involved changes to the underlying zoning district, (ii) modified development standards, or (iii) proposed private streets, which require a PAD overlay. In 1999, however, the City of Mesa allowed to be filed Case No. Z99-31, which was filed as a site plan only case. The facts of that case are strikingly similar to this one in the following ways:

- The conceptual land use plan for Case No. Z89-36 did not show single-family lots on this property (see Exhibit E); provided however, it did show/approve the underlying zoning district of R1-9 (PAD). Interestingly, Case No. Z89-36 identified the parcel upon which Case Z99-31 was proposed as "Cluster Single Family" when in reality, Case No. Z99-31 was for single-family detached homes.

- The applicant had previously filed a zoning case on the same property (Case No. Z98-109), which was proposed as a R1-9 PAD subdivision with private streets. Case No. Z98-109 was withdrawn by the applicant due to neighborhood opposition and Case Z99-31 was thereafter filed. Interestingly, the adjacent property owners believed (whether rightfully or wrongfully) that the property would remain as open space.

- Case No. Z99-31 was simply for site plan and preliminary plat review (did not include a zoning component) for the development of a conventional R1-9 subdivision. Planning Staff processed the case and it was agendized several times before the Planning & Zoning Board. The case was continued several times to allow negotiations between the owner and the neighbors.

The facts of that case are distinguishable to the subject project by one major difference:

- The homes being proposed in Case No. Z99-31 were adjacent to existing homesites – whereas in the instant case we are not proposing to locate any new home adjacent to existing homes.

The case concluded by the Applicant reaching a compromise with the opposing neighbors and amending the application to include modifications to a few of the development standards. Thus, a PAD overlay was needed to enforce the "self-imposed" building height restrictions on some of the proposed homesites that were located higher up the mountain looking down on the existing lots. The resolution of the case as a zoning case, rather than a site plan only case, is not determinative of the analysis or contrary to our reliance on Case No. Z99-31 as precedent. The critical point is that the case was filed and allowed to be processed as a site plan case proposing a conventional R1-9 subdivision.

1999 City Attorney Opinion is Supportive

In support of our opinion that Case No. Z99-31 and our case (Z09-018) are proper site plan cases, is a 1999 City Attorney Opinion letter. Interestingly, and quite telling, is that as a part of Case No. Z99-31, the applicant originally took the position that they did not have to file a site plan and could proceed directly to a preliminary plat. In a Legal Opinion from Neal Beets, City Attorney, dated March 26, 1999, Mr. Beets opined that under the 1983 zoning case (Case No. Z83-24), that a site plan case must be processed based on an original stipulation that reads: "Subject to individual site plans and subdivision plats for all development tracts to be approved by the Board and Council for the applicable zoning." For your convenience, we have included a copy of the Legal Opinion with this letter as Exhibit G.

To be clear, we are not challenging this stipulation as it is applied to this case. Rather, we believe this Legal Opinion by the City Attorney to be additional evidence that a site plan only case was and is appropriate where the proposed project is consistent with the underlying zoning. Quoting again from the letter, Mr. Beets wrote, "The Council-approved Development Master Plan and base zones were useful in establishing the overall future density and character of that large, master-planned community." He also summarized City Staff's position on the matter, which is that they "believe that this zoning condition requires site plan review as well as plat review by the P&Z Board and City Council." What is noticeably missing from Mr. Beets' opinion is a statement in opposition to a site plan only case or a statement requiring that the applicant process a corresponding DMP or zoning case. We find this absence quite telling and indicative of how the proper interpretation of the RMR DMP should be applied. That is, when consistent with the overall

density of RMR, such projects do not have to process a corresponding DMP case and may proceed with a site plan and pre-plat only.

There are No Property Restrictions Prohibiting Homes from Being Built on the Driving Range

While not determinative of the issue at hand, the following paragraphs provide additional answers to questions and include detail and background information about RMR Country Club and the golf course that we thought would be useful in gaining a full understanding of the proposed project.

There are no property restrictions that either: (i) require that a driving range be maintained on the site, or (ii) prohibit any portion of the driving range from being developed as single-family, detached, custom homes. To this end, the RMR CC&R's, recorded as Instrument No. 1985-286511 in the Official Records of Maricopa County, provides the following notice to all RMR residents: "Declarant makes no representation that the portion of the Project adjacent to the Properties now or hereafter used as a golf course will always be used as a golf course." This issue has been reviewed carefully by Joseph Atkinson, who is the real estate attorney for Divot Partners, the owner of the RMR Country Club. For your convenience, we have included a copy of Mr. Atkinson's opinion letter dated August 31, 2009 (see Exhibit H – Joseph Atkinson Letter).

This language is important for two reasons. First, no lot owner has the right to control the development of any portion of the golf course, including adjacent fairways and especially not the driving range. Second, the practical reality is that no fairway lot owner is losing any fairway views. As noted above, each fairway lot owner will retain their fairway lots.

Interestingly, Mr. Atkinson's letter notes that in 1995, the then golf course owner recorded a declaration in favor of the RMR Owners Association, as Instrument No. 1995-0018077, which provides that the RMR Owners Association has the right to review and approve the "exterior aesthetic appearance" of structures built on the golf course property. While we do not know the genesis of this document, we are left wondering its purpose if the parties thought that golf course could never be developed. The answer is clear – and that is that development of the golf course was always thought to be a possibility. A copy of the document is included in Exhibit H.

The RMR Country Club is a Private Club – Not a Part of the RMR Community Association

Required open space within a master planned community is typically available to all residents of that particular community. The RMR Country Club, however, is a private country club for members only. Notably, there are several levels of membership, but simply being a homeowner within RMR, does not provide one with an automatic membership within the Country Club. Interestingly, on Page 17 of the RMR Specific Plan, first adopted in 1983, its states, "It is contemplated that all property owners will be entitled to social membership in the Country Club with active golf playing memberships restricted to approximately 400 members." Again, this statement was made not as a promise but in anticipation and hope. Today, the RMR Country Club does offer social memberships to each homeowner in RMR for a fee. Mere ownership of a home in RMR does not entitle one to a membership in the RMR Country Club.

It should also be noted that the RMR Community Association CC&R's do not apply to any part of the property owned by the Country Club. In other words, the RMR Community Association does not control the Country Club. In fact, the third paragraph of Article II of the RMR CC&R's, reads:

> Access to the golf course and to the club facilities or to a part thereof is strictly subject to the rules and procedures of the golf club. No owner or occupant gains any right to enter or to use those facilities by virtue of ownership or occupancy of a Residential Unit.

The various RMR Country Club membership documents have also been reviewed to ensure that club members do not have a right to force the Owner to provide and maintain a driving range as part of the golf course. In short, nothing in the various membership documents provides such rights to the members.

Conclusion

For the foregoing reasons, we believe that the Owner possesses the legal ability to amend its current application to remove the rezoning component and process a site plan and preliminary plat case for a conventional, single-family, detached, custom home subdivision on 11.4 acres of his property.

Please contact me if you have any questions or would like to discuss this letter in more detail. Upon receipt of a letter of confirmation from your office or the Planning Division, we will file the necessary documents to amend the current application with the Planning Division. We look forward to hearing from you shortly and working with you on this project.

Sincerely,

PEW & LAKE, PLC

Reese L. Anderson

Enclosures

cc: Mr. Shelby Futch (Divot Partners, LLC)
Mr. Jeff Welker (Welker Development Resources)

EXHIBIT A

ORDINANCE NO. 1704

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MESA, MARICOPA COUNTY, ARIZONA CHANGING THE ZONING IN ZONING CASE Z83-34 AMENDING SECTION 11-2-2, OF THE MESA CITY CODE; AND PROVIDING PENALTIES FOR THE VIOLATIONS THEREOF.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESA, MARICOPA COUNTY, ARIZONA, AS FOLLOWS:

Section 1: That the zone of the property described in Zoning Case Z83-34 is changed to 'R1-9-PAD' and 'M-1-PAD' from County 'Rural-43' and 'Rural-70' for a proposed Master Planned Development, subject to the following stipulations:

(A) Approval of the overall Development Master Plan as described in the Specific Plan - Red Mountain Ranch, dated March 21, 1983; and

(B) Subject to overall residential density including the school, park, golf course and retention area acreage not to exceed 4.7 dwelling units per acre. Alternate density limitations involving the school and commercial/retail sites will be as described on page 2 of the staff analysis of the specific plan; and

(C) Subject to a blanket avigation easement with a minimum elevation of 225 feet for that area located within the C.U.D. 5 zone; and

(D) Subject to individual avigation easements to be obtained and recorded for all development within the C.U.D. 5 zone as applications are filed; and

(E) Subject to individual site plans and subdivision plats for all development tracts to be approved by the Board and Council for the applicable zoning.

Section 2: That Section 11-2-2 of the Mesa City Code is amended to read as follows:

"11-2-2. MAP:

(A) Locations and Boundaries of Districts.

1. The locations and boundaries of the use districts and figures, expressing distances in feet and otherwise on a map entitled 'Zoning Map of the City of Mesa', dated May 2, 1983, and signed this day by the Mayor and City Clerk, which map accompanies and is hereby declared to be part of this ordinance, are hereby approved and adopted.

2. The indicated district boundary lines are intended to follow street, alley, lot or property lines as the same exist at the time of the passage of this code, except where such district boundary lines are fixed by dimensions shown on said map, in which case such dimensions shall govern.

(B) Any person, firm or corporation who shall violate any of the provisions of said Mesa City Code as hereby amended, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $1000.00 or by imprisonment in the City Jail for a period not to exceed six (6) months, or by both such fine and imprisonment, and each day of violation continued shall be a separate offense, punishable as hereinabove described."

PASSED AND ADOPTED by the City Council of the City of Mesa, Maricopa County, Arizona, this 2nd day of May, 1983.

APPROVED:

Don W. Strauch

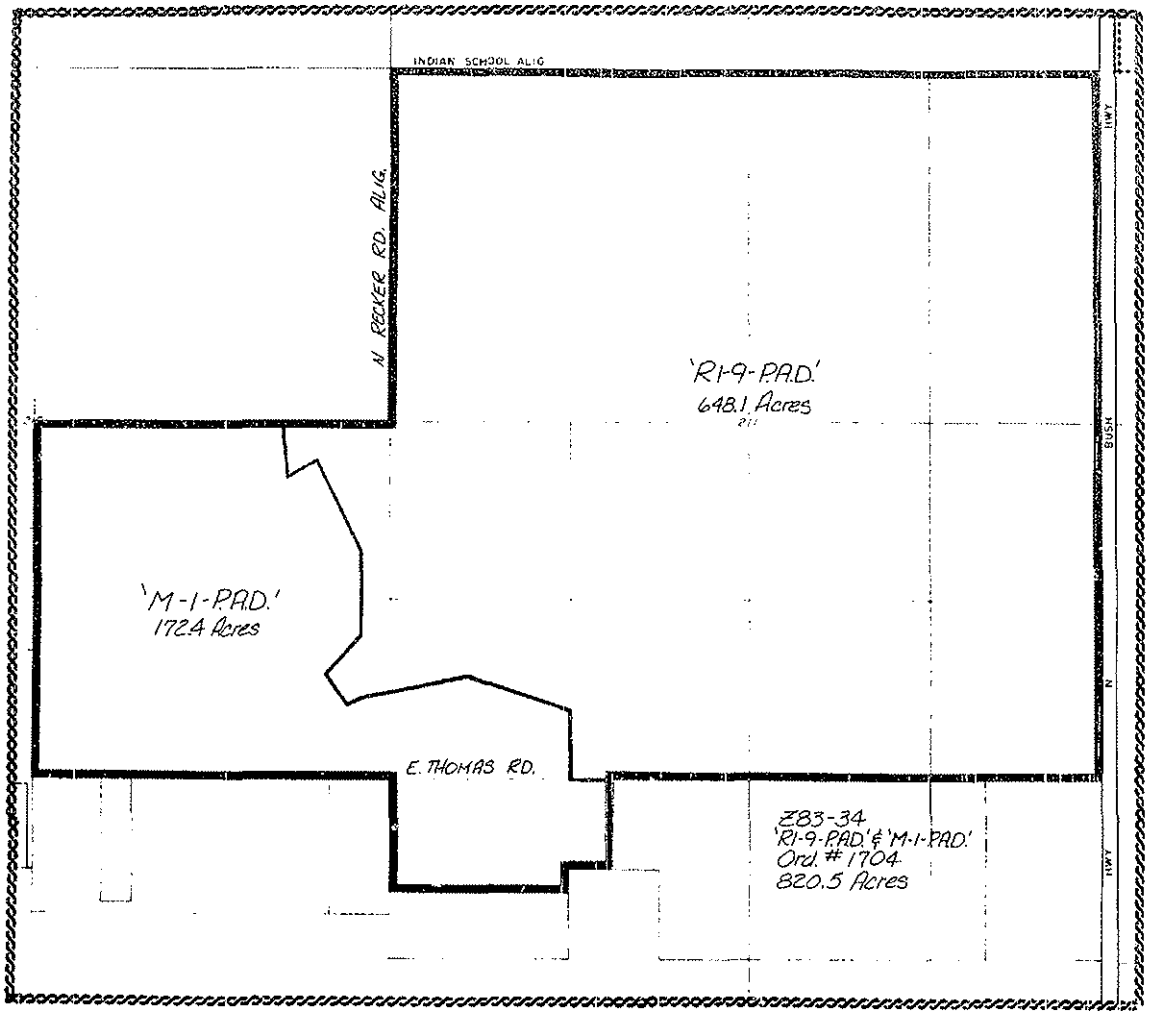
Don W. Strauch, Mayor

ATTEST:

Dorothe Dana

Dorothe Dana, City Clerk

EFFECTIVE DATE: June 1, 1983



CITY OF MESA

The attached zoning changes were approved on May 2, 1983, by Ordinance #1704. If you have any questions concerning these changes, please contact the Mesa Planning Department at 834-2185.

Lon W. Frances ATTEST: Barbara Jones DATED 5-5-83
MAYOR CITY CLERK

Specific Plan
Planned Area Development Application

Red Mountain Ranch

Mesa, Arizona

Game Creek Properties, Inc.

March 22, 1983

SPECIFIC PLAN

PLANNED AREA DEVELOPMENT APPLICATION

RED MOUNTAIN RANCH PROPERTY

City of Mesa, Arizona

Prepared by:

GAME CREEK PROPERTIES, INC.

RED MOUNTAIN RANCH PROPERTY - MESA, ARIZONA

The following is the Specific Plan and Planned Area Development applications for the Red Mountain Ranch project.

We have followed the suggested outline set by the Mesa Community Development Department, which forms the major headings for the text.

TABLE OF EXHIBITS

I. DESCRIPTION OF THE APPLICANT

The existing land ownership is held by a number of different individuals, subdivision trusts and partnerships, all represented by United Development, Inc., United Marketing and Investments, Inc., or Land Development Group, Inc., or certain title insurance companies as trustees. An option on the project land is currently held by Game Creek Properties, Inc., a subsidiary of Mobil Land Development Corporation. The ultimate project, if developed, would be owned by Game Creek Properties, Inc. The Land Plan was prepared by Mobil Land Development Corporation.

Mobil Land Development Corporation, the parent company of Game Creek Properties, Inc., is active in large-scale project development throughout the United States. Projects range in size from a 56 acre mixed use office and residential program in Virginia, adjacent to Washington, D.C., to their largest single land holding in excess of 25,000 acres near Colorado Springs, Colorado. Active development projects include Reston, in Virginia, Sailfish Point, in Florida, Windward, in Georgia, and Redwood Shores and the East Highlands Ranch, in California.

All of Mobil's projects are comprehensive, large-scale developments brought about in cooperation with local authorities, designed in concert with contemporary notions of environmental concern and with a view to satisfying all the needs of the future inhabitants, as well as being a part of the existing community. These objectives would be part of the development process for this portion of the Red Mountain Ranch property in Mesa, Arizona.

II. LOCATION OF PROPERTY

The Red Mountain Ranch property is located in the extreme north easterly part of the City of Mesa. (Exhibit 1). It is bounded on the south by the extension of Thomas Road, on the east by Bush Highway, on the north by rugged undeveloped land and on the west by undeveloped desert impacted by the CUD/5 Airport Influence Zone. The property is located 14 miles from the major commercial office center of Mesa, via Main Street and Bush Highway.

III. MAJOR SITE FEATURES

The 820.47 acre site is a gentle westerly sloping plain with a high elevation of 1575 feet to the east along Bush Highway, and a low elevation of 1400 feet immediately west of Recker Road. The northsouth slope is undiscernable with the exception of a minor topographic feature adjacent hills directly on the north boundary and is cut eastwest by a series of dry washes. The sloping plain provides reasonable westerly views. The property is presently in its natural state and is dotted with Saguaro Cacti, typical of this desert area. A 30 acre portion of the project lies east of Recker Road and south of Thomas Road.

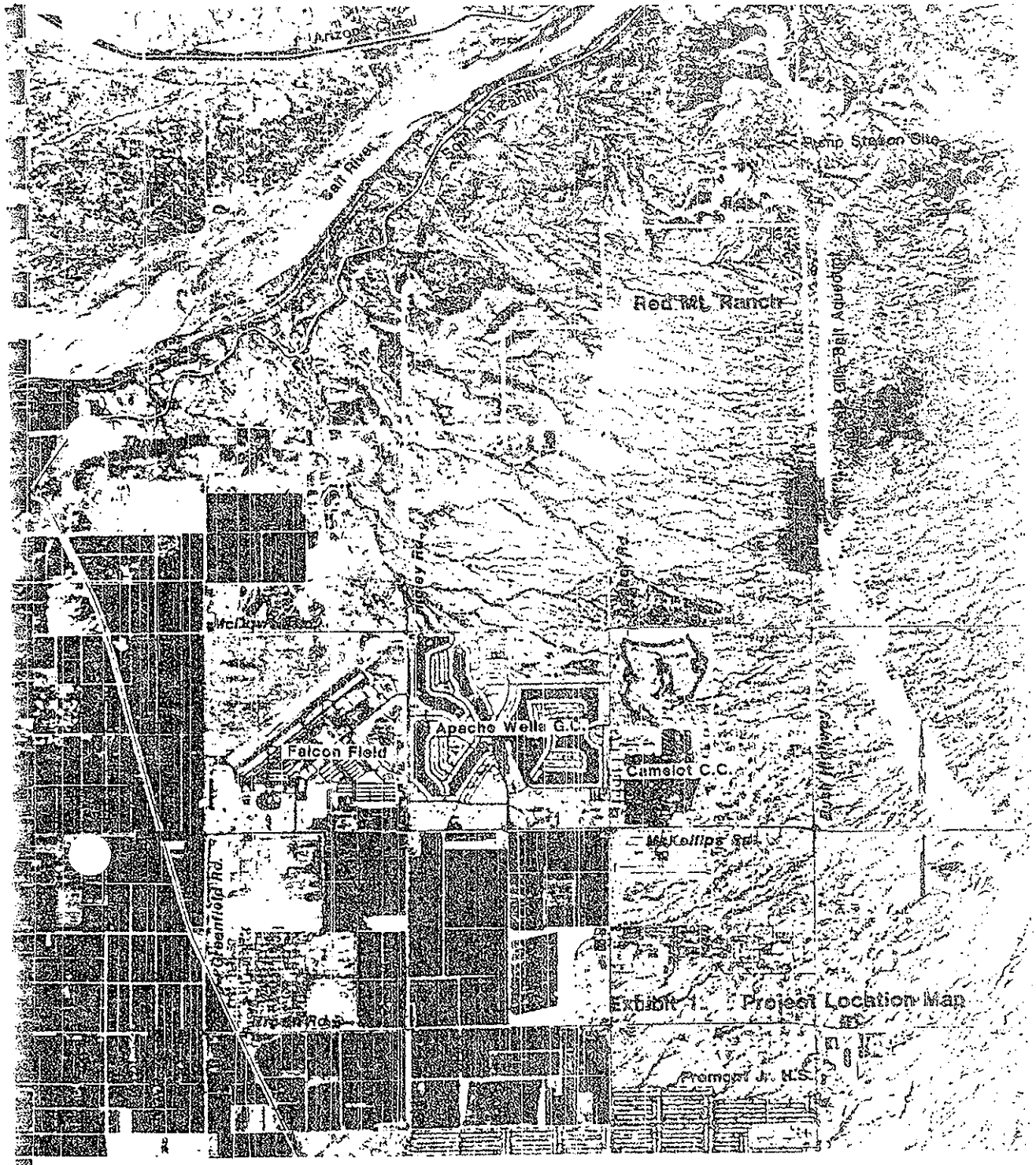
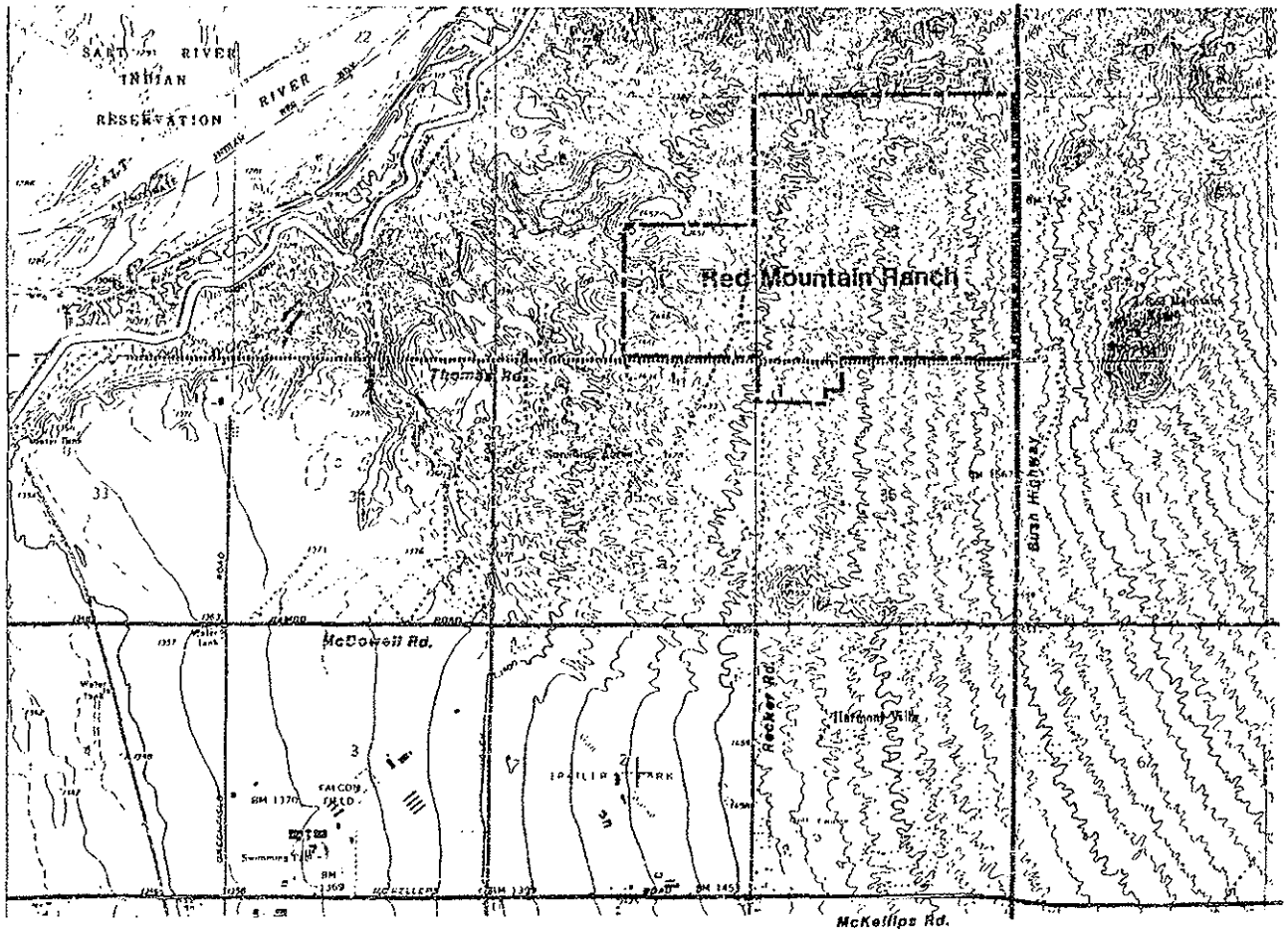


Exhibit 1 Project Location Map



Topographic Features
Exhibit 2

IV. DEVELOPMENT CONCEPT

The objective of the development concept is to provide a wide range of housing types suitable to the elderly as well as families. The major formative element in the Land Plan, apart from the housing, would be a golf course, if this proves to be a viable marketing concept. The range of housing types would be suitable for a variety of income levels. In addition to the traditional subdivision pattern, many lots will front on the golf course, which course will double as an open space feature. Livability will be enhanced with the inclusion of a Commercial/Office/Industrial Park adjacent to the residential development, a source of employment.

Access to cluster housing situated between major collectors and the golf course will be serviced by private frontage roads (EXHIBIT 5). The feature entry from Bush Road will be a specially designed boulevard which flows into the major collector, running diagonally across the project, past the proposed golf and country clubhouse and exiting at the intersection of Thomas and Recker Roads.

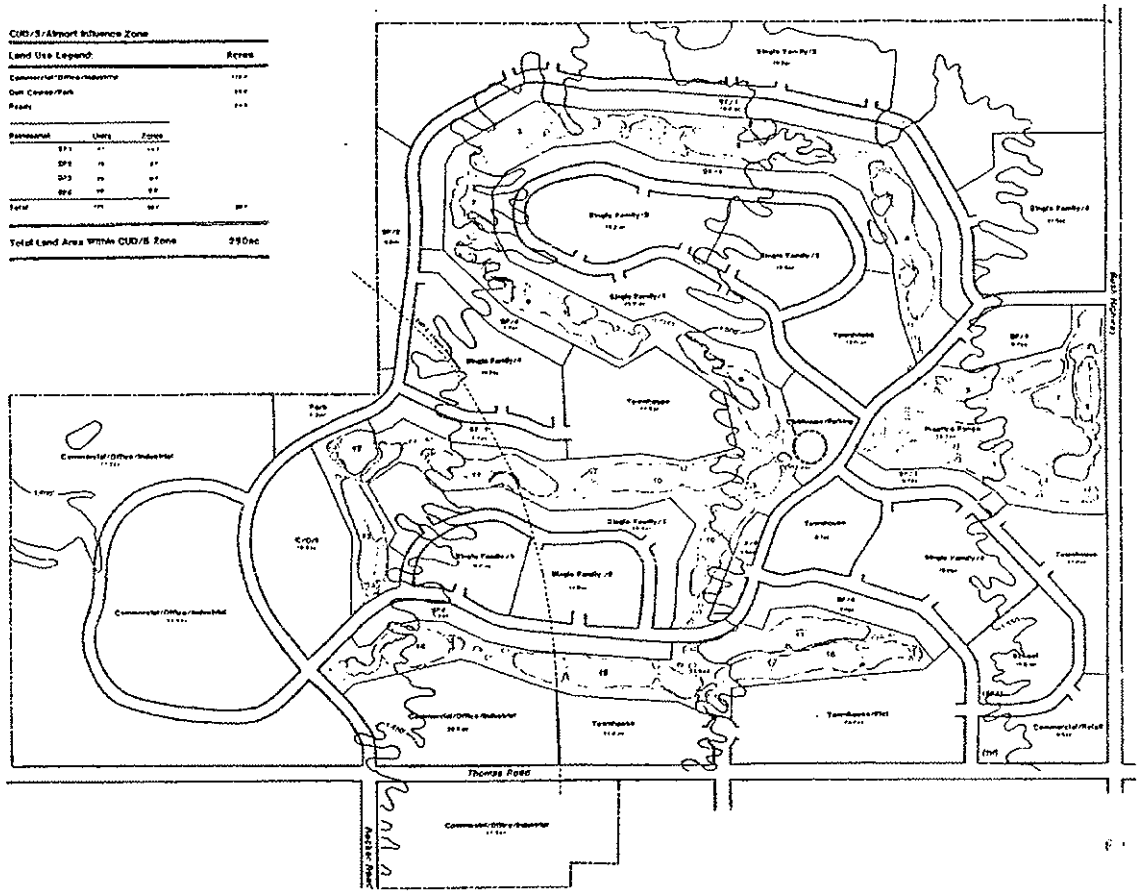
Red Mt. Ranch 3/14/83

CUD/S / Airport Influence Zone

Land Use Legend:	Acres
Commercial/Office/Industrial	
Golf Course/Park	
Roads	

Parcel	Units	Acres
Total		

Total Land Area Within CUD/S Zone 950ac



Red Mountain Ranch Property

Mesa, Arizona

Conceptual Land Use Plan
Exhibit 3

V. CONCEPTUAL LAND USE PLAN AND FEATURES

The Conceptual Land Use Plan (EXHIBIT 3) proposes the following major land use distribution:

Residential	385.50 AC
Commercial/Retail	9.00 AC
Commercial/Office/Industrial	172.40 AC
School	10.00 AC
Park	4.30 AC
Golf Course & Storm Water Retention Areas	147.07 AC
Roads	92.20 AC
TOTAL	820.47 AC

The golf course is laid out in a linear fashion to provide the maximum opportunity for positioning housing along its perimeter. Various lot sizes and densities ranging from 4.0 DU per acre to 17.0 DU per acre will take advantage of this major open space feature. In some locations Commercial/Office/Industrial land also fronts on the golf course. A 4.3 acre park and a 10 acre school site are situated within the residential development, for easy access. All development is served by an internal road system, of collectors and local streets. Access to the project is restricted to three intersections on Thomas Road and one intersection on Bush Highway approximately 3/5ths of a mile north of Thomas Road.

VI. EXISTING PROPERTY DESCRIPTION

The site condition is typical of the desert landscape existing east of the City of Mesa. The gentle westerly sloping site is dotted with Saguaro Cacti and Chaparral. There appear to be no special site environmental conditions, a typical example of the local undeveloped desert.

VII. EMPLOYMENT OPPORTUNITIES

The Commercial/Office/Industrial portion of this comprehensive project will maximize work opportunities by minimizing travel. The inclusion of employment-oriented development is aimed at producing a balanced community in which young and old can work, live and play. The location of the COI area in the western portion of the project is a direct recognition of the Falcon Field Airport in an effort to maximize compatibility.

VIII. UTILITIES

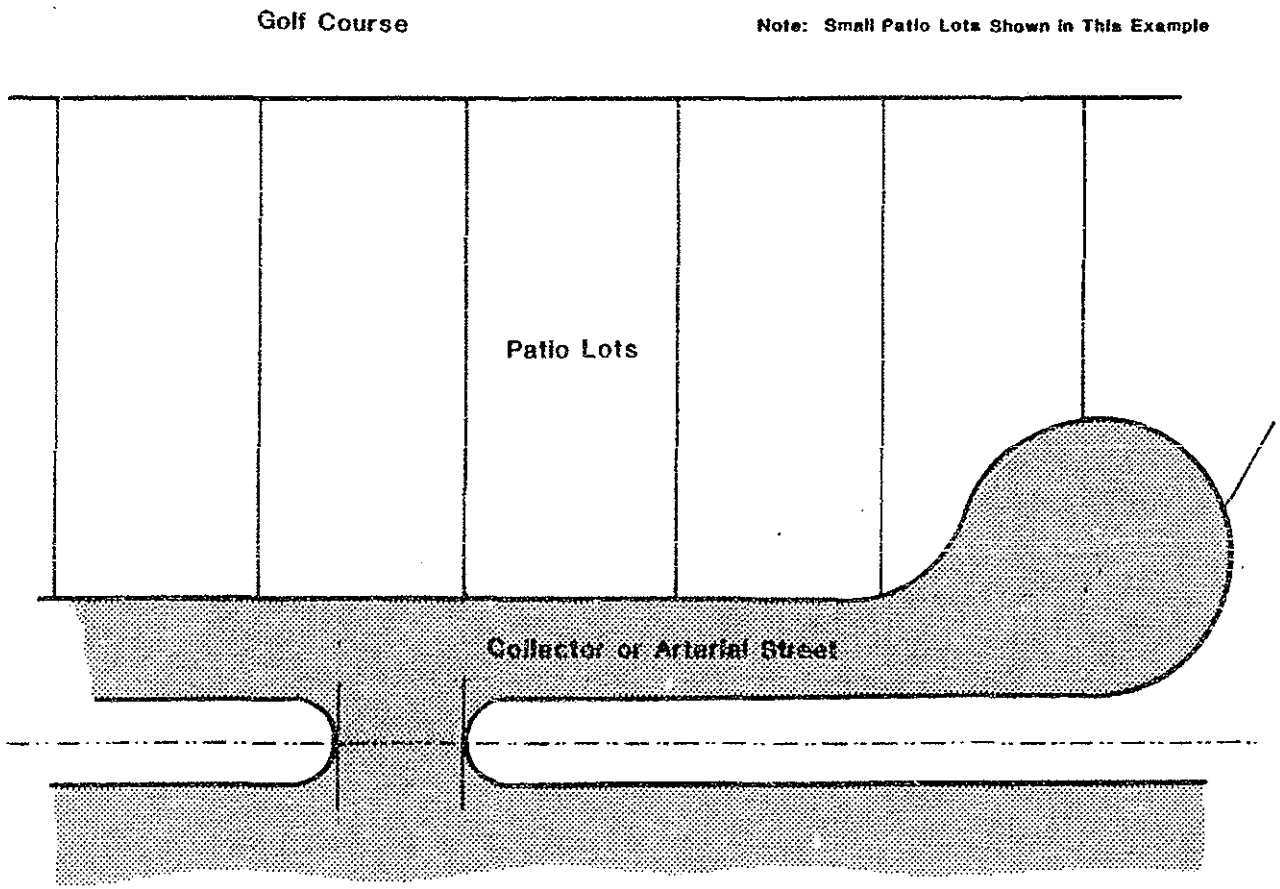
Water and sewer service are to be provided by the City of Mesa. The conditions of service will be formalized via the approval of the City Utility Committee and City Council. Should natural gas be brought in, service will be directed by the City of Mesa.

Telephone is provided by Mountain Bell. All utilities will be underground, with the exception of transformer boxes, switching units and normally above-ground facilities in accordance with Mesa specifications and requirements.

IX. ENERGY CONSCIOUS DEVELOPMENT CONCEPTS

Mobil Land Development Corporation subscribes to the objective of energy conscious land planning and development. Specific building siting, current insulation techniques, shading devices, heat energy gathering systems, as well as numerous other passive approaches to energy conservation will be encouraged. Active systems will also be encouraged, but left to the discretion of the individual housing builder.

Project Circulation Plan
Exhibit 4



Concept Sketch - SF4 Frontage Road
Exhibit 5

X. TRANSPORTATION AND CIRCULATION.

Transportation within and around the project will be accomplished with improved arterials (Thomas Road and Bush Highway), collectors and local roads. The ultimate development of Thomas Road will provide relief for the Commercial/Office/Industrial area with a direct route east to Bush Highway or west to the proposed Salt River Crossing at Higley Road. The road planning concept is an internal ring system with a series of loops and culs-de-sac dispersing local traffic. Limited access to the arterials is restricted to one intersection on Bush, and three intersections on Thomas Road, only two of which connect directly to the internal collector route system.

Public streets will be to the City of Mesa standards, as a minimum. Betterment of these standard sections, for landscaping and entrance features, will be approved at the time of the preparation of final improvement plans. Private roads will be maintained by the Master Homeowners' Assocation or by sub-Homeowners' Associations associated with specific condominium projects. These might include special access roads for limited driveway access to major collectors, as shown on EXHIBIT 5. All roads shown on the Land Use Plan, and some local roads not shown, are intended for public ownership.

XI. HOUSING DESCRIPTION

The objective of the development is to provide a wide variety of housing types accessible to various income levels, lifestyles and ages. The housing stock is defined as follows:

Single Family Detached I (SF-1)
- 297 Dwelling Units 74.3 AC
- 11,000 Sq. Ft. Lots
- Variety of Housing Styles Predominately Conventional
- Comparable Mesa Zoning - R1-9 (Large)

Single Family Detached II (SF-2)
- 516 DU 115 AC
- 9000 Sq. Ft. Lots
- Variety of Housing Styles Predominately Conventional
- Comparable Mesa Zoning - R1-9

Single Family Detached III (SF-3)
- 72 DU 23.9 AC
- 14,000 Sq. Ft. Lots
- Variety of Housing Styles Predominately Conventional
- Comparable Mesa Zoning - R1-9 (Large)

Single Family Detached IV (SF-4)
- 527 DU 87.4 AC (Not Including School Site)
- Averaging 7000 Sq. Ft./Lot
- Variety of Housing Styles Including Patio and Cluster Housing as well as Conventional.
- Comparable Mesa Zoning - R1-7 PAD

Multi-Family V (MF-5)
- 750 DU 60.9 AC (Not Including Commercial Retail)
- 2500-3000 Sq. Ft. Lots - 12 DU/AC
- Traditional town housing with common party walls, in groupings.
- Common open space, parking and shared recreation facilities will be owned and operated by sub-Homeowners' Associations.
- Comparable Mesa Zoning - R-2 PAD

Multi-Family VI (MF-6)
- 408 DU 24 AC
- 600-1200 Sq. Ft. Units - 17 DU/AC
- Lot Area Ratio - 1000 - 1500 Sq. Ft.
- Town houses or flats over will form the housing style.
- Common open space, parking and shared recreation will be owned and operated by sub-Homeowners' Associations.
- Comparable Mesa Zoning - R-3 PAD

Housing design will be coordinated thru the development Master Plan and the Architectural Review Committee which will set down standards and guidelines of design, including materials, relationship to open space and parking alternatives. A set of development guidelines and standards will be utilized to direct the project and to assure early home buyers of a quality development, now and in the future. This approach to design control has been successfully utilized by Mobil Land Development Corporation in other projects throughout the country.

XII. POPULATION DEMOGRAPHICS

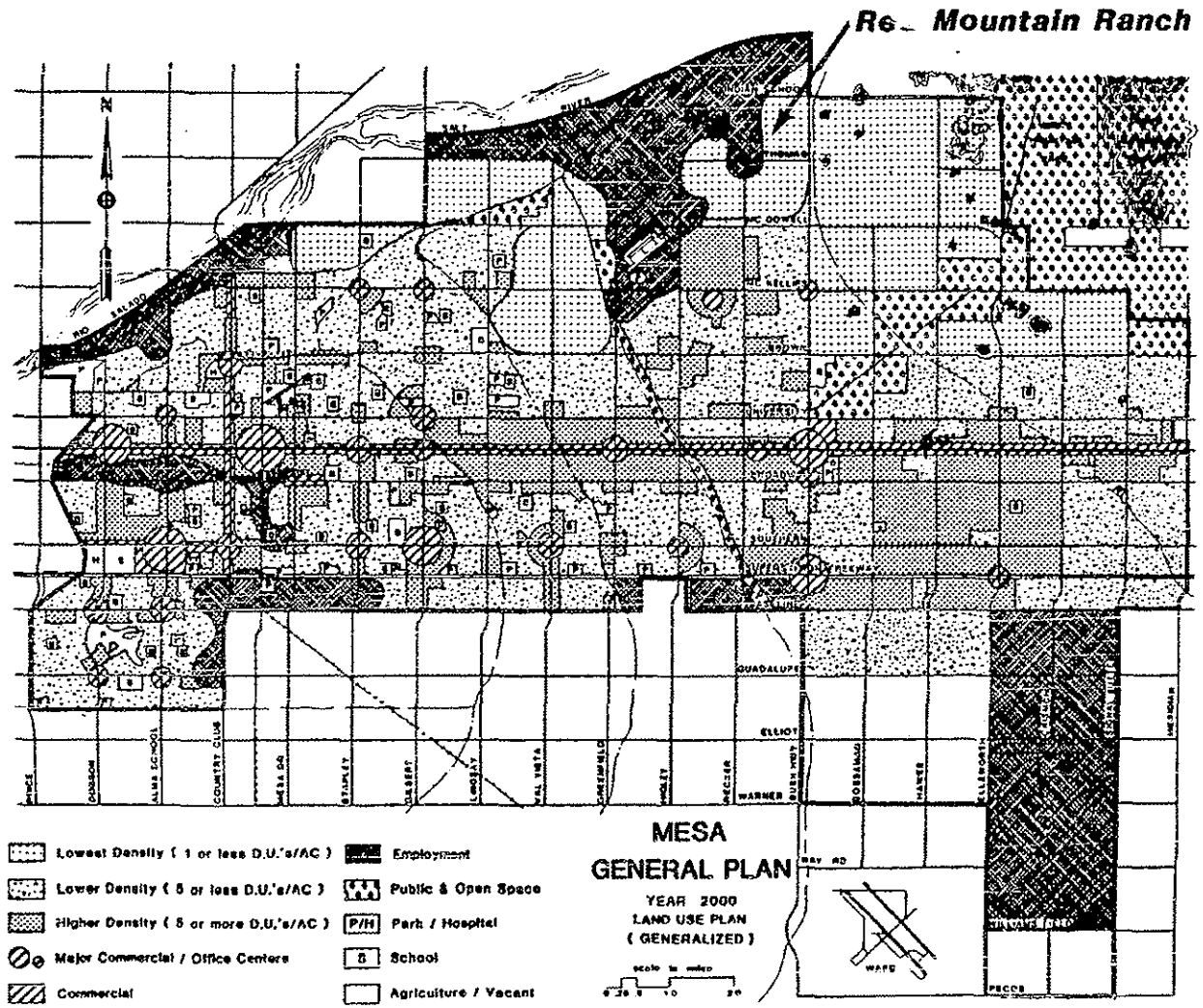
The objective of the development plan is a balanced project providing housing for the elderly, early retirees, as well as conventional family housing. Population projections included here were developed jointly with the Mesa Community Development Department and show a total population range of 5,500 to 6,000 people.

XIII. SCHOOL REQUIREMENTS.

As the project contains a significant number of conventional housing units in addition to those directed at early retirees and the elderly, a site for an elementary school has been included in the Land Plan. The 10 acre school site appears to be more than sufficient to satisfy projected school population needs. Game Creek Properties will be working with the Mesa School District to determine their requirements as more specific plans become available. Should the need for a school site be satisfied elsewhere, this site, set aside in the Land Plan, would be developed as SF 4 housing.

XIV. EXISTING PLANS AND POLICIES

The Specific Land Use Plan for this portion of the Red Mountain Ranch conforms to the fundamental notion behind the Mesa General Plan which states that detailed studies for various sites will refine the overall concept. The Land Plan preparation was directed by the Land Use Compatibility Guidelines and reflects their emphasis on Commerical/Office/Industrial and low density residential within the CUD/5 Airport Influence Zone. By adopting these Guidelines as a formative part of the land planning process, the Land Plan recognizes the proximity of Falcon Field and the intent of the developer to enter into agreements to grant specific avigation easements within the CUD/5 Zone. In addition to the avigation easements, which would be presented to potential Commercial/Office/ Industrial developers and home buyers as a policy of full disclosure, particular building processes directed at noise attenuation would be incorporated into the Development Guidelines for the project. It is the intention of Game Creek Properties to work with the City in relationship to the recently completed Transportation Study and Recommendations.



Mesa General Plan
Exhibit 6

XV. ASSOCIATIONS & DESIGN CONTROL

Separate Homeowners' Association for the residential portion of the project and Commercial Owners' Association for the Commercial/ Office/Industrial portion of the project will be set up to take ownership and control of common facilities. It is contemplated that all property owners will be entitled to social membership in the Country Club with active golf playing memberships restricted to approximately 400 members.

In order to protect future land values and provide a consistency of design quality throughout the life of the project, an Architectural Review Committee, of independent design professionals, is set up to review all development. The Architectural Review Committee will publish a set of Design Guidelines for both the Commercial/Office/ Industrial area and residential areas. These Guidelines will be adjudicated by the Architectural Review Committee at a series of review meetings for each project, prior to the sale of the development site to the home or office builder. This process has been used previously by Mobil Land Development Corporation in its Virginia, Florida and California projects and has proven to be a great assistance to the subdeveloper as well as providing the community with a high degree of design quality and livability.

XVI. AVIGATION EASEMENTS/NOISE CONTROL

The Land Use Plan has recognized the impact of Falcon Field and the associated aircraft patterns. Development proposed to take place within the CUD/5 Airport Influence Zone has been restricted to a maximimum of 129 dwelling units on 30.7 acres, all of which would have special noise attenuation construction. The major portion of the CUD/5 zone is developed as Commercial/Office/Industrial, golf course, park and roads.

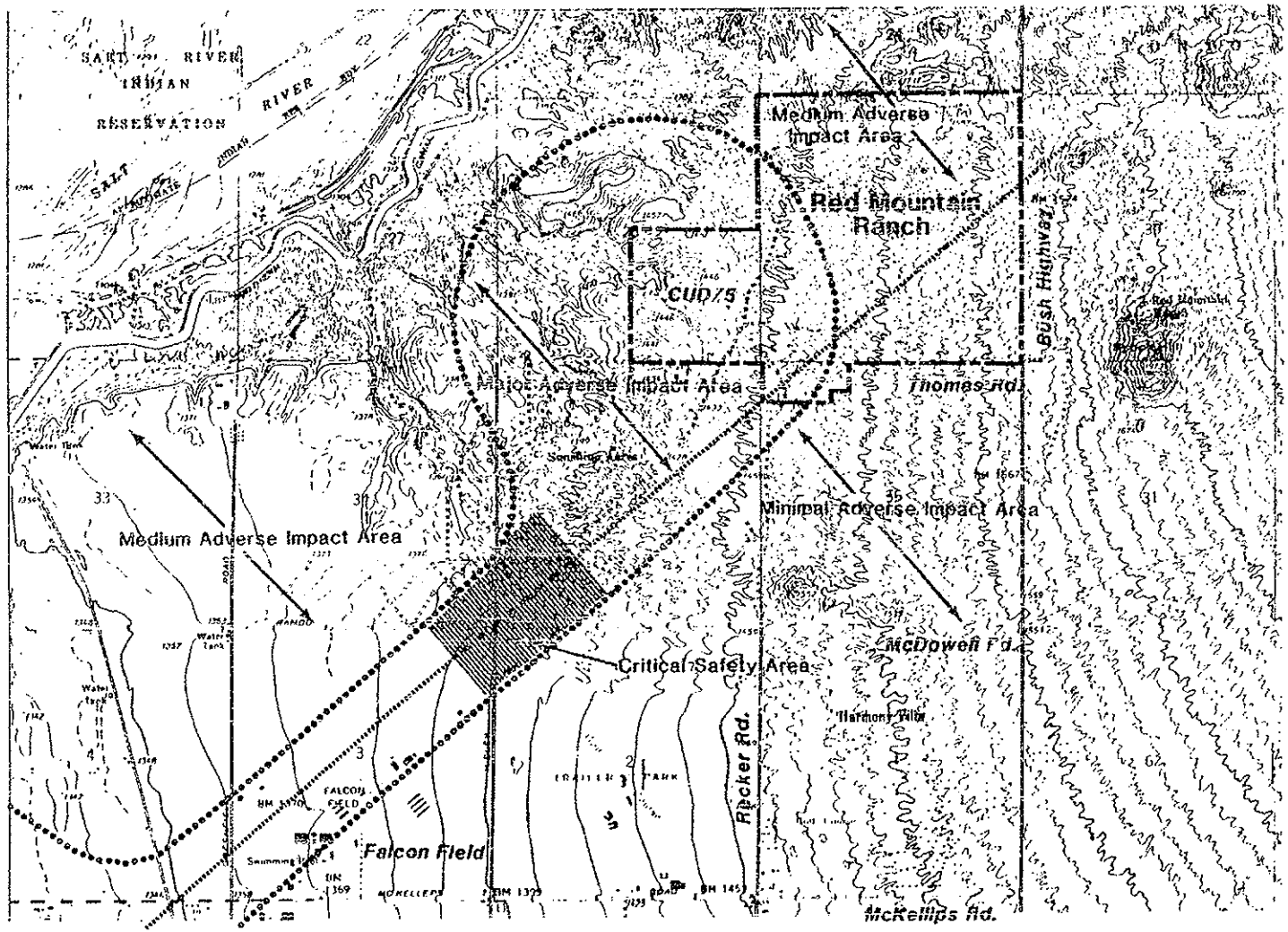
- CUD/5 - 250 AC
- 129 DU
- 1 DU/1.9 AC

The residential units have been clustered at the periphery of CUD/5 maximizing noise attenutation measures.

Game Creek Properties concur with the notion of specific avigation easements and agrees to enter into negotiations to grant specific avigation easements within the CUD/5 zone. Such easements and notification of such easements to potential developers and residents are consistent with Mobil's development standard of full disclosure.

XVII. DEVELOPMENT PHASING

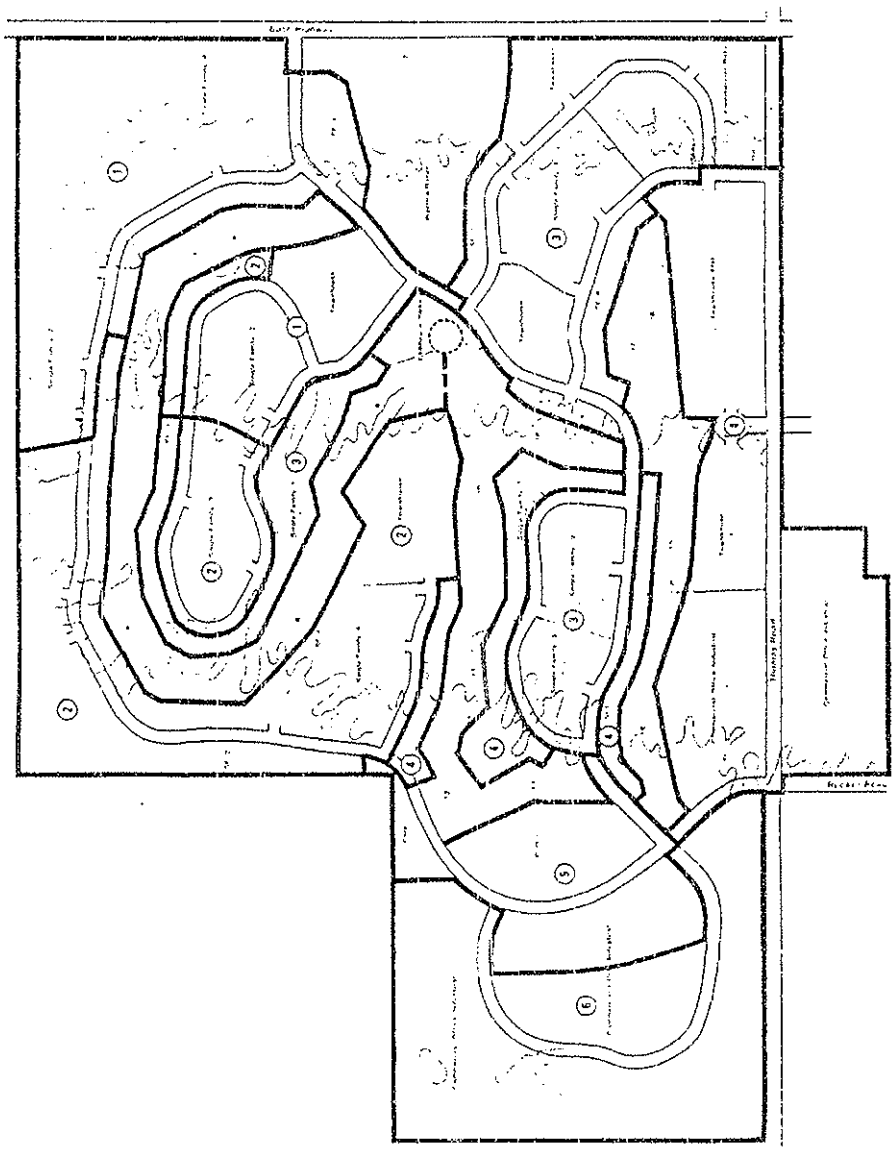
The Red Mountain Ranch is a phased development project with Commercial/Office/Industrial land available, as well as a full spectrum of housing types. If the golf course proves to be a viable marketing concept, the first nine holes would be constructed as part of first phase development. Phasing for the full life of the project is outlined in EXHIBIT 8.



Airport Influence Zone
Exhibit 7

Development Phasing Plan

Exhibit D



Red Mt. Ranch 3/14/83

EXHIBIT B

ORDINANCE NO. 1958

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MESA, MARICOPA COUNTY, ARIZONA, AMENDING SECTION 11-2-2 OF THE MESA CITY CODE; CHANGING THE ZONING OF CERTAIN PROPERTY IN THE CITY OF MESA; AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESA, MARICOPA COUNTY, ARIZONA, AS FOLLOWS:

Section 1: That Section 11-2-2 of the Mesa City Code is amended to read as follows:

"11-2-2. MAP:

(A) Locations and Boundaries of Districts.

1. The locations and boundaries of the use districts and figures, expressing distances in feet and otherwise on a map entitled 'Zoning Map of the City of Mesa', dated April 15, 1985, and signed this day by the Mayor and City Clerk, which map accompanies and is hereby declared to be part of this ordinance, are hereby approved and adopted.

2. The indicated district boundary lines are intended to follow street, alley, lot or property lines as the same exist at the time of the passage of this Code, except where such district boundary lines are fixed by dimensions shown on said map, in which case such dimensions shall govern.

(B) Any person, firm or corporation who shall violate any of the provisions of said Mesa City Code as hereby amended, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $1,000 or by imprisonment in the City Jail for a period not to

exceed six (6) months, or by both such fine and imprisonment, and each day of violation continued shall be a separate offense, punishable as hereinabove described."

PASSED AND ADOPTED by the City Council of the City of Mesa, Maricopa County, Arizona, this 15th day of April, 1985.

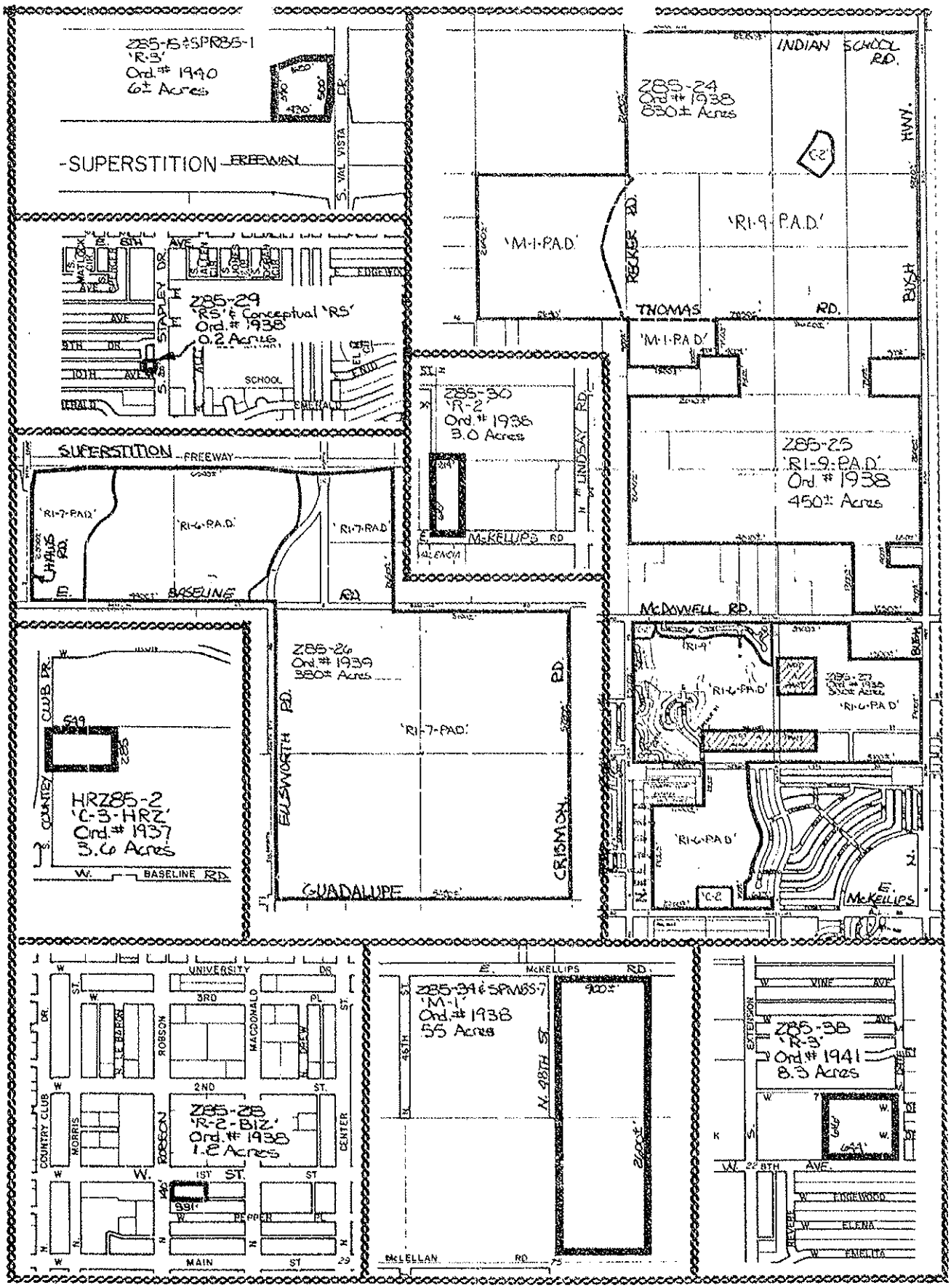
APPROVED:

Mayor

ATTEST:

City Clerk

EFFECTIVE DATE: May 15, 1985



CITY OF MESA

The attached zoning changes were approved on April 15, 1985, by Ordinances #1937, #1938, #1939, #1940 and #1941. If you have any questions concerning these changes, please contact the Mesa Planning Department at 834-2185.

EXHIBIT C

Z85-24 PREVIOUSLY APPROVED DMP

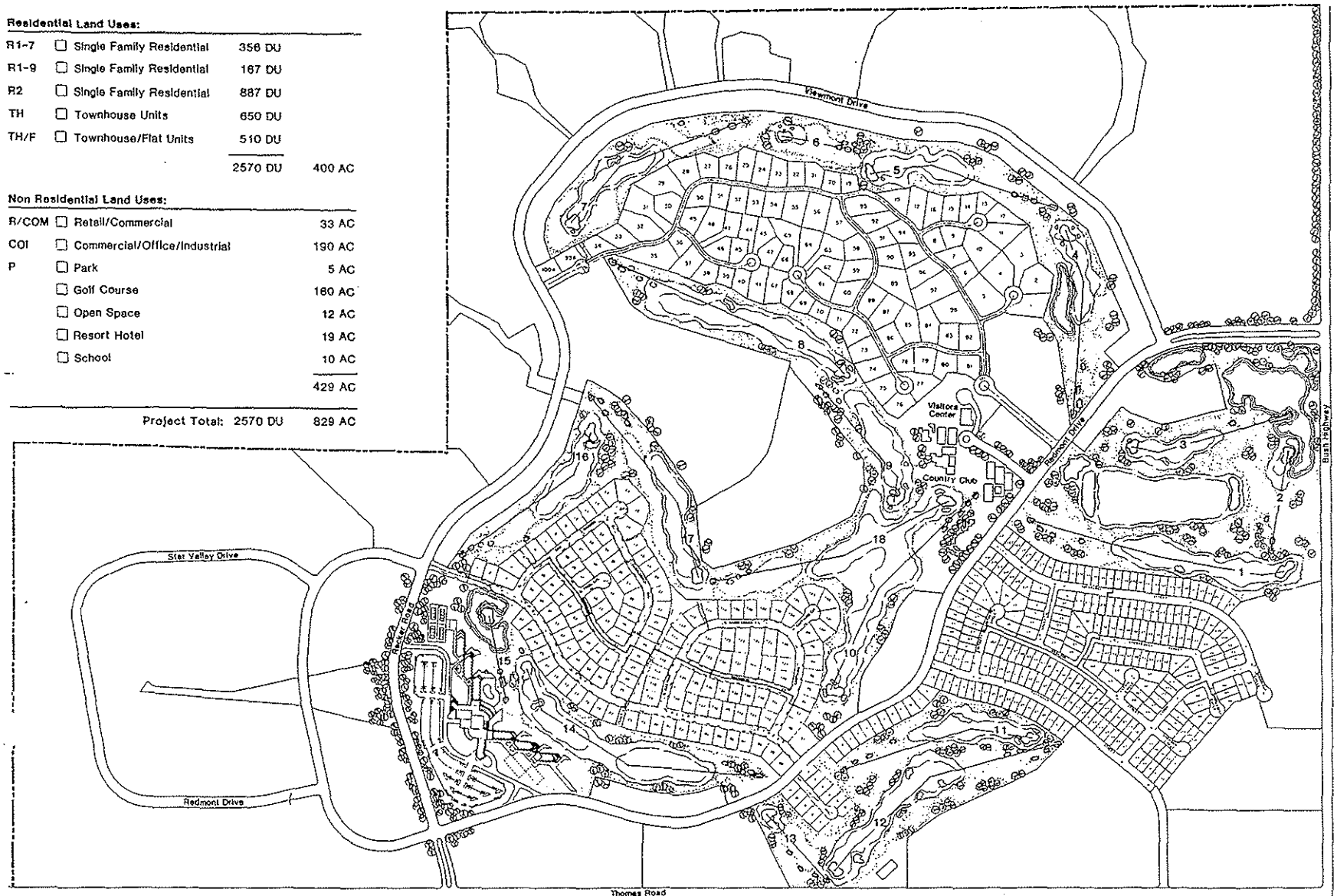
Residential Land Uses:

R1-7	☐ Single Family Residential	356 DU	
R1-9	☐ Single Family Residential	167 DU	
R2	☐ Single Family Residential	887 DU	
TH	☐ Townhouse Units	650 DU	
TH/F	☐ Townhouse/Flat Units	510 DU	
		2570 DU	400 AC

Non Residential Land Uses:

R/COM	☐ Retail/Commercial	33 AC
COI	☐ Commercial/Office/Industrial	190 AC
P	☐ Park	5 AC
	☐ Golf Course	180 AC
	☐ Open Space	12 AC
	☐ Resort Hotel	19 AC
	☐ School	10 AC
		429 AC

Project Total: 2570 DU 829 AC



Z85-24

Z83-34

North

NOTE: This graphic describes current development plans for Red Mountain Ranch which the developer, Red Mountain Ranch, Inc. reserves the right to modify. Firm completion dates have not been established for the proposed amenities—Golf Course, Golf Clubhouse, Parks and Bicycle Paths.

200' 0 200' 400' 800'

3/25/86 Graphic Scale

Red Mountain Ranch

Red Mountain Ranch, Inc.
Mesa, Arizona

5-1-87

EXHIBIT D

ORDINANCE NO. 2486

AN ORDINANCE AMENDING SECTION 11-2-2 OF THE MESA CITY CODE, CHANGING THE ZONING OF CERTAIN PROPERTY DESCRIBED IN ZONING CASE Z89-36, ADOPTING AN OFFICIAL SUPPLEMENTARY ZONING MAP AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.

BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF MESA, MARICOPA COUNTY, ARIZONA, AS FOLLOWS:

Section 1: That Section 11-2-2 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.

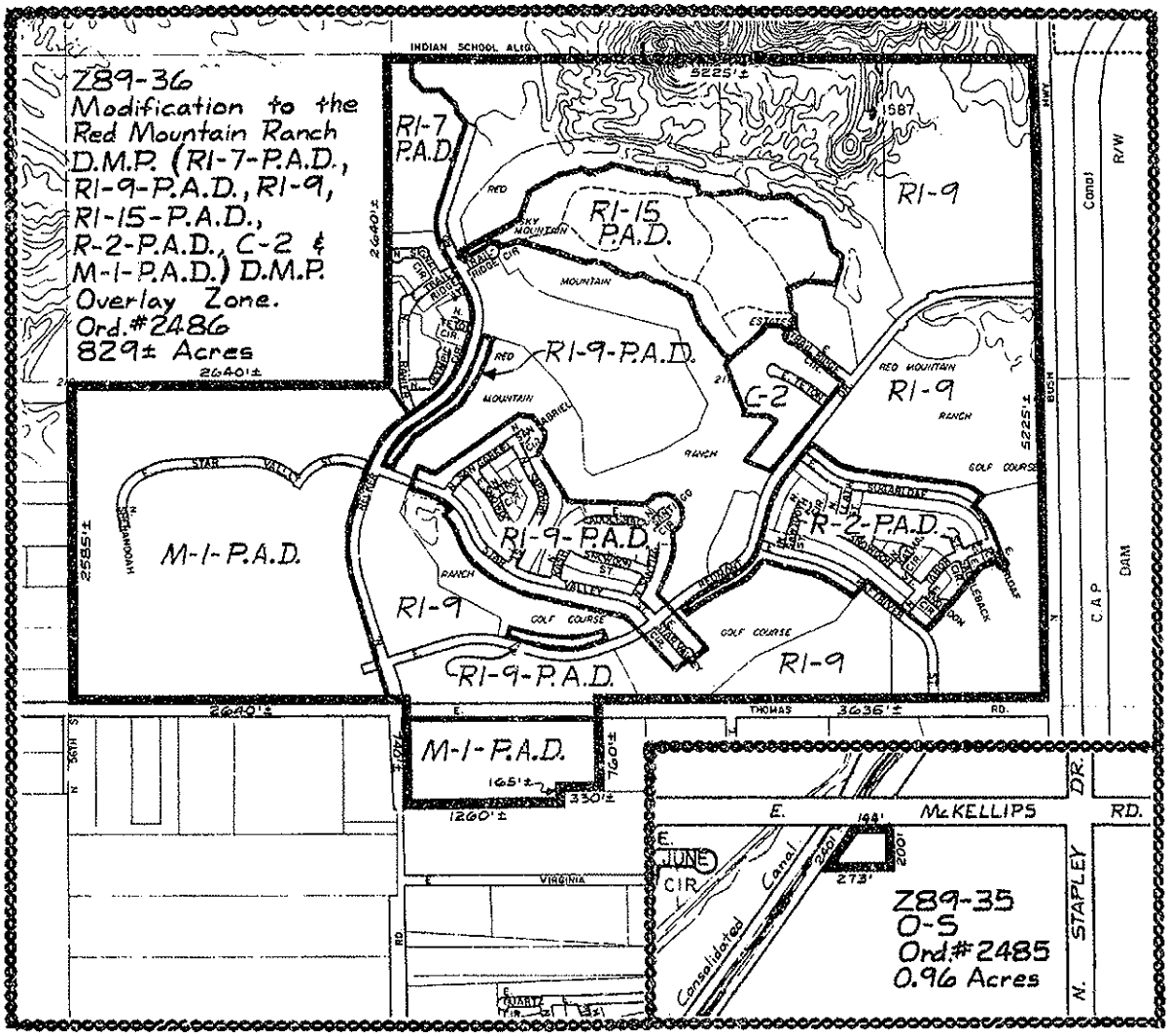
Section 2: The Official Supplementary Zoning Map annexed hereto is adopted subject to compliance with the following conditions:

1) Compliance with the basic development as shown on the site plan and elevations submitted; and

2) Avigation easements to be recorded and sound attenuation measures be incorporated into the construction of the homes for all development within the C.U.D. 5 Zone.

Section 3: PENALTY, Any person, firm or corporation violating any provision of this Ordinance, or any provision of the Mesa City Code as amended by this Ordinance, shall be guilty of a Class One Misdemeanor, punishable by a fine not exceeding $2,500.00, or by imprisonment in the City Jail for a period not exceeding 6 months, or by both such fine and imprisonment; and each day of violation continued shall be a separate offense, punishable as described.

OFFICIAL SUPPLEMENTARY ZONING MAP
AMENDING THE CITY OF MESA ZONING MAP



Please be advised that the attached zoning changes were approved by the Mesa City Council on January 22, 1990 by Ordinances #2485 and #2486. If you have any questions concerning these changes, please contact the Mesa Community Development Department at 644-2185.

Peggy Rubach MAYOR ATTEST: [signature] CITY CLERK DATED 14 Feb 90

EXHIBIT E

Z89-36

RED MOUNTAIN RANCH

PARCEL NO.	NAME	USE	STATUS	AREA	D.U.	DENSITY
1	Viewpoint @ RMR	Single Family Detached	Undeveloped	13.7 Ac.	51	3.7 D.U./Ac.
2		Single Family Detached	Undeveloped	17.3 Ac.	51	2.9 D.U./Ac.
3		Attached Single Family	Undeveloped	17.8 Ac.	132	7.4 D.U./Ac.
4		Cluster Single Family	Undeveloped	32.2 Ac.	135	4.2 D.U./Ac.
5		Single Family Detached	Undeveloped	54.3 Ac.	201	3.7 D.U./Ac.
6		Single Family Detached	Undeveloped	4.7 Ac.	22	4.7 D.U./Ac.
7		Townhouse	Undeveloped	8.2 Ac.	98	12 D.U./Ac.
8		Elementary School	Undeveloped	10.0 Ac.	--	--
9		Retail/Commercial	Undeveloped	10.0 Ac.	--	--
10		Townhouse	Undeveloped	22.3 Ac.	401	18 D.U./Ac.
11		Single Family Detached	Platted	44.4 Ac.	252	5.7 D.U./Ac.
12	Red Mountain Village	Attached Single Family	Undeveloped	5.9 Ac.	47	8 D.U./Ac.
13-14		Attached Single Family	Undeveloped	2.4 Ac.	19	8 D.U./Ac.
15		Single Family Detached	Undeveloped	6.1 Ac.	9	1.5 D.U./Ac.
16		Single Family Detached	Platted	55.3 Ac.	100	1.8 D.U./Ac.
17	Sky Mountain Estates	Single Family Detached	Undeveloped	38.4 Ac.	158	4.1 D.U./Ac.
18-19		Single Family Detached	Platted	17.2 Ac.	70	4.1 D.U./Ac.
20	West Hills	Single Family Detached	Platted	4.7 Ac.	16	3.4 D.U./Ac.
21	The Fairways II	Single Family Detached	Platted	42.9 Ac.	149	3.5 D.U./Ac.
22	Red Mountain Estates	Single Family Detached	Platted	7.9 Ac.	31	3.8 D.U./Ac.
23	Pin High	Single Family Detached	Platted	3.0 Ac.	11	3.7 D.U./Ac.
24	Mountain View Greens	Townhouse	Undeveloped	12.4 Ac.	149	12 D.U./Ac.
25		Comm./Office/Indust.	Undeveloped	27.1 Ac.	--	--
26		Attached Single Family/ Office	Undeveloped	6.0 Ac.	108	18 D.U./Ac.
27		Single Family Detached	Undeveloped	18.4 Ac.	61	3.3 D.U./Ac.
28		Single Family Detached	Undeveloped	8.4 Ac.	33	3.9 D.U./Ac.
29		Comm./Office/Indust.	Undeveloped	136.0 Ac.	--	--
30-42	Visitors Center			1.9 Ac.	--	--
	Country Club Complex			7.0 Ac.	--	--
	Golf Course			136.8 Ac.	--	--
	Public Right-of-Way			51.1 Ac.	--	--
			PROJECT TOTALS:	829 Ac.	2784	2.76 D.U./Ac

DEVELOPMENT
PLANS
TY INCIL
1-22-1990

EXHIBIT G

Legal Opinion

Date: Friday, March 26, 1999
From: Neal Beets
To: Dorothy Chimel
Subject: Interpretation of Zoning Condition

CITY OF MESA
Great People, Quality Service!

You have asked about the legal interpretation of the following zoning condition from the 1983 zoning case establishing a Development Master Plan for Red Mountain Ranch:

> "(2) Approval of R1-9-PAD and M-1-PAD as base zones subject to the following conditions:
>
> * * *
>
> (d) Individual site plans and subdivision plats for all development tracts to be approved by the Board and Council for the applicable zoning."

An applicant at Red Mountain Ranch believes this condition only makes his proposed R1-9 parcel subject to plat review for consistency with technical subdivision standards by the P&Z Board and City Council. The applicant does not believe this condition requires him to go through public hearings that would subject him to a possible citizen legal protest petition, necessitating a ¾ Council vote to approve the applicant's proposed site plan.

The city staff believe this zoning condition requires site plan review as well as plat review by the P&Z Board and City Council. Site plan review is not so much a process looking for compliance with technical subdivision building standards as it is a public input process about the overall layout and development of the proposed subdivision. Site plan review does subject developers to the possibility of a legal protest petition by persons owning property within 150' of the proposed development. If a valid legal protest petition is filed against a proposed site plan, then under our City Code that legal protest triggers a City Council ¾ vote requirement for approval. For the reasons that follow, I concur with staff's interpretation of this 1983 zoning condition.

The 1983 zoning condition says site plans "and" plats must be approved for "all" Red Mountain Ranch development tracts. It does not say site plans "or" plats" must be approved. And the condition does not say that it applies only to "some" development tracts and not others. It applies to "all." This is true whether the applicant seeks zoning consistent with the "base zones" established in 1983 or zoning that is different in any respect from the base zones. If the 1983 City Council had intended to exempt from the site plan requirement those parcels proposed to be developed at the approved base zone, the City Council could have said so. Instead, the Council required "all" cases to go through the site plan review process for whatever zoning density developers were seeking (which is "the applicable zoning" referred to in the zoning condition 2(d)).

Therefore, the language used, and not used, in the zoning condition makes all Red Mountain Ranch parcels, including the applicant's, subject to site plan review and citizen input, including the possibility of a legal protest petition. In addition, you have told me that all development parcels subject to the 1983 Red Mountain Ranch zoning case have indeed gone through a public site plan review process. Hence, city staff's position

respecting this applicant is consistent with the position and practice respecting all prior applicants. This would seem to include a large number of parcels and developers, inasmuch as the residential portion of Red Mountain Ranch is almost entirely built out.

The applicant has two arguments. One, that parcels proposed to be developed at the "base zone" density ought not have to go through a public site plan process, that includes the possibility of a citizen legal protest. Two, that if all Red Mountain parcels subject to the 1983 zoning case must return through the public process for site plan review, then what was the purpose of the 1983 zoning case and approval?

I think the best response is that the 1983 Red Mountain Ranch zoning case only approved a general "Development Master Plan" for Red Mountain Ranch with certain suggested "base zones" at a time when there was little or no development there. The Council-approved Development Master Plan and base zones were useful in establishing the overall future density and character of that large, master-planned community. They alerted individual parcel developers to some of the City Council's expectations. But because that large community extends over a square mile of land, apparently the 1983 City Council was concerned about development follow through. The City Council still wanted each, separate development parcel to return through a public process for site plan review to assure compatibility of development as the Red Mountain Ranch community evolved and the Development Master Plan was implemented. Hence, the City Council created, and the Master Developer accepted, zoning condition 2(d), above, requiring "all" development tracts to go through a public "site plan" process before the P&Z Board and the City Council. Moreover, the 1983 Council made no exception for parcels proposed for development at the suggested "base zone."

Given this context, I see nothing irregular, unreasonable, or illegal in this zoning requirement or condition. Nor do I see anything unfair in applying it to this applicant as it has been applied to all prior applicants at Red Mountain Ranch for parcels subject to the 1983 zoning case.

Let me know if you have any questions.

copy to: C.K. Luster, Wayne Balmer, Frank Mizner, Ralph Pew

EXHIBIT H

ATKINSON, HAMILL & BARROWCLOUGH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
3550 NORTH CENTRAL AVENUE
SUITE 1150
PHOENIX, ARIZONA 85012

JOSEPH M. ATKINSON*
PATRICK R. BARROWCLOUGH
CHRISTOPHER G. HAMILL

*CERTIFIED SPECIALIST REAL ESTATE LAW

TELEPHONE
(602) 222-4828
FACSIMILE
(602) 222-4820

Writer's E-Mail Address:
joseph.atkinson@azbar.org

Writer's Direct Line:
(602) 222-4824

August 31, 2009

VIA E-MAIL

Jeff D. Welker
Welker Development Resources, LLC
1755 S. Val Vista Drive, Suite 207
Mesa, AZ 85204

Re: Title Issues re Residential Use of Red Mountain Ranch Driving Range

Dear Jeff:

I have completed a review of the various title documents affecting the Red Mountain Ranch golf course and driving range, as referenced in the recent title report prepared by Stewart Title, order no. 09100111. The following recorded documents impact, but do not prevent, the proposed use of the driving range as single family residential:

1. Special Warranty Deed. There are no use restrictions set forth in the current vesting deed, recorded 2-28-02 as instrument no. 2002-0210868.

2. Declaration of CC&Rs. This document is the master declaration for Red Mountain Ranch Owners Association, instrument no. 85-286511. Although it does not affect the golf course or driving range (it is intended only for the surrounding residential development), it nevertheless contains the disclaimer in article XIV that "Declarant makes no representation that the portion of the Project adjacent to the Properties now or hereafter used as a golf course will always be used as a golf course". In addition, article II states that "Access to the golf course and to the club facilities or to a part thereof is strictly subject to the rules and procedures of the golf club. No Owner or occupant gains any right to enter or to use those facilities by virtue of ownership or occupancy of a Residential Unit."

3. Property Tax Related Restrictions for Golf Course Use. While there are several different declarations of restrictive covenant for golf course use, stretching over a 20 year period, they were recorded solely for the purpose of obtaining reduced valuation and rates for real property taxes. This is a common practice for virtually all golf course properties in Arizona. Although they state that the property may be used only as a golf course, they also reserve to the owner the right to unilaterally terminate the restriction, e.g.: "this restriction may be terminated or modified at any time by the then recorded owner of the Property and the Property may be converted to a different use", and "[owner] is not representing or warranting that the Property will be used as a golf Course". (example is from 93-0897584).

4. Owners Association Standards. Note that the Red Mountain Ranch Owners Association retains the right to review and approve exterior design, exterior materials and color schemes. This applies to "exterior aesthetic appearance only and no other standards". (95-0018073). The document specifically provides that the approval rights "are not in any manner a restriction on the usage of the Club Property". Standards are established as that which is "in conformity and harmony with the exterior design of comparable neighboring structures". A copy of 95-0018073 is attached for your reference.

5. Specific Restrictions Expired. Note that any use restrictions contained in certain memoranda of post-closing covenants (95-0018077 and 95-0018078) terminated automatically on January 7, 2005.

Please don't hesitate to contact me if you have any questions or you need anything else at this time.

Sincerely,

Joseph M. Atkinson

JMA:hlw
Enclosure
cc (via e-mail): Shelby Futch
Gordon W.D. Petrie
Reese Anderson

OLD REPUBLIC TITLE AGENCY
WHEN RECORDED, RETURN TO:
Red Mountain Ranch, Inc.
6617 North Scottsdale Road #103
Scottsdale, Arizona 85250
Attn.: L. W. Phelps

95-0018073

L03-1036

Z48

DECLAR
RED MOUNTA

THIS DECLARATION OF COVENANT is made this 6th day of January, 1995, by PAR VIEW, INC., a Delaware corporation ("Declarant"), with reference to the following facts:

A. Declarant is the owner of the Red Mountain Ranch Country Club in the city of Mesa, county of Maricopa, Arizona, located on land more particularly described on the attached schedule dated December 12, 1994, and entitled "Legal Description Red Mountain Ranch Golf Course" (the "Property").

B. Declarant wishes to subject the Property to the covenants set forth herein, for the benefit of RED MOUNTAIN RANCH, INC. and RED MOUNTAIN RANCH OWNERS ASSOCIATION.

NOW, THEREFORE, Declarant hereby subjects the Property to the covenants set forth below, such covenants to run with the land and bind all future owners of the Property.

1. This Declaration shall be enforceable by Beneficiary. Beneficiary shall be RED MOUNTAIN RANCH, INC. until the earlier to occur of the following events:

(a) Red Mountain Ranch, Inc. no longer owns any real property it currently owns in Sections 25, 26 or 36, Township 2 North, Range 6 East of the Gila & Salt River Base & Meridian, Maricopa County, Arizona, or

(b) Red Mountain Ranch, Inc. assigns its rights as Beneficiary to Red Mountain Ranch Owners Association. Upon the happening of either event set forth above, Red Mountain Ranch Owners Association shall become the Beneficiary, acting by and through its New Construction Committee and Modifications Committee.

2. Beneficiary shall have the right to approve, for the limited purpose set forth herein, the plans and specifications (the "Plans") for any New Improvements or Major Renovations located on the Property. Beneficiary's right of approval shall be limited solely to a determination as to whether the exterior design and exterior materials and color schemes for the New Improvements or Major Renovations are in conformity and harmony with the exterior design of (i) comparable neighboring structures in Red Mountain Ranch, (ii) comparable existing structures located on the Property, or (iii) guidelines within the general land use standards (as to aesthetic exterior appearance only and no other standards), set forth in the Declaration of Covenants, Conditions, and Restrictions for Red Mountain Ranch Owners Association, which instrument was recorded on June 21, 1985, as Instrument No. 85-286511, in the Records of Maricopa County, Arizona. The Club Owner shall determine under which of the standards in (i)-(iii) above it is submitting for review by Beneficiary. If Club Owner meets any one of the standards set forth in (i)-(iii), then Beneficiary's review as to the remaining two standards shall

not be required. Beneficiary shall review the Plans for the New Improvements or Major Renovations within 30 days after receipt and advise Club Owner in writing of its comments. Beneficiary's approval shall not be unreasonably withheld or delayed. If no written comments are received within 30 days after Beneficiary's receipt of the Plans, they shall be deemed approved. In the event Beneficiary and Club Owner cannot agree on the Plans within 60 days after receipt of Beneficiary's comments (or such longer period as mutually agreed to by the parties), the matter shall be resolved by arbitration pursuant to the rules of the American Arbitration Association. Further, all existing improvements located on the Club Property are acceptable to Beneficiary. The approval rights set forth in this Section are not in any manner a restriction on the usage of the Club Property, and they are solely to ensure that the general appearance and aesthetic quality of the New Improvements or major Renovations are comparable to comparable improvements located within Red Mountain Ranch.

The term "New Improvements" or "Major Renovations" shall be defined as any material expansion or remodeling of the exterior portion of the existing building or structures or construction of new buildings or structures on the Property (excluding minor improvements, repairs, restorations, improvements or alterations to the existing clubhouses, or the golf course maintenance facilities, or other existing buildings or structures located on the Property; but including painting a different color, roofing using a different color or material, or other significant changes to the aesthetic appearance of the structures on the Property).

IN WITNESS WHEREOF, the undersigned Declarant has executed this Declaration this 6th day of January, 1995.

PAR VIEW, INC.,
a Delaware corporation

By: C. J. Linley
Its: PRESIDENT

State of Arizona
County of Maricopa

The foregoing instrument was acknowledged before me this 9 day of January, 1995 by C. J. Linley, the President of Par View, Inc., a Delaware corporation.

Linda Marten
Notary Public

My commission expires: 5-14-96

LegalOnes.co