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April 4, 2017

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

Re: BA16-049 Red Mountain Ranch-Divot Partners Appeal

Dear Members of the Board of Adjustment:

We represent Divot Partners, the owner of the Red Mountain Ranch Golf Course, which is appealing an interpretation by the Mesa Zoning Administrator (“ZA”) related to development of the driving range at the golf course. The purpose of this letter is to summarize our position, which we will explain in more detail at the hearing on April 12, 2017.

I. INTRODUCTION.

Divot Partners is proposing to develop the driving range with single-family custom homes. The Golf Course is zoned RS-9 (PAD), and the driving range is about 11.43 acres – less than 1.4% of the 829 acres which makes up the Red Mountain Ranch community. In response to our inquiries about developing the driving range with RS-9 uses, on June 29, 2016, the ZA issued an interpretation of the Zoning Ordinance requiring Divot Partners to go back through an entire new rezoning process, even though underlying, and existing, zoning district allows the proposed residential use and even though the golf course and its ancillary amenities will remain. We appealed that interpretation to this Board, which decides appeals of ZA interpretations.

At the outset, we want to stress that this case is *not* about trying to avoid a public City Council hearing on the proposed development. Rather, this case is about the type of application that should be filed and processed and eventually ruled upon by the City Council. Stated differently, this appeal is about whether the terms of the applicable ordinances require the City Council hear this case in the context of a “rezoning” or as a “site plan review.”

We also want to stress that no resident of Red Mountain Ranch will lose golf course frontage due to the proposed development, and the density and open space requirements of the Red Mountain Ranch Development Master Plan will remain satisfied. In contrast, Divot Partners has a longstanding property right to develop the driving range in accordance with its existing residential zoning, which the City cannot abridge without becoming liable for denial of those rights.

II. SUMMARY.

Divot Partners respectfully disagrees with the ZA's interpretation for the following reasons as explained more fully below:

1. The driving range is zoned RS-9 (PAD). The PAD designation is an overlay zoning district but does not change the rights to develop consistent with the underlying base zoning district. Because the underlying zoning district is residential, the proposed development of the land as a single-family project is permitted as a matter of right.
2. Because Divot Partners is proposing to develop a subdivision under the RS-9 zoning that will change an approved site plan, it must file a new application for site plan modification, not an application for rezoning.
3. Development of 32 homes on 11+/- of 829 acres, to replace a driving range that was never required by any prior zoning case and is permitted by the underlying zoning, is consistent with the "basic development" and does not require a new rezoning case.

III. FACTS.

A. **The Golf Course Is Zoned RS-9 (DMP), Which Permits Single-family Homes.**

The Development Master Plan ("DMP") for Red Mountain Ranch was first approved in 1983 in Case No. Z83-34. Today, Mesa's Zoning Ordinance refers to all previously approved DMP's as Planned Area Developments ("PAD"). A PAD/DMP overlay zoning district allows, among other things, flexibility for large developments by permitting a landowner to incorporate multiple permissible uses. A PAD/DMP overlay is not "stand alone" zoning, but must be used in conjunction with one or more zoning districts:

The PAD overlay district is to be used in conjunction with one or more underlying zoning districts, *thereby permitting the same uses and activities as the underlying base zoning district(s)*, except those that may be excluded by the City Council. . . .

Mesa Zoning Ordinance § 11-22-2 (emphasis added).

The 1983 zoning case adopted R1-9 (Residential) as the underlying zoning district for the golf course.¹ Ordinance No. 1704, is attached as **Exhibit 1**. The 1983 DMP allowed 2,570 residential dwelling units. At the time, there was an area set aside for a future golf course, but no specific designation of a driving range.

In 1990, the City Council adopted Ordinance No. 2486 (Zoning Case No. Z89-36), which adopted an Official Supplementary Zoning Map for Red Mountain Ranch. Ordinance No. 2486 is attached as **Exhibit 2**. The map attached to Ordinance No. 2486 identified the general outline of

¹ The City later would change the designation of R1-9 to RS-9, but the change was only to the name of the zoning district, and the regulations stayed materially the same.

a golf course, but did not show a driving range, and maintained the R1-9 zoning of the golf course. The City Council in 1990 also amended the DMP to reduce the allowed number of units to 2,284. The owner presumably went forward with a zoning case at that time because there was a change to the overall density and to dwelling unit allocations for particular parcels. In other words, the 1990 case was not just a site plan modification.

Ordinance No. 2486 contained two stipulations, including: “Compliance with the basic development as shown on the site plan and elevations submitted.” Ordinance No. 2486 does not define the term “basic development” or identify the “site plan” contemplated by the stipulation.

Neither the 1983 nor the 1990 approvals contained any requirement that the golf course, if built, include a driving range or that residential use of the golf course was excluded. Nor did either zoning case impose an open space requirements, although an intervening 1985 case listed 12 acres as the minimum amount of open space. In Mesa, golf courses count as open space.

Today, the City’s zoning maps show the zoning of the Golf Course as RS-9 PAD. Red Mountain Ranch has 1,595 dwelling units and nearly 200 acres of open space, including the golf course and community common area. Divot Partners plans to develop the 11.43 acre driving range with up to 32 single-family detached custom homes. The proposed single-family development is permitted in an RS-9 zoning district.

B. The Dispute.

In 2009, counsel for Divot Partners wrote a letter to Margaret Robertson, then Assistant City Attorney, explaining why a zoning case was unnecessary to develop the driving range. The letter is attached as **Exhibit 3**, and is incorporated by reference. However, due to the uncertainty brought on by the Great Recession, including the near-collapse of the Arizona real estate market, Divot Partners put its plans on hold.

In 2016, we again approached the City about processing a site plan review case. In response, the ZA issued an interpretation on June 29, 2016 that Divot Partners was required to go through a rezoning process. As the ZA explained his rationale:

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

Zoning Administrator Interpretation, June 29, 2016, attached as **Exhibit 4**, p. 2.

After we appealed the June 29 interpretation, the ZA issued a second interpretation, requiring us to notify all 3,350 property owners within a 500-foot radius of the Red Mountain

Ranch DMP of the hearing involving the driving range. At the December 7, 2016 hearing, the Board decided that we only needed to notify owners within 500 feet of the driving range.

IV. THE ZONING ORDINANCE REQUIRES DIVOT PARTNERS TO GO THROUGH SITE PLAN REVIEW, NOT REZONING.

A. Standard of Review.

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

B. The Driving Range Is Zoned RS-9, Which Permits Residential Use.

According to the ZA, the stipulation in Case Z89-36 that requires "compliance with the basic development as shown on the site plan and elevations submitted" controls the outcome of this dispute. The ZA determined that single-family homes instead of a driving range would be a "significant change" to the 829-acre site plan; and, therefore, not in compliance with the basic development. Therefore, the ZA reasoned, Divot Partners must go back through the rezoning process to amend the stipulation, or in other words, amend the site plan.

The ZA's decision ignores the fact that the underlying zoning of the driving range is RS-9, which allows residential use as a matter of right. The RS-9 zoning designation is not limited by the PAD overlay zoning, but is an independent entitlement. Section 11-22-2 of the Zoning Ordinance states:

The PAD overlay district is to be used in conjunction with one or more underlying zoning districts, thereby permitting the same uses and activities as the underlying base zoning district(s), except those that may be excluded by the City Council. Limitations and standards of use also may be established in the overlay district as conditions of approval for individual developments. Before the City Council excludes a land use from a base zoning district, a development agreement that also excludes those specified land uses shall be adopted previous to or concurrently with the adoption of the overlay district. (Emphasis added).

This Zoning Ordinance provision gives Divot Partners rights to the allowed uses under the PAD zoning, *and* rights to the allowed uses under the base RS-9 zoning district. Had the City Council wanted to ban residential uses from the driving range area, it could have done so through a development agreement with the land owner when the property was first zoned in 1983 (See Case No. Z83-34) or again in 1990 (See Case Z89-36). But that did not happen on either occasion.

By the clear terms of the Zoning Ordinance, Divot Partners is “permit[ed] the same uses and activities as the underlying base zoning district.” The ZA’s interpretation that Divot Partners must go back through a rezoning process to use its property consistent with the underlying RS-9 base zoning would read § 11-22-2 out of existence.

Under Arizona law, statutes and ordinances cannot be interpreted to render a provision meaningless or insignificant. *Salt River Project Agr. Imp. & Power Dist. v. City of Tempe*, 147 Ariz. 144, 145, 708 P.2d 1335, 1336 (App. 1985). There is only one way to read the stipulation in Case No. Z89-36 and § 11-22-2 together and not render the latter meaningless: Divot Partners must return to the City Council for site plan approval, not go through another rezoning process to develop its property for a use the underlying zoning already allows.

Divot Partners is choosing to develop the driving range consistent with the underlying RS-9 base zoning.² The ZA’s interpretation cannot overrule the clear language in § 11-22-2 of the Zoning Ordinance that indisputably gives Divot Partners the right to all uses found in the RS-9 zoning district. Because the property is already zoned RS-9, the next step in the development process under the Zoning Ordinance is site plan review. Therefore, Divot Partners must only submit a new application for site plan review, not a rezoning.

C. The Zoning Ordinance Does Not Require a New Zoning Application for Rezoning, Only a New Site Plan Application.

Our interpretation that Divot Partners must go through site plan review is not only consistent with § 11-22-2 of the Zoning Ordinance, but also consistent with several other provisions in the Zoning Ordinance applying to changes to site plans. As you will recall, the ZA’s interpretation was: “Because the Proposed Development is a significant change from the approved site plan, the Ordinance requires Divot to file and process a ‘new application.’” See **Exhibit 4**, p. 2. The requirement relied upon by the ZA that a party submit a “new application” is found in Zoning Ordinance § 11-67-10.B, which reads as follows:

Changed Plan. A request for changes in conditions of approval of a discretionary permit or a change in an approved site plan or building plan that would affect a condition of approval shall be treated as a new application, except that such changes determined to be minor, in the opinion of the Zoning Administrator, may be approved by the Administrator. (Emphasis added).

As we will explain, the modification of 1.37% of the total land area within the Red Mountain Ranch DMP to allow a use permitted by the underlying zoning is not a “significant change.” Even so, the ZA’s reference to § 11-67-10.B actually supports Divot Partners’ position.

² The ZA claims that the owner did not assign dwelling units to the golf course during Case Z89-36. **Exhibit 4**, p. 2. Such assignment would have been unnecessary because the PAD/DMP assigned dwelling units across the entire development, and the underlying R1-9 zoning established the permitted density. More importantly, the City did exclude residential use from the driving range.

The term “new application” cannot be examined in a vacuum. Rather, one must look at the overall context of the request being made. In so doing, the phrase “new application,” relates back to the subject matter of the approval, which in this case is a site plan – not a rezoning. In context, § 11-67-10.B would read that the request for a change in an approved site plan “shall be treated as a new application *for site plan approval*,” which is exactly what Divot Partners contends.

This reading is not only sensible, but is consistent with longstanding Arizona case law that interprets zoning ordinances strictly and in favor of free use of property. *E.g. Kubby v. Hammond*, 68 Ariz. 17, 22, 198 P.2d 134, 138 (1948) (“Zoning ordinances, being in derogation of common law property rights, will be strictly construed and any ambiguity or uncertainty decided in favor of property owners”); *Levine v. City of Phoenix*, 2016 WL 5436413, at *3 (App. 2016) (“Because zoning ordinances are in derogation of common law property rights, we strictly construe them, and resolve any ambiguity or uncertainty in favor of the property owner”).

This reading also accords with six other provisions of the Zoning Ordinance where the phrase “new application” appears. As you can see from the quoted sections below, the phrase always appears in the appropriate context of the application. These provisions are as follows:

- Section 11-69-6.B: Site Plan Review – Minor and Major Modifications: “Any modification that is considered a major modification by the Planning Director, such as changes in uses, densities, or other major changes, shall be considered *a new application, subject to the procedures described in this Section for Site Plan Review.*”
- Section 11-71-7.B: Design Review – Minor and Major Modifications: “Any modification that is considered a major modification by the Planning Director, such as changes in uses, densities, or other major changes, shall be considered a *new application, subject to the procedures described for new application in this Section for Design Review.*”
- Section 11-72-5.C: Development Incentive Permits – Appeals; Expiration & Extensions; Modifications: “A minor modification of a DIP granted pursuant to this Chapter may be approved under Section 11-67-10(A), Modifications of Approvals. Changed plans, including *changes in conditions of approval of a DIP shall be treated as a new application*; see Section 11-67-10(B), Changed Plan.”
- Section 11-73-5.C: Substantial Conformance Improvement Permits – Appeals; Expiration & Extensions; Modifications: “A minor modification of a SCIP granted pursuant to this Chapter may be approved under Section 11-67-10(A), Modifications of Approvals. Changed plans, including *changes in conditions of approval of a*

SCIP shall be treated as a new application; see Section 11-67-10(B), Changed Plan”

- Section 11-80-6.C: Variances – Appeals; Expiration & Extensions; Modifications: “A minor modification of a variance granted pursuant to this Chapter may be approved under Section 11-67-10, Changed plans, including changes in conditions of approval of a variance shall be treated as a new application; see Section 11-67-10(B)”
- Section 11-11-7.C: Planned Communities – Expiration & Renewal of Site Plan Review – New Application: “If the approval of a site plan expires and an extension to the approval is not, or cannot, be granted, a new application for Site Plan Review shall be filed.”

Section 11-67-10.B similarly requires a “new application” for requests for changes to an approved site plan that would affect a condition of approval. As with the above-quoted ordinances, the term “new application” refers to the change to the site plan. Changes to a site plan, therefore, require site plan modification process, not a rezoning process.

D. The Proposal Does Not Change the “Basic Development.”

The ZA also is incorrect that development of the 11.43-acre driving range within the 829-acre Red Mountain Ranch DMP changes the “basic development as shown on the site plan and elevations.”

The “basic development” of Red Mountain Ranch was, at most, a community with a golf course that has underlying residential zoning. The ZA has not identified any requirement in any document that a driving range must be associated with the golf course. The driving range is not expressly included in the open space calculation, listed as a golf course amenity, described as integral to the golf course or even mentioned in the Specific Plan. Nor was the driving range “shown on the site plan and elevations” as a distinct, labeled use. Therefore, the “basic development” does not include a driving range.

Furthermore, in defining the “basic development” one must consider that the underlying zoning is RS-9. The City never excluded residential use from the golf course, as required by the Zoning Ordinance, and the site plans approved in 1983 and 1990 established the underlying zoning as residential. Divot Partners’ proposal is absolutely consistent with the underlying zoning, and therefore within contemplation of the “basic development.”

In addition, no resident will lose golf course frontage, and the additional 32 homes will not increase the density above the maximum allowed or reduce the amount of open space below the minimum required. Divot Partners’ proposed change will affect about 1.37% of the land within Red Mountain Ranch, leaving the remaining 98.63% in its existing condition. The 32 homes will only cause the density to increase by .04%, from 2.29 to 2.33 du/ac, whereas the maximum allowed density within Red Mountain Ranch is 3.27 du/ac.

In sum, use of a miniscule portion of the property as permitted by the underlying zoning, that will imperceptibly increase density, to replace an amenity that was never specifically required by any City approval, is not a “significant change” to the “basic development” that requires a rezoning process.

E. The ZA Cannot Repeal § 11-22-2 by Imposing Stipulations on Individual Zoning Cases.

The ZA’s interpretation is incorrect for another reason as well. Section 11-22-2 of the Zoning Ordinance is a legislative mandate: the PAD overlay district *must* be used with an underlying zoning district, “thereby permitting the same uses and activities as the underlying zoning district.” If an otherwise use is to be excluded, there *must* be a development agreement so providing. This language gives the City Council no discretion to ignore it.

The ZA’s argument essentially is that the City Council can effectively repeal § 11-22-2 by simply attaching a vaguely worded, single sentence boiler-plate stipulation to approval of a zoning case, which it has done so in nearly every zoning case processed by the City. If the City wants to repeal § 11-22-2, Arizona law requires the City Council to go through a public process to amend the Zoning Ordinance. See A.R.S. §§ 9-462.03 and 9-462.04. The ZA or the City Council cannot, by stipulation, repeal § 11-22-2 of the Zoning Ordinance and deprive a property owner of his rights to use the land consistent with the underlying zoning district.

F. This Board Has Already Decided that the Driving Range Proposal Does Not Impact the Entire DMP.

An underlying and critical premise of the ZA’s interpretation is that development of the driving range affects the *entire* Red Mountain Ranch DMP. As the ZA stated in his June 29 Interpretation, “Such an alteration would significantly change the use of the property and alter the anticipated density of the parcel.” See **Exhibit 4**, p. 5. This is why in his prior interpretation as to the notification radius, the ZA required Divot Partners to notify the entire Red Mountain Ranch community, plus 500 feet therefrom, about the proposed change to the driving range.

As discussed above, it simply is not true that the development would significantly change the use and density of the DMP. The use of the property for residential purposes is already allowed by the underlying zoning, and the additional homes will have virtually no statistical impact on the density, which will remain well below the maximum number of dwelling units.

The ZA’s position that the entire DMP is affected also is not true. In fact, at the prior hearing involving this property, this Board determined that the affected properties are limited to those surrounding the driving range, and *not* the entire DMP. For the same reasons, the proposed development is localized to the area around the driving range, which further justifies a finding that Divot Partners must only go through site plan modification, not a new rezoning case for the entire Red Mountain Ranch DMP.

G. The City Has Processed Applications For Site Plan Modification in Cases Involving The Same Or Similar Stipulation.

The operative Red Mountain Ranch DMP case, Case No. Z89-36, contains the following Condition No. 2: “Compliance with the basic development as shown on the site plan and elevations submitted.” This condition is a standard, boilerplate stipulation that appears in almost every zoning and site plan case in the City of Mesa and is in the zoning ordinance in dispute. The ZA has taken the position that this condition means that any significant change to the site plan triggers a rezoning. However, the City has and continues to process site plan cases where the original, underlying zoning case contains identical or similar language to Case No. Z89-36. Below, we will provide a very brief sampling of these cases.

1. Red Mtn. Ranch DMP Site Plan Cases

Most of land use cases in Red Mountain Ranch 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 accepted 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 (*see Exhibit 2*) did not show single-family lots on the property considered in Case No. Z99-31; however, it did show 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. The adjacent property owners believed that the property would remain as open space.
- Case No. Z99-31 was only for site plan and preliminary plat review, not zoning, 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 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 next to existing homes.

Case No. Z99-31 concluded by the applicant reaching a compromise with the opposing neighbors and amending the application to include modifications to the development standards. Thus, a PAD overlay was needed to enforce the “self-imposed” building height restrictions on some of the proposed homesites. The negotiated resolution of the case as a zoning case, rather

than a site plan 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 only case proposing a conventional R1-9 subdivision.

In support of our position that Case No. Z99-31 and our case are proper site plan cases, is a 1999 City Attorney Opinion letter, attached as **Exhibit 5**. Tellingly, as part of Case No. Z99-31, the applicant originally argued that a site plan was unnecessary and the case could proceed directly to a preliminary plat. A Legal Opinion from Neal Beets, City Attorney, dated March 26, 1999, opined that under the 1983 zoning case (Case No. Z83-24), a site plan must be processed based on the 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."

To be clear, we are not challenging the stipulation in Case No. Z83-24. Rather, we believe the City Attorney's Legal Opinion to be additional evidence that a site plan only case 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." See **Exhibit 5**, p. 2. He also summarized City Staff's position on the matter as believing "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 requiring the applicant to process a rezoning case. We find the absence of such statement indicative of the proper interpretation of the Red Mountain Ranch PAD. That is, when a proposed development is consistent with the overall density of Red Mountain Ranch, a rezoning case is not necessary, and the applicant may proceed with a site plan and pre-plat only.

Another Site Plan Modification case within the Red Mountain Ranch PAD was Case No. Z99-71, which is at the corner of Thomas and Power Roads. As you recall, Condition No. 2 in Case No. Z89-36 contains the condition the ZA is relying upon to require Divot Partners to go through a rezoning for the entire Red Mountain Ranch PAD. Prior to Case No. Z99-71, the City Council had approved Case No. Z98-53 with a similar condition of approval, which read: "Compliance with the basic development as shown on the site plan, preliminary plat and elevations submitted, except as noted below." So, again, we see here the same language, which is now doubly operative against this property. Yet, in Case No. Z99-71, the City processed a "site plan modification" case for a 15,120 sq. ft. free standing Walgreens. The site plan modification case also contained the following condition in Ordinance 3679: "Compliance with the basic development of the Walgreen's Store only, as described in the project narrative and as shown on the site plan and elevations submitted, except as noted below." Clearly, the City knows how to impose express requirements on maintaining specific uses, but did not do so in our case.

The conclusion to be drawn from these examples is that the City has previously processed site plan cases within the Red Mountain Ranch PAD that not only are subject to the original Condition No. 2 in Case Z89-36, but also the same language in subsequent zoning cases. There are additional cases like the foregoing within the Red Mountain Ranch DMP that we incorporate by reference but for the sake of brevity do not include herein.

2. Las Sendas DMP Site Plan Cases

The Las Sendas DMP was first established in Case No. Z95-74 and contained in that ordinance the following language: “Compliance with the basic development as shown on the DMP submitted, except as noted below.” If we followed the ZA’s conclusion, there should not be a single site plan review case within the Las Sendas DMP; but, this is not the case.

We will start with Case Z07-74, which was a 51-acre rezoning of the vacant property at McDowell and Ridgecrest within the Las Sendas DMP. The request as stated in the Staff Report was as follows: “ZONING REQUEST: Rezone from R1-90 DMP to R-2 (20± ac), C-2 (9± ac) and PEP (21± ac), and PEP with a Council Use Permit (2± ac), all part of a P.A.D. overlay and a modification to the Las Sendas Development Master Plan . . .” As one can see, this was a rezoning case and the associated Ordinance No. 4849 contained the following condition of approval: “Compliance with the basic development as described in the project narrative and as shown on the site plan, [and] preliminary plat, (without guarantee of lot yield, building count, lot coverage).”

Again, we now have two land use cases with the same or identical language found in a condition of approval. One would think under the ZA’s interpretation, that no site plan case could be processed on this property. Nevertheless, in Case No. Z13-09, the City did process a site plan modification case, which stopped at the P&Z Board level because the Las Sendas DMP does not have a similar condition of approval that all site plan cases must be heard by the City Council.

There are additional cases this one within the Las Sendas DMP that we incorporate by reference but for the sake of brevity do not include herein.

3. Superstition Springs DMP Site Plan Cases

In case Z94-10, the City processed a “site plan modification” case for a 62,000 sq. ft. grocery store, with shops and four pad building sites at the northeast corner of Power and Baseline Roads on 12.22 acres within the Superstation Springs DMP. This case contained the standard condition of approval: “Compliance with the basic development as shown on the site plan and elevations submitted, except as noted below.” But Case No. Z92-14, the original zoning case establishing the Superstition Springs DMP, includes this language: “Compliance with the Development Master Plan submitted, except as noted below.” The DMP Map attached to Case No. Z92-14 did not show a specific site plan, but rather just established the base zoning district.

Of special note is Condition of Approval No. 12 in the Superstition Springs DMP and Case No. Z92-14, which states: “the golf course shall retain substantially the current usage and configuration as shown on the Development Master Plan.” Thus, if someone tried to change the golf course within the Superstition Springs DMP, that would change a condition of approval and have to return to the City Council for a rezoning to a Council approved condition. In Red Mountain Ranch, however, no such language exists in any zoning case, nor is there a development agreement as required by § 11-22-2 of the Zoning Ordinance, as discussed above.

There are additional cases like Z94-10 within the Superstition Springs DMP that we incorporate by reference but for the sake of brevity do not include herein.

V. **THE ZA'S INTERPRETATION WOULD DEPRIVE DIVOT PARTNERS OF ITS PROPERTY RIGHTS.**

Divot Partners has a property interest in the underlying base RS-9 zoning, and in the right to proceed with development pursuant to that zoning without undue interference. Requiring Divot Partners to go through an entire rezoning case would be a substantial interference with its property interests, resulting in the denial of Divot Partners' constitutionally protected rights of due process and equal protection and entitling Divot Partners to damages pursuant to 42 U.S.C. § 1983 and Arizona law.

VI. **CONCLUSION.**

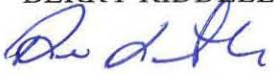
In conclusion, we respectfully ask that the Board overturn the ZA's interpretation, and rule as follows:

1. In this specific and limited situation, where the proposed development is consistent with the underlying zoning of the PAD, the driving range is not expressly required by the DMP, and the development will not exceed the maximum density or reduce the required open space, Divot Partners may submit an application for a site plan modification for the 11.43 +/- acres of the driving range; and,
2. Divot Partners may proceed through a properly noticed public hearing before the Planning & Zoning Board and City Council pursuant to the rules and standards that apply to site plan modifications.

We look forward to discussing these issues with you at the April 12, 2017 hearing.

Very truly yours,

BERRY RIDDELL LLC


For Jeffrey D. Gross
Jeffrey D. Gross

PEW & LAKE, PLC


Reese Anderson

cc: David Ouimette
Phyllis Smiley

Attachments

EXHIBIT 1

**Ordinance No. 1704
(Zoning Case Z83-34)**

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.

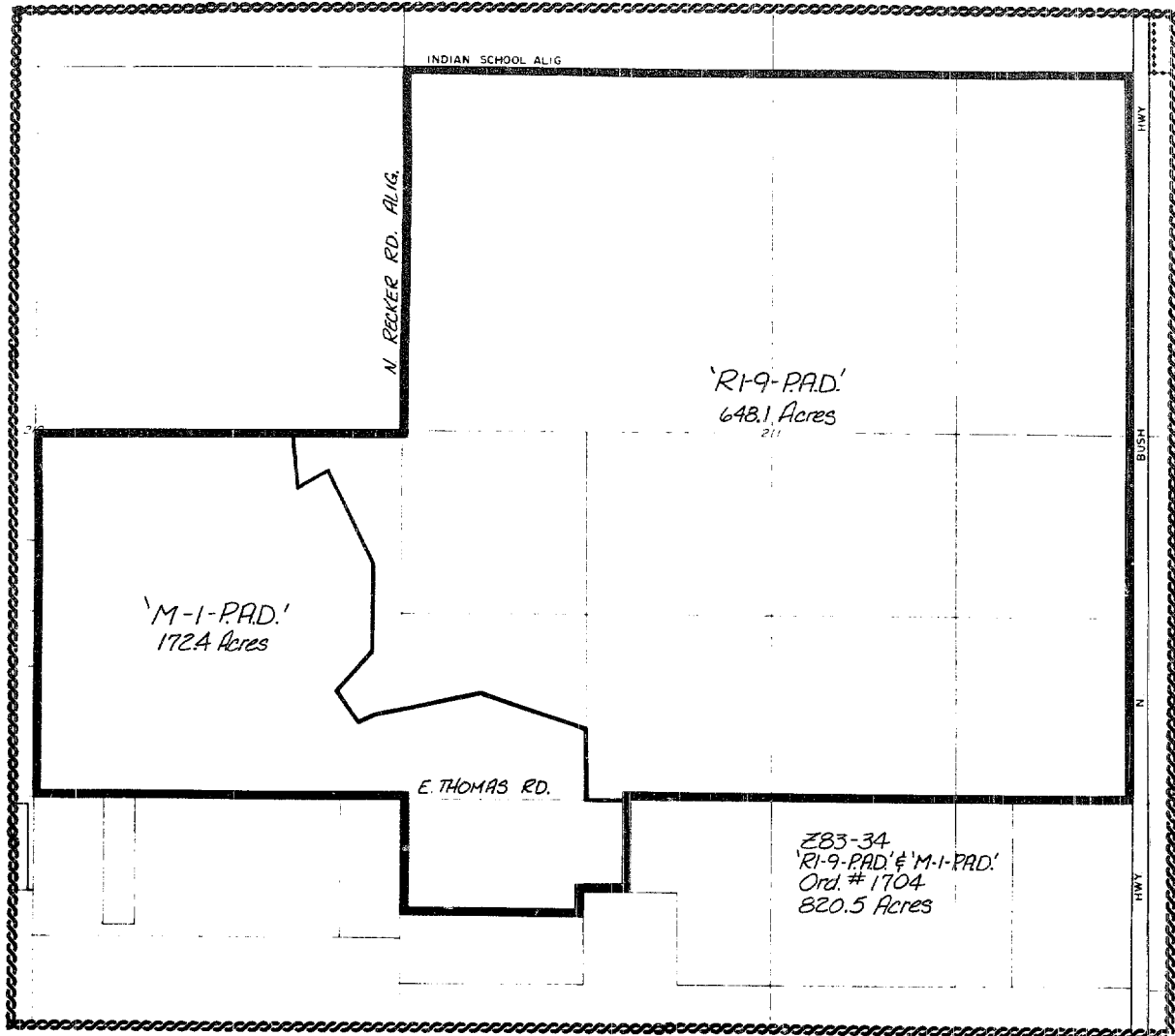
APPROVED:


Don W. Strauch, Mayor

ATTEST:


Dorothe Dana, City Clerk

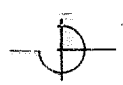
EFFECTIVE DATE: June 1, 1983



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.

Con W. Strauch MAYOR ATTEST: Rosita Luna CITY CLERK DATED 5-5-83



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.

Section I	Description of the Applicant.	Page 2
Section II	Location of Property.	3
Section III	Major Site Features.	3
Section IV	Development Concept Plan.	6
Section V	Conceptual Land Use Plan and Features.	8
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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.

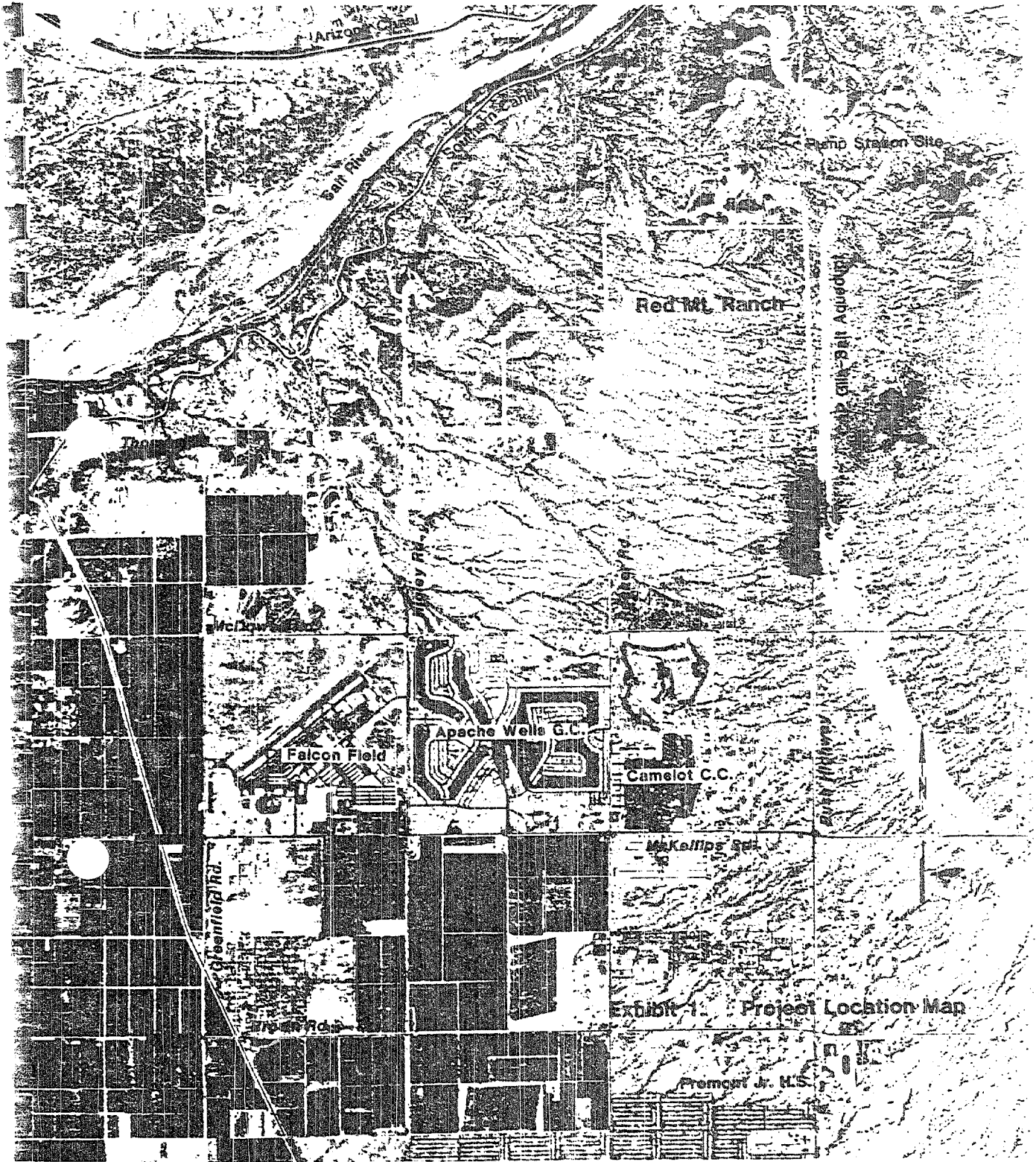
All of Mobil's projects are comprehensive, large-scale developments brought about in cooperation with local authorities, designed in concert with contemporary notions of environmental concern and with a view to satisfying all the needs of the future inhabitants, as well as being a part of the existing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

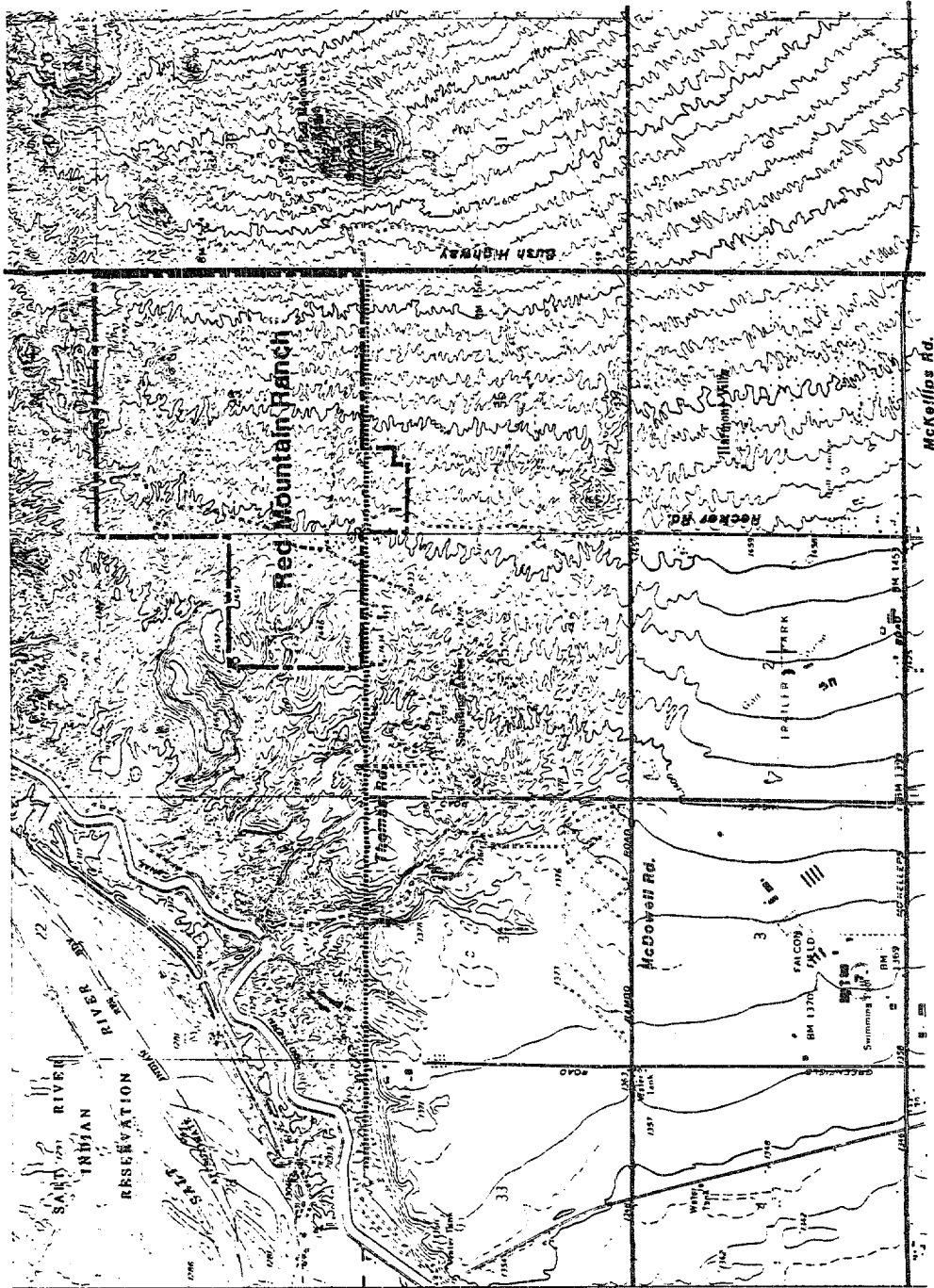
II. LOCATION OF PROPERTY

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 indiscernable 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.





Topographic Features
Exhibit 2

Red Mt. Ranch 3/22/83



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.

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	<u>820.47 AC</u>

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.

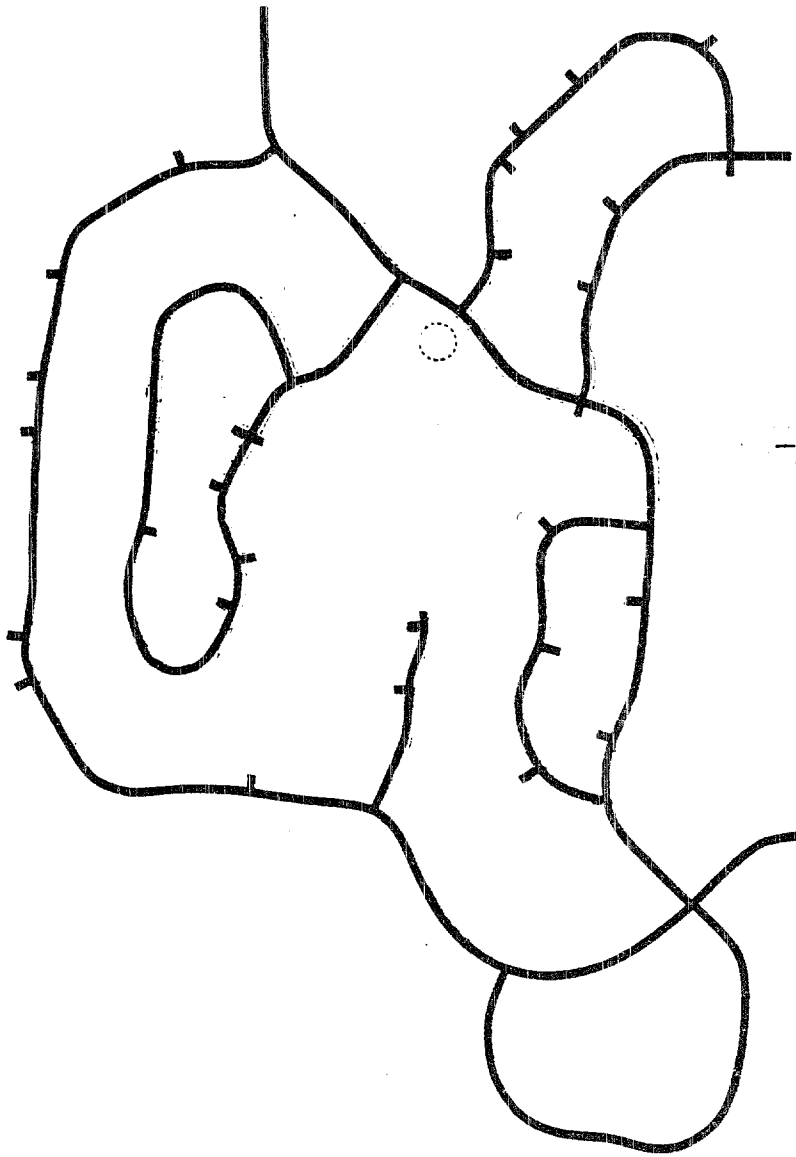
VIII. UTILITIES

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

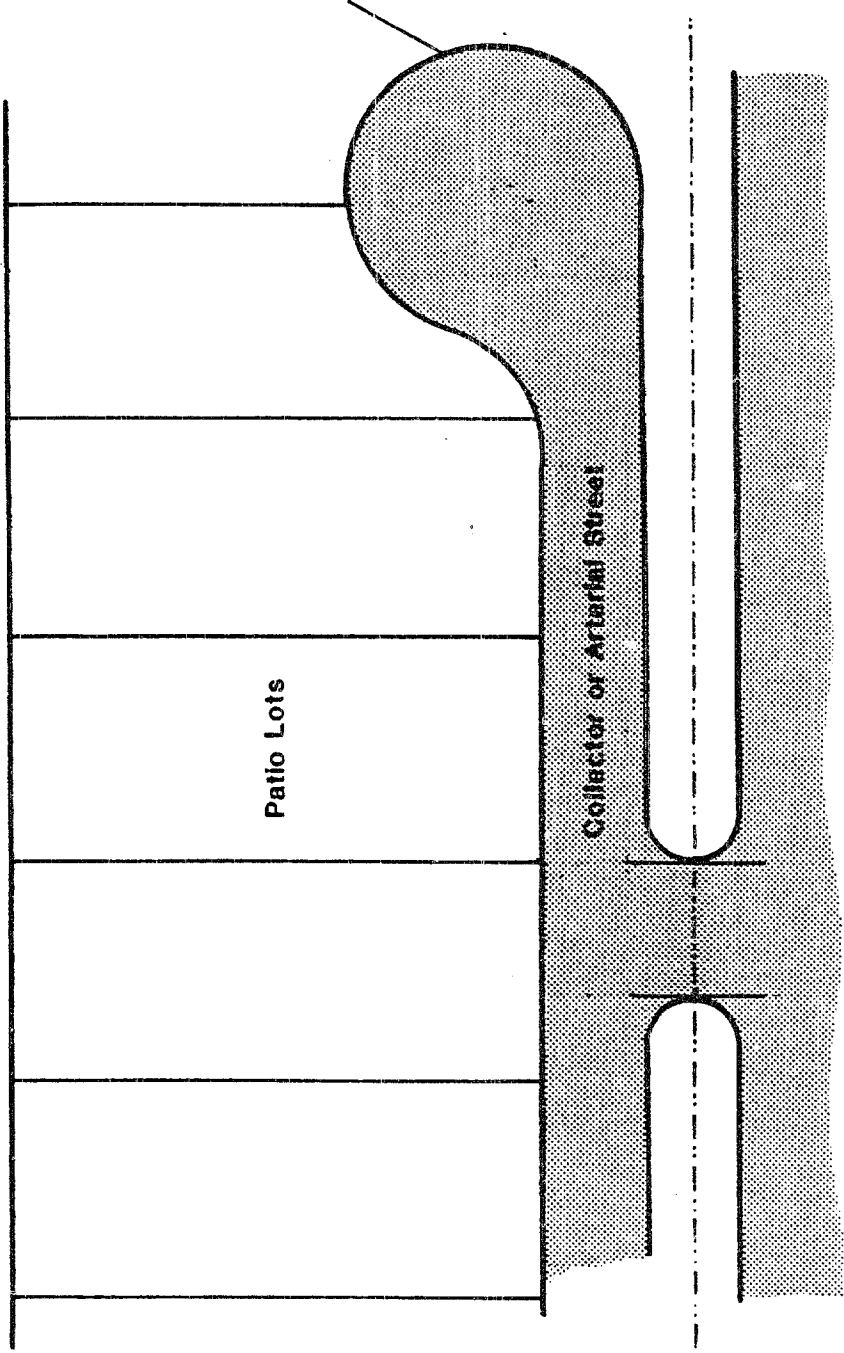
Mobil Land Development Corporation subscribes to the objective of energy conscious land planning and development. Specific building siting, current insulation techniques, shading devices, heat energy gathering systems, as well as numerous other passive approaches to energy conservation will be encouraged.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



Project Circulation Plan
Exhibit 4

Note: Small Patio Lots Shown in This Example

Golf Course



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' Association 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.

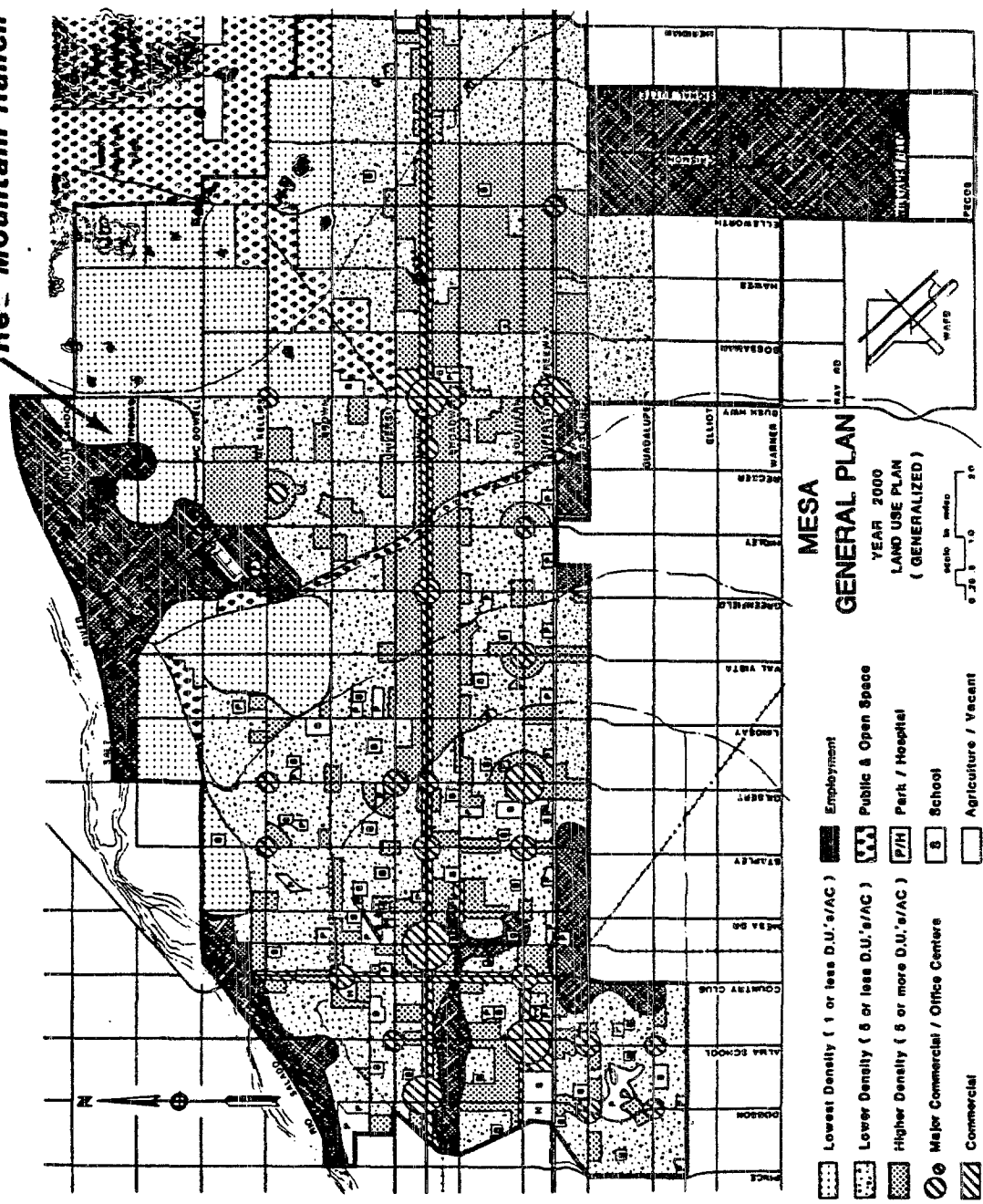
XIII. SCHOOL REQUIREMENTS.

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 Commercial/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 aviation easements within the CUD/5 Zone. In addition to the aviation 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.

Re- Mountain Ranch



MESA
GENERAL PLAN

YEAR 2000
LAND USE PLAN
(GENERALIZED)

- Lowest Density (1 or less D.U.'s/AC)
- Lower Density (5 or less D.U.'s/AC)
- Higher Density (5 or more D.U.'s/AC)
- Major Commercial / Office Centers
- Commercial
- Employment
- Public & Open Space
- Park / Hospital
- School
- Agriculture / Vacant

Red Mt. Ranch 3/22/83

-16-



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 maximum 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.

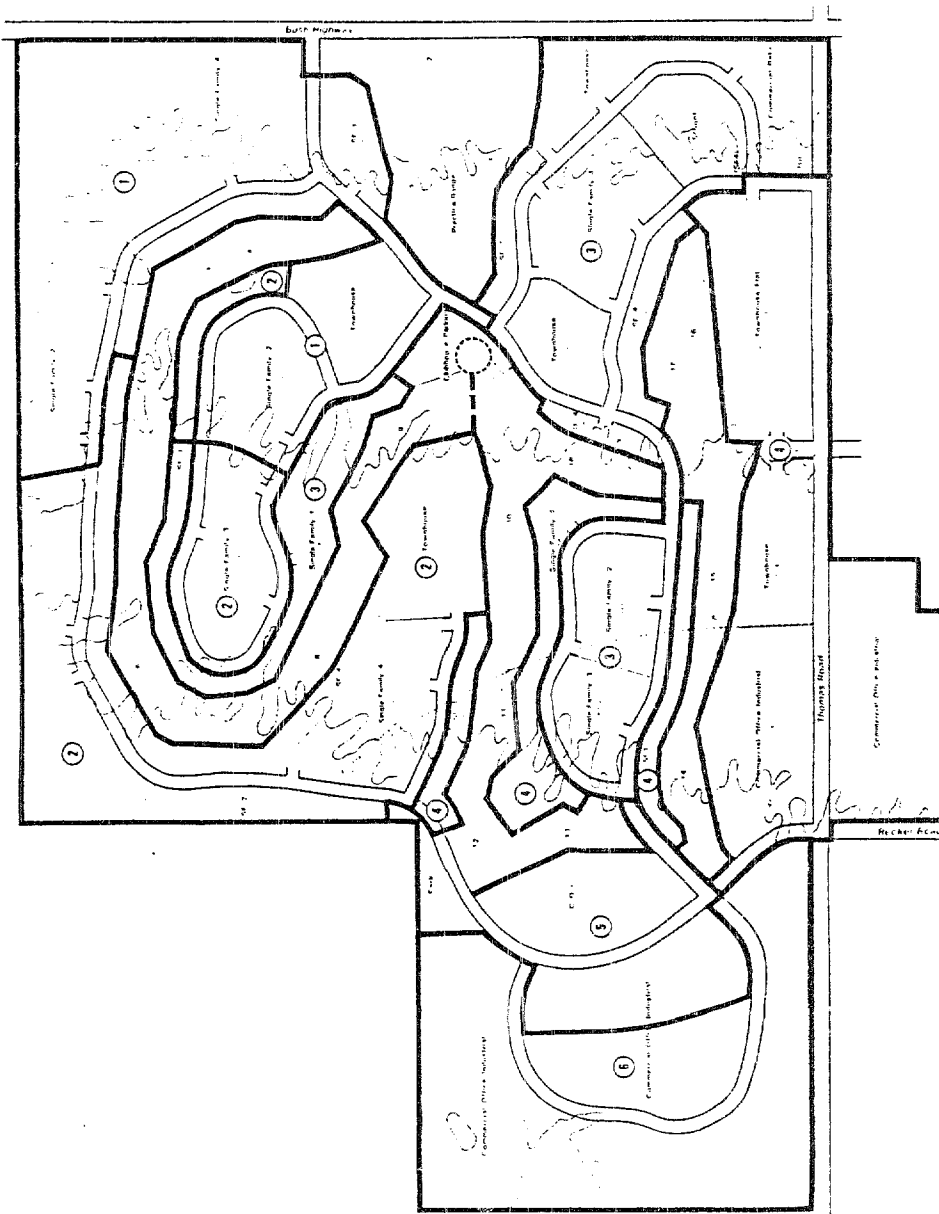
- CUD/5 - 250 AC
- 129 DU
- 1 DU/1.9 AC

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



Red Mt. Ranch 3/14/83



Development Phasing Plan

Exhibit A

EXHIBIT 2

**Ordinance No. 2489
(Zoning Case Z89-36)**

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.

PASSED AND ADOPTED by the City Council of the City of Mesa,
Maricopa County, Arizona, this 22nd day of January, 1990.

APPROVED:

MK "Peggy" Rubach

Mayor

ATTEST:

SMEppa

City Clerk

EFFECTIVE DATE: February 22, 1990

TS:da

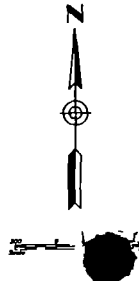
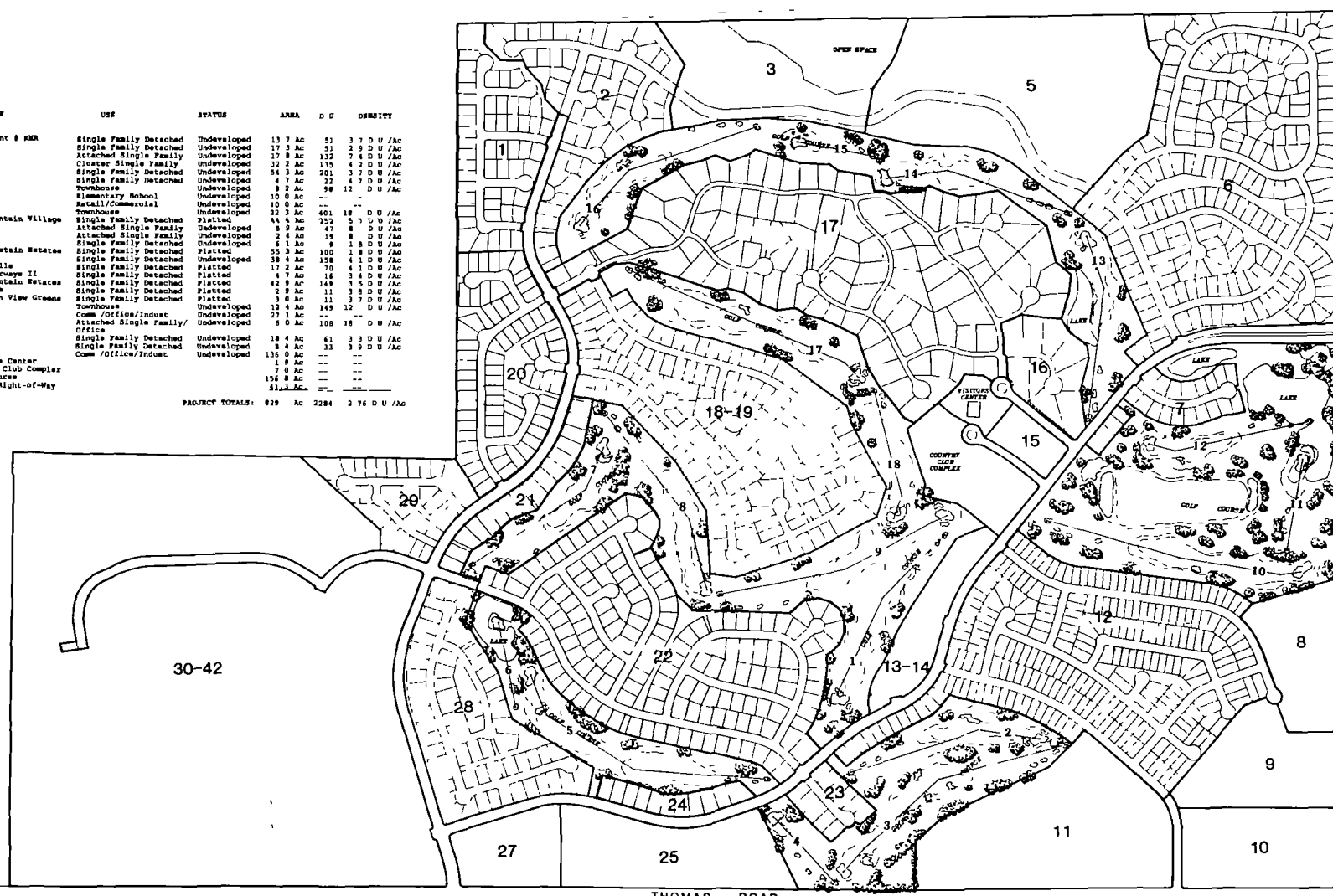
Z89-36.ORD





RED MOUNTAIN RANCH

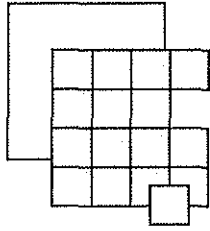
PARCEL NO	NAME	USE	STATUS	AREA	D	D	DENSITY
1	Viewpoint # 12R	Single Family Detached	Undeveloped	13.7 Ac	51	37	0 U / AC
2		Single Family Detached	Undeveloped	17.3 Ac	51	29	0 U / AC
3		Attached Single Family	Undeveloped	17.8 Ac	132	74	0 U / AC
5		Cluster Single Family	Undeveloped	32.2 Ac	170	42	0 U / AC
6		Single Family Detached	Undeveloped	54.3 Ac	201	37	0 U / AC
7		Single Family Detached	Undeveloped	4.7 Ac	22	47	0 U / AC
8		Townhouse	Undeveloped	8.2 Ac	18	17	0 U / AC
9		Elementary School	Undeveloped	10.0 Ac	--	--	--
10		Retail/Commercial	Undeveloped	10.0 Ac	--	--	--
11		Townhouse	Undeveloped	22.3 Ac	401	18	0 U / AC
12		Single Family Detached	Platted	44.4 Ac	252	55	0 U / AC
13-14	Red Mountain Village	Attached Single Family	Undeveloped	5.9 Ac	47	8	0 U / AC
15		Attached Single Family	Undeveloped	2.4 Ac	19	8	0 U / AC
16		Single Family Detached	Undeveloped	4.1 Ac	9	43	0 U / AC
17	Sky Mountain Estates	Single Family Detached	Platted	55.3 Ac	100	18	0 U / AC
18-19		Single Family Detached	Undeveloped	58.4 Ac	158	41	0 U / AC
20	West Hills	Single Family Detached	Platted	17.2 Ac	70	43	0 U / AC
21	The Fairways II	Single Family Detached	Platted	4.7 Ac	16	34	0 U / AC
22	Red Mountain Estates	Single Family Detached	Platted	42.8 Ac	149	35	0 U / AC
23	Pin High	Single Family Detached	Platted	2.8 Ac	11	38	0 U / AC
24	Mountain View Greens	Single Family Detached	Platted	3.0 Ac	11	37	0 U / AC
25		Townhouse	Undeveloped	12.4 Ac	145	17	0 U / AC
26		Comm / Office/Indust	Undeveloped	27.1 Ac	--	--	--
27		Attached Single Family/Office	Undeveloped	6.0 Ac	108	18	0 U / AC
28		Office	Undeveloped	18.4 Ac	61	33	0 U / AC
29		Single Family Detached	Undeveloped	8.4 Ac	33	39	0 U / AC
30-42	Visitors Center	Comm / Office/Indust	Undeveloped	136.0 Ac	--	--	--
	Country Club Complex			1.8 Ac	--	--	--
	Golf Course			7.0 Ac	--	--	--
	Public Right-of-Way			15.8 Ac	--	--	--
				11.3 Ac	--	--	--
PROJECT TOTALS:				829 Ac	2284	276	0 U / AC



COMMUNITY DEVELOPMENT
 APPROVED PLANS
 CITY COUNCIL
 DATE 1-22-1990
 WITH SIF: YES NO

EXHIBIT 3

**(Copy of Letter to Asst. City Attorney Margaret
Robertson, dated November 23, 2009)**



Pew & Lake, P.L.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,

Margaret Robertson, Esq.
November 23, 2009
Page 2 of 13

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

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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, it 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.

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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.

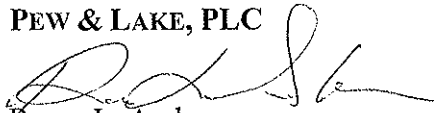
Conclusion

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.

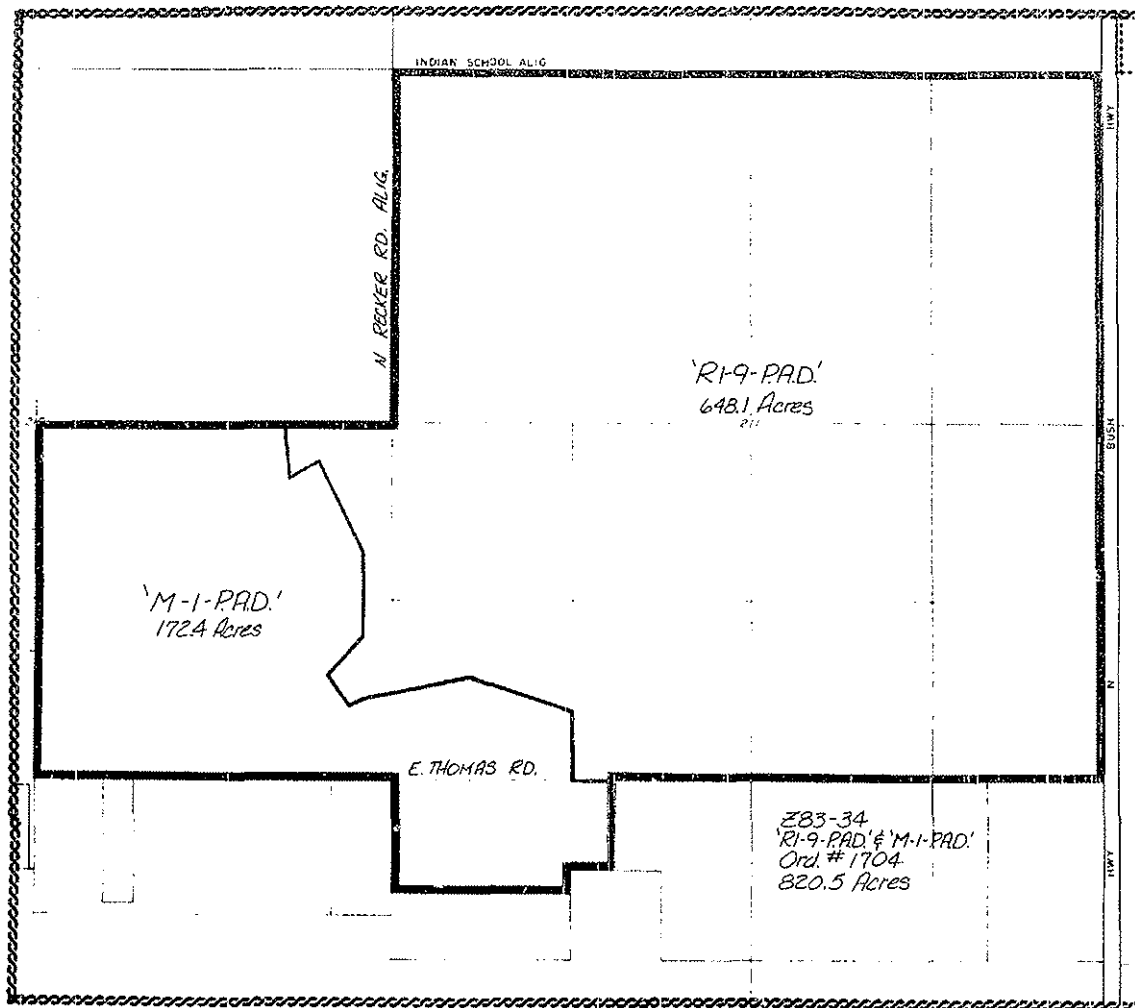
APPROVED:


Don W. Strauch, Mayor

ATTEST:


Dorothe Dana, City Clerk

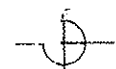
EFFECTIVE DATE: June 1, 1983



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.

Don W. Strauss MAYOR ATTEST: Rozza Kana CITY CLERK DATED 5-5-83



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.

Section I	Description of the Applicant.	Page	2
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Section III	Major Site Features.		3
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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.

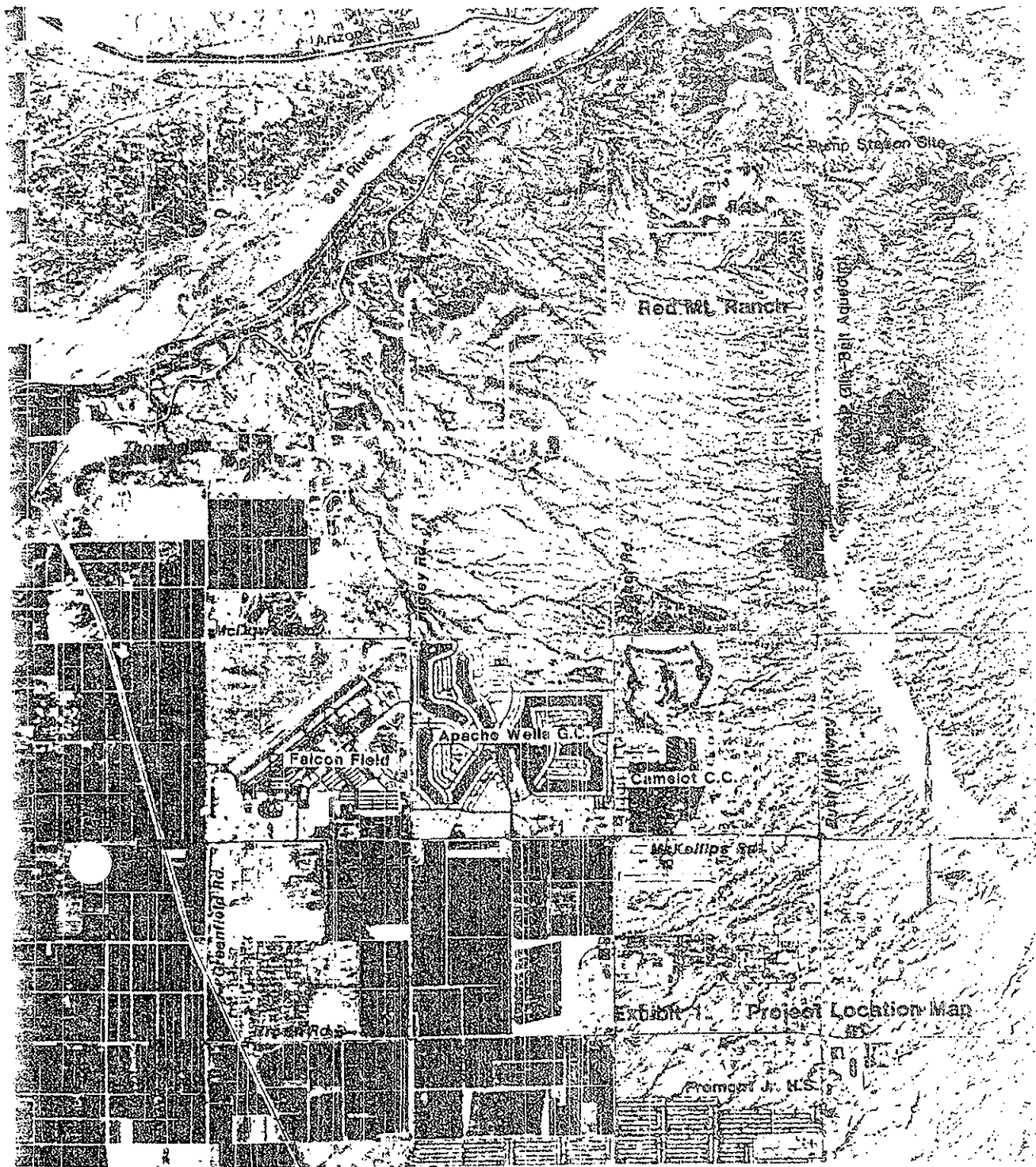
All of Mobil's projects are comprehensive, large-scale developments brought about in cooperation with local authorities, designed in concert with contemporary notions of environmental concern and with a view to satisfying all the needs of the future inhabitants, as well as being a part of the existing 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.

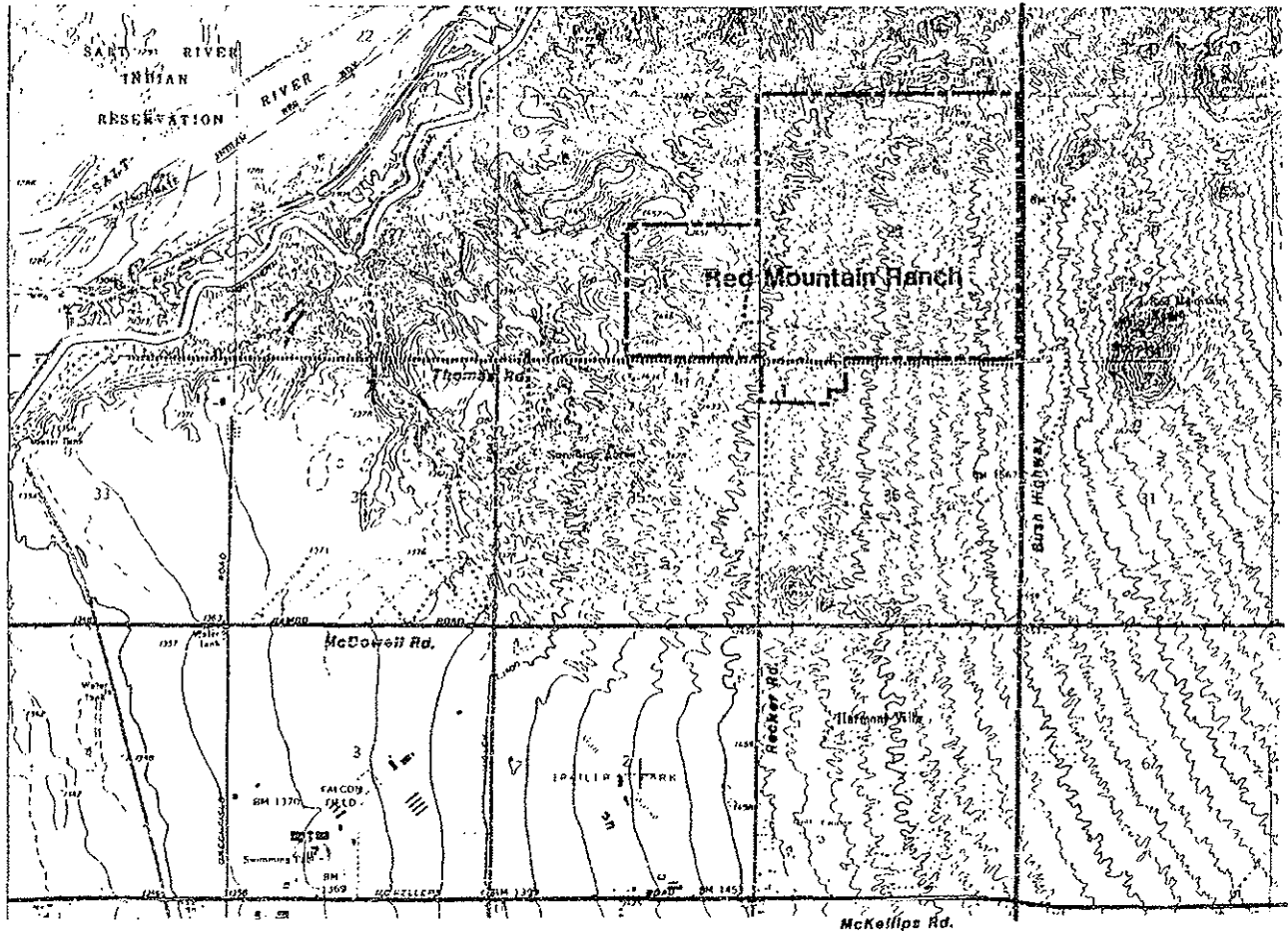


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Red Mt. Ranch 3/22/83

-5-



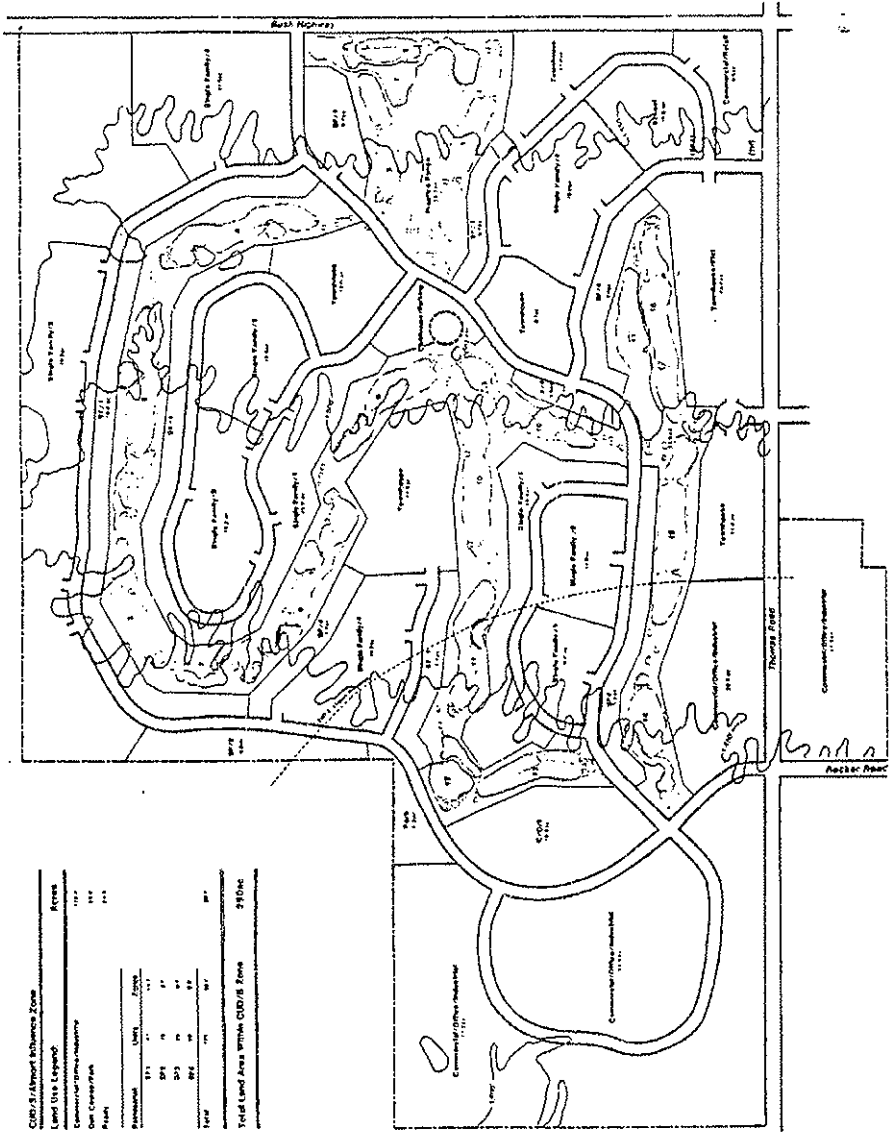
Topographic Features
Exhibit 2

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.





CUU-3 Airport Influence Zone
 Land Use Legend:
 Single Family 1
 Single Family 2
 Single Family 3
 Single Family 4
 Single Family 5
 Single Family 6
 Single Family 7
 Single Family 8
 Single Family 9
 Single Family 10
 Single Family 11
 Single Family 12
 Single Family 13
 Single Family 14
 Single Family 15
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 Single Family 100

Red Mt. Ranch 3/14/83

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	<u>820.47 AC</u>

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.

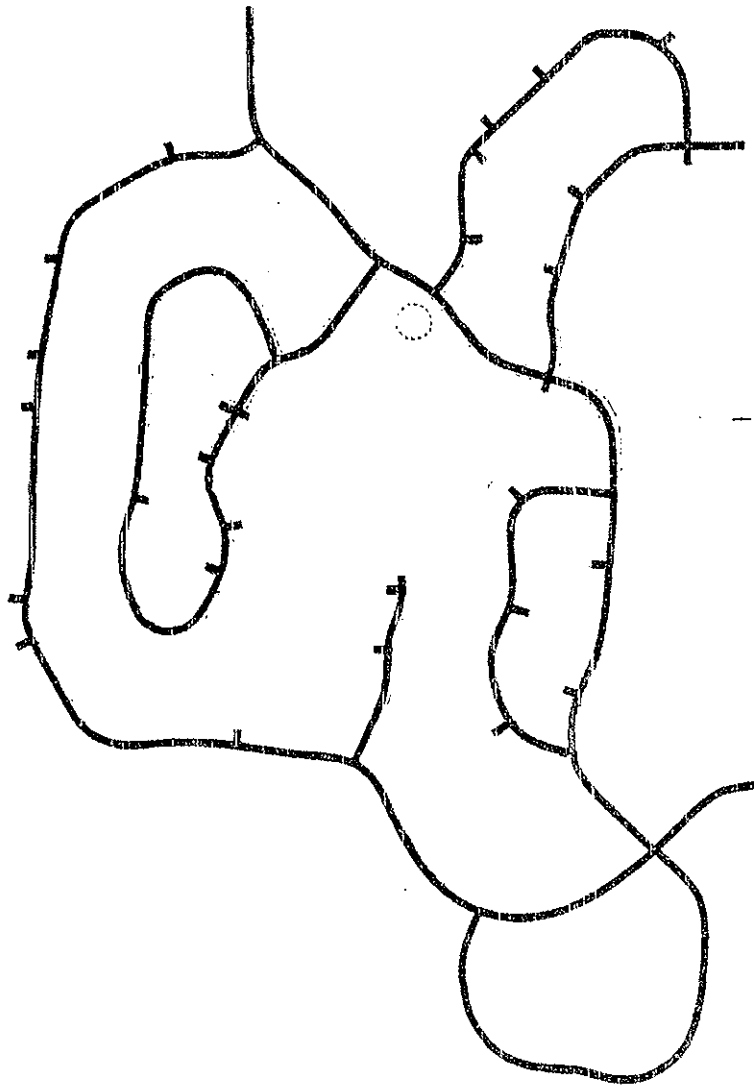
VIII. UTILITIES

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.

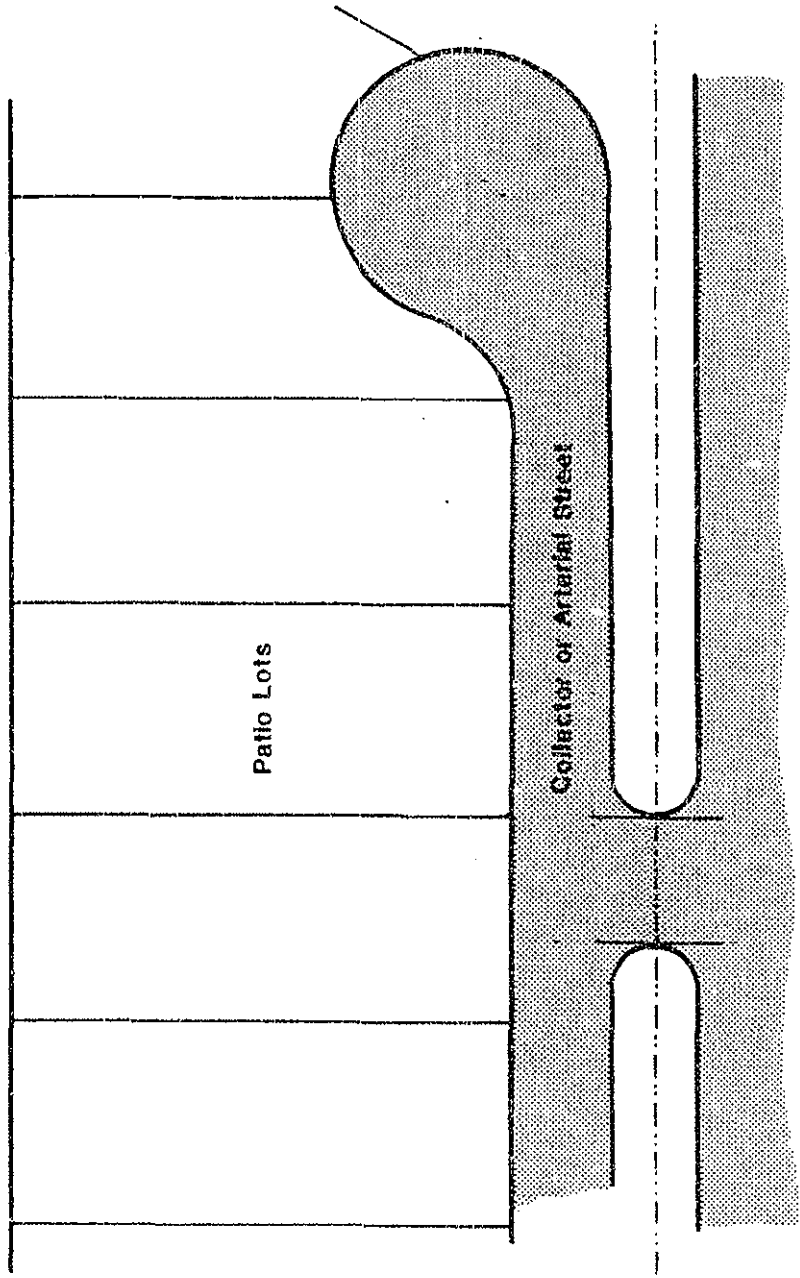


Project Circulation Plan
Exhibit 4

Red Mt. Ranch 3/22/83

Note: Small Patto Lots Shown in This Example

Golf Course



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' Association 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 Commercial/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 aviation easements within the CUD/5 Zone. In addition to the aviation 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.

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 maximum 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.

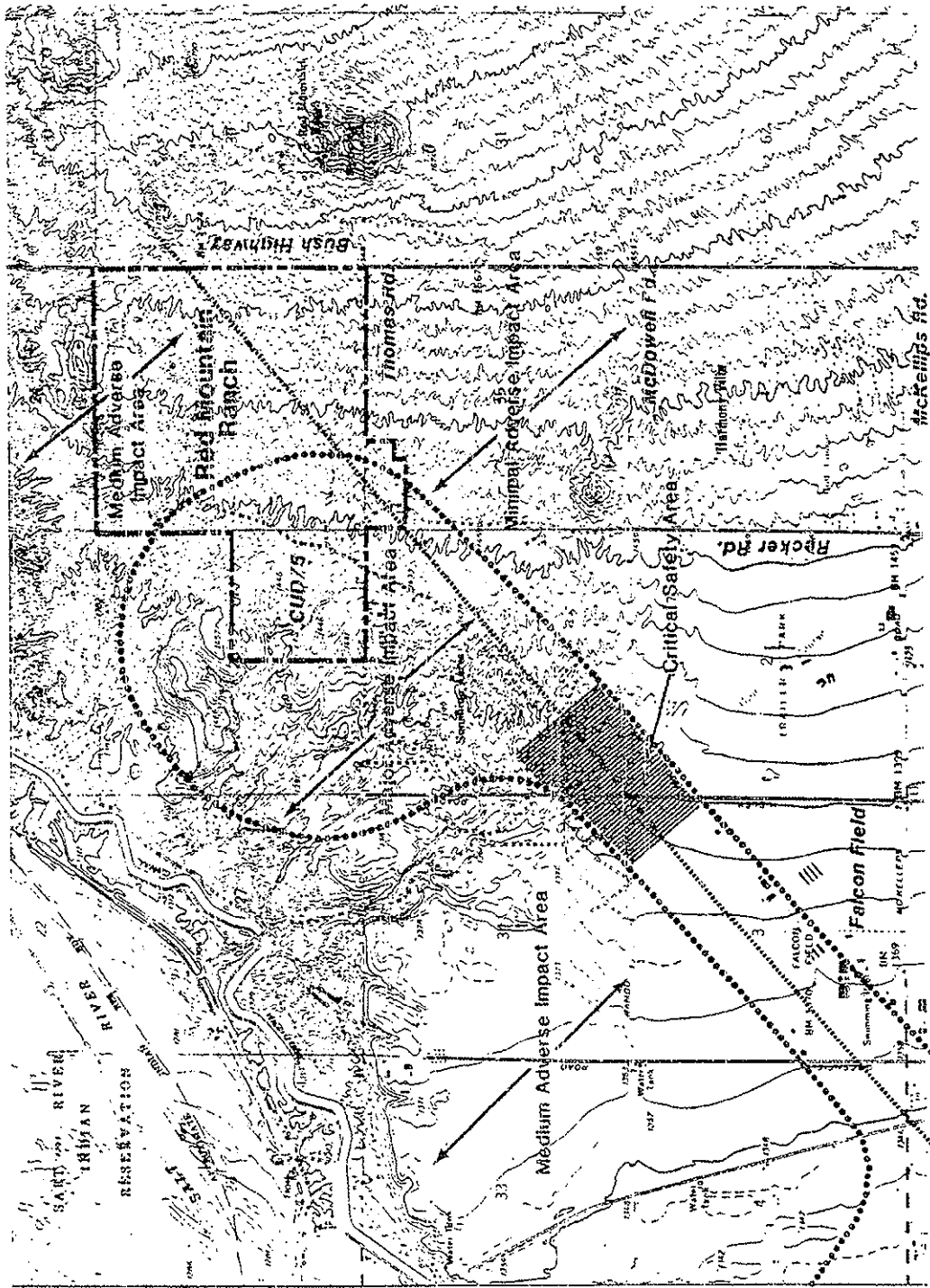
- CUD/5 - 250 AC
- 129 DU
- 1 DU/1.9 AC

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

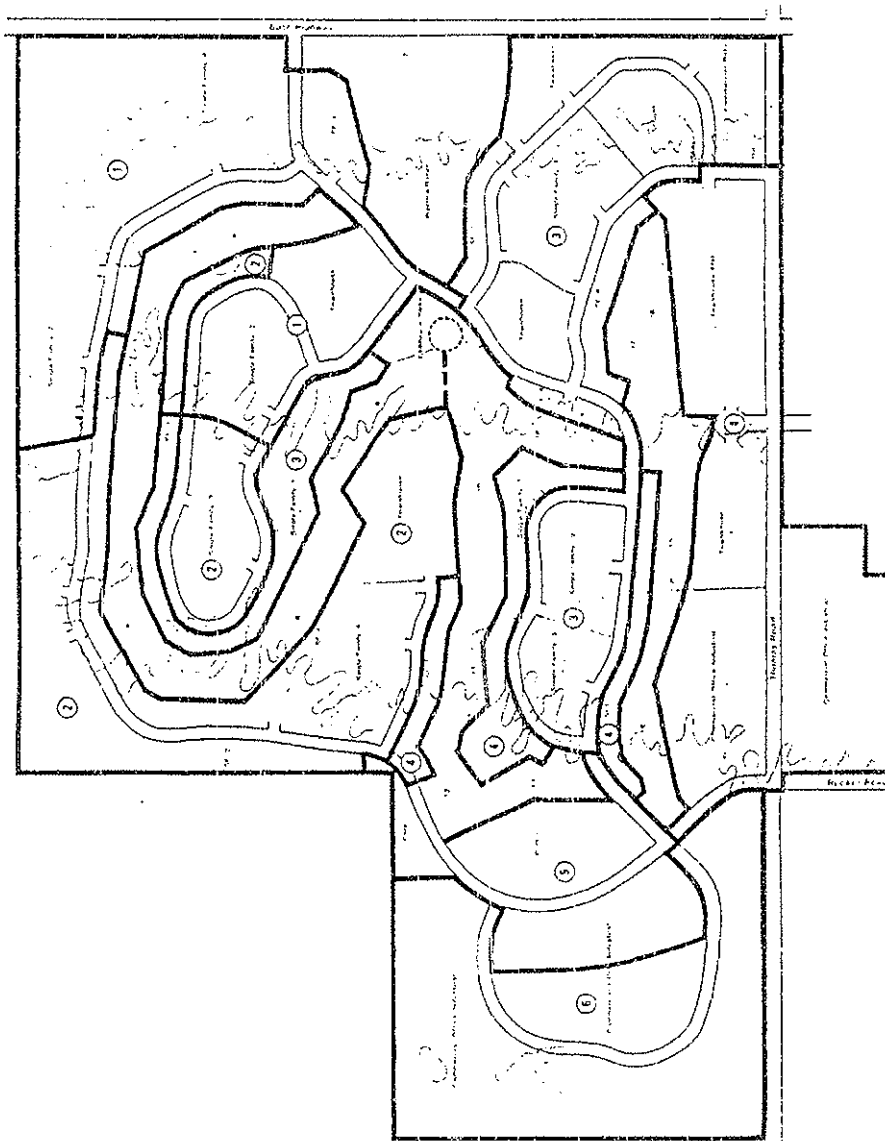
Game Creek Properties concur with the notion of specific avigation easements and agrees to enter into negotiations to grant specific avigation easements within the CUD/5 zone. Such easements and notification of such easements to potential developers and residents are consistent with Mobil's development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



Red Mt. Ranch 3/14/83



Development Phasing Plan
Exhibit 0



EXHIBIT B

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."

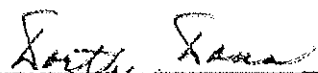
PASSED AND ADOPTED by the City Council of the City of Mesa, Maricopa County, Arizona, this 15th day of April, 1985.

APPROVED:



Mayor

ATTEST:



City Clerk

EFFECTIVE DATE: May 15, 1985

EXHIBIT C

Z85-24 PREVIOUSLY APPROVED DMP

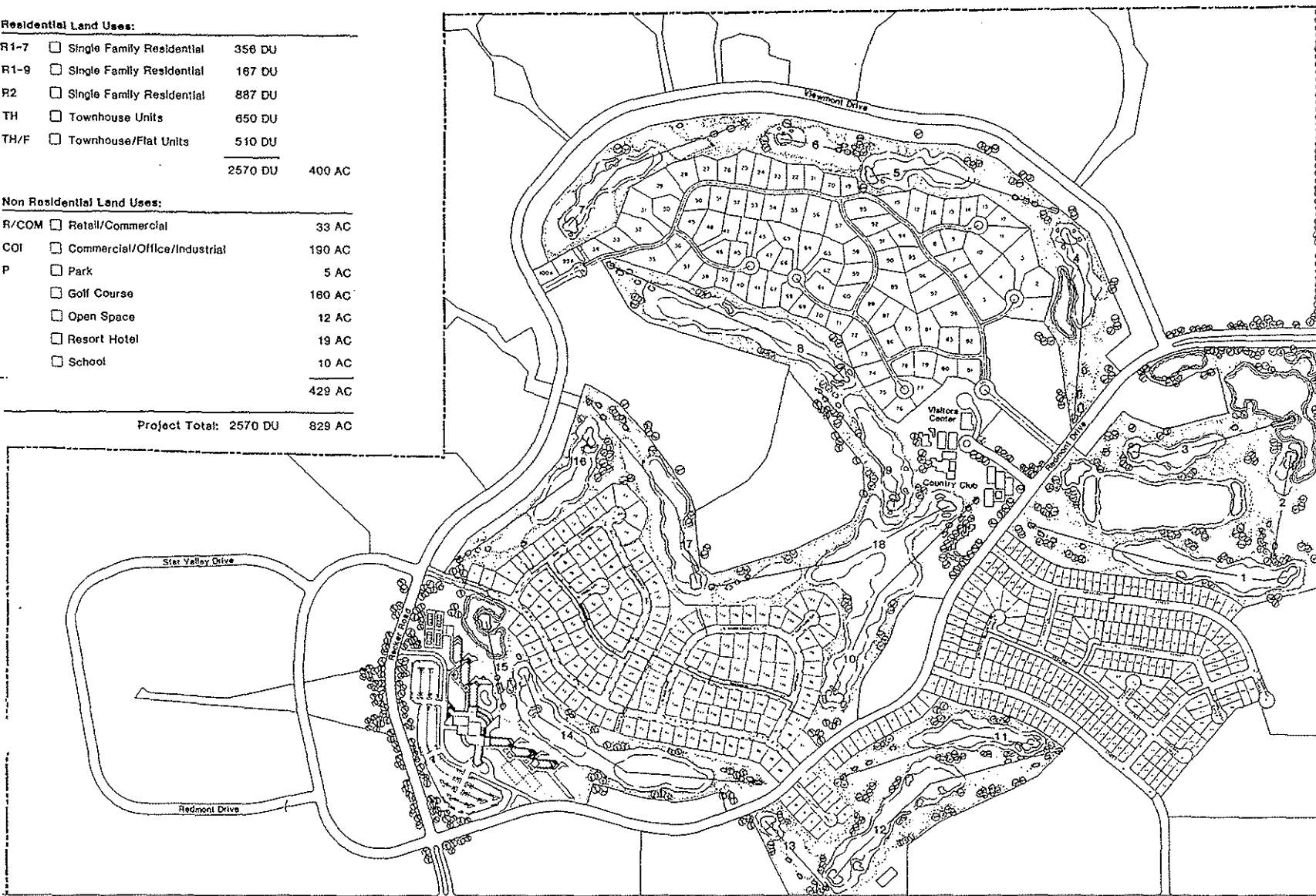
Residential Land Uses:

R1-7	<input type="checkbox"/> Single Family Residential	356 DU
R1-9	<input type="checkbox"/> Single Family Residential	167 DU
R2	<input type="checkbox"/> Single Family Residential	887 DU
TH	<input type="checkbox"/> Townhouse Units	650 DU
TH/F	<input type="checkbox"/> Townhouse/Flat Units	510 DU
		2570 DU
		400 AC

Non Residential Land Uses:

R/COM	<input type="checkbox"/> Retail/Commercial	33 AC
COI	<input type="checkbox"/> Commercial/Office/Industrial	190 AC
P	<input type="checkbox"/> Park	5 AC
	<input type="checkbox"/> Golf Course	180 AC
	<input type="checkbox"/> Open Space	12 AC
	<input type="checkbox"/> Resort Hotel	19 AC
	<input type="checkbox"/> School	10 AC
		429 AC

Project Total: 2570 DU 829 AC

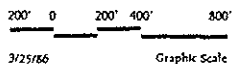


Z85-24

Z83-34



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.



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.

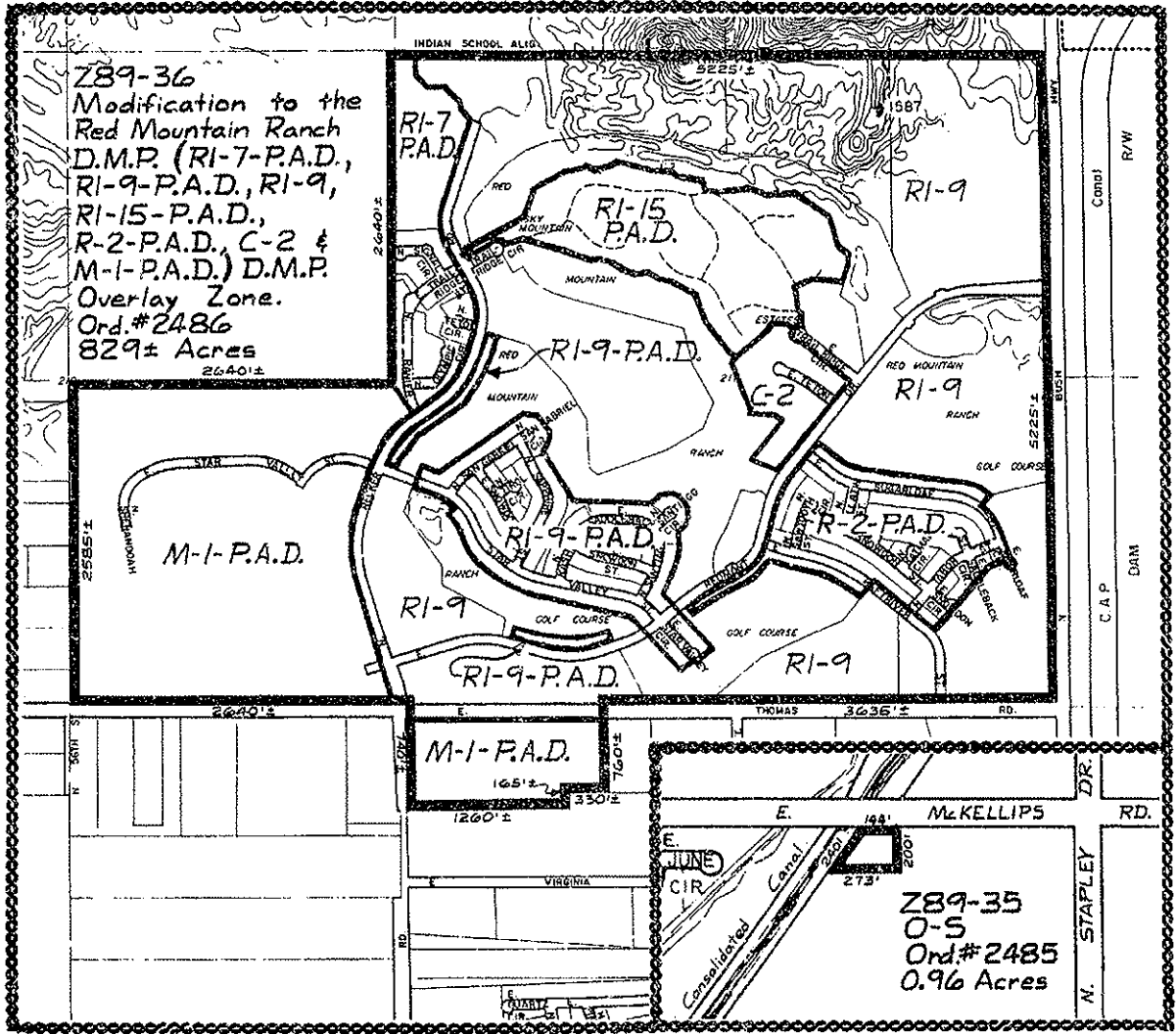
Section 2: The Official Supplementary Zoning Map annexed hereto is adopted subject to compliance with the following conditions:

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 Ruben MAYOR ATTEST: SM Eagle CITY CLERK DATED 14 Feb 90

EXHIBIT E

EXHIBIT G

Legal Opinion

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



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 $\frac{3}{4}$ 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 $\frac{3}{4}$ 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

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

*CERTIFIED SPECIALIST REAL ESTATE LAW

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

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."

Jeff D. Welker
August 31, 2009
Page 2

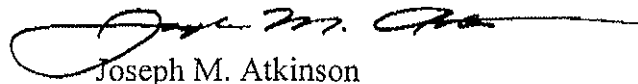
3. Property Tax Related Restrictions for Golf Course Use. While there are several different declarations of restrictive covenant for golf course use, stretching over a 20 year period, they were recorded solely for the purpose of obtaining reduced valuation and rates for real property taxes. This is a 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

Unofficial Document

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

63-1036

2/8

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.

Unofficial Document

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

EXHIBIT 4

**(Copy of Zoning Administrator Interpretation,
dated June 29, 2016)**



Zoning Administrator Interpretation

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

Through: John Wesley AICP, Planning Director

From: Gordon Sheffield AICP CNUa, Zoning Administrator

Date: June 29, 2016

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

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

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

I. Introduction and Summary

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

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

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

II. History of Zoning of the Property

On May 2, 1983, the City Council established the base zoning classifications for the approximately 820 acres¹ commonly referred to as “Red Mountain Ranch,” with base zones of M-1-PAD and R1-9-PAD in accordance with the Red Mountain Ranch Development Master Plan (“RMR DMP”) (Case Z83-034). As a condition of approval, the City Council placed five (5) stipulations on the zoning, including approval of the overall Development Master Plan and City approval of all individual site plan and subdivision plats for all development tracts. The case was approved with the adoption of Ordinance No. 1704, which approved a DMP as described in the “Specific Plan – Red Mountain Ranch, dated March 21, 1983” (the “Specific Plan”). At the same City Council meeting, Council adopted the Specific Plan (Resolution No. 5198). The Specific Plan describes and depicts a mixture of housing types and densities (for residential uses) oriented around a golf course that included a practice range. Inclusion of the golf course with practice range in the Specific Plan illustrates that this amenity was contemplated as an integral feature of Red Mountain Ranch since the property was annexed into the City, and the City Council considered the compatibility of the various uses, and the boundaries of each use, in relation to the golf course amenity when it approved the zoning case.

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

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

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

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

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

III. Stipulations Imposed in Connection with a Zoning Change

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

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

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

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

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

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

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

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

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

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

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

The City Council amended the Zoning Map (and ultimately the Ordinance) when it adopted Ordinance No. 2486. That is why the ordinance indicated "[t]hat Section 11-2-2⁸ of the Mesa City Code is hereby amended by adopting the Official Supplementary Zoning Map dated January 22, 1990, for Zoning Case Z89-36, signed by the Mayor and City Clerk, which accompanies and is annexed to this ordinance and declared a part hereof." As discussed above, the City Council approved the rezoning case subject to certain stipulations, which are also incorporated into the adopted Zoning Map.⁹ Under Ordinance § 11-67-10 (B), any modification to an approved site plan that does not comply with a condition of approval must be treated as a new application, unless the Zoning Administrator determines the change to be "minor." No such determination has been made, or is appropriate, in this case.

V. Determining if a Change to a Plan is a Major or Minor Modification

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

⁶ McQuillin Mun. Corp. § 25:75 (3d ed. 2009).

⁷ Mesa Zoning Ordinance § 11-3-2.

⁸ Mesa Zoning Ordinance § 11-2-2 is now § 11-3-2 in Mesa's Updated Zoning Ordinance.

⁹ Mesa Zoning Ordinance § 11-3-2 (B).

¹⁰ Mesa Zoning Ordinance § 11-67-10 (B).

Minor Modifications

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

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

Major Modification

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

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

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

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

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

¹¹ Mesa Zoning Ordinance § 11-67-10.

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

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

VII. Mesa’s Process Compared to Other Cities

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

VIII. Conclusion

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

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

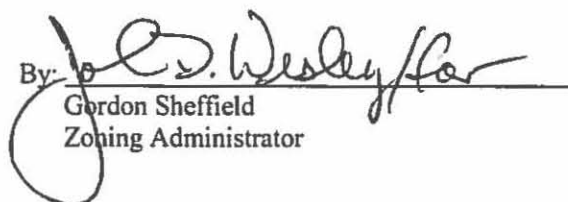
¹³ *See, e.g.*, City of Tempe, Zoning and Development Code, Chapter 6, see also, City of Phoenix Zoning Information Guide *Planning Hearing Officer Public Hearing Process*. Revised May 29, 2015; City of Tucson, Unified Development Code Section 3.5.4.

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

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

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

Pursuant to the Zoning Ordinance, Ordinance No. 2486 can only be amended by Divot's submittal of a new application in accordance with the procedures outlined in § 11-76.¹⁷ Under Mesa's City Charter, the only way to amend or repeal an ordinance is by the City Council adopting another ordinance.¹⁸ Thus, the new application must state Divot's desire to amend Ordinance No. 2486, and this legislative act will require public hearings by both Planning and Zoning and the City Council.

By: 
Gordon Sheffield
Zoning Administrator

¹⁷ Mesa Zoning Ordinance § 11-76-1.

¹⁸ Mesa City Charter, Article 2, § 210(D).

EXHIBIT 5

**(Copy of Opinion Letter from Neal Beets,
City Attorney, dated March 26, 1999)**

Legal Opinion

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



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 $\frac{3}{4}$ 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 $\frac{3}{4}$ 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