

BOARD OF ADJUSTMENT APPEAL APPLICATION

PROPERTY INFORMATION

PROJECT NAME: Mountain Enclave Lots 1-76

PROJECT ADDRESS: 1117 E. Halcyon Road, Tucson, AZ 85719
Pima County Assessor Parcel Nos. 113040380, 11304039B, 113042700, and 11304269E.

ZONING OF PROPERTY e.g. R-1, C-2, O-3, I-1 Authorized, etc: R-2

PROJECT TYPE (check all that apply):

- New building on vacant land
- New addition to existing building
- Existing building needs permits
- New building on developed land
- Change of Use to existing building
- Other: FLD subdivision

RELATED APPLICATIONS (check all that apply and provide case numbers):

- Board of Adjustment C10- 19-08
- DDO _____
- SE _____
- HPZ _____
- Rezoning C9- _____
- Other: DP18-0201

LIST ALL RELATED DP AND PERMIT ACTIVITY NUMBER/S: DP18-0201

AGENT/APPELLANT

NAME: Carl Sammartino (agent)

ADDRESS/ZIP: 5240 E. Pima St. #113, Tucson, AZ 85712

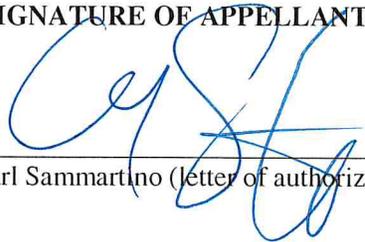
BUSINESS EMAIL: carl.sammartino@sammartinogroup.com

BUS. PHONE: (520) 955-5152 **FAX:** (520) 577-7044

PROPERTY OWNER INFORMATION, IF DIFFERENT FROM ABOVE:

See following page.

[SIGNATURE OF APPELLANT OR ATTACH LETTER OF AUTHORIZATION FOR AGENT]:



Carl Sammartino (letter of authorization attached)

B/A CASE NUMBER: C10- 19-08 **ACTIVITY NUMBER:** T19SA000062

PROPERTY OWNER INFORMATION

113040380: RUSSELL IMOGENE TR
ATTN: MIMI MOFFATT T
2365 E EDISON ST
TUCSON AZ 85719-3807

11304039B: RUSSELL JAMES A 3/8 & MOFFATT FAMILY REVOC TR 5/8
ATTN: JOHN H & MIMI R MOFFATT TR
2365 E EDISON ST
TUCSON AZ

113042700: RENTAL 1113 & 1117 E HALCYON LLC
7830 N SANDY DESERT TRL UNIT B
TUCSON AZ 85741-4927

11304269E: FLOYD LINDA FRANCES
7830 N SANDY DESERT TRL #B
TUCSON AZ 85741-4926

APPELLANT'S APPEAL ARGUMENTS

See attached document, "Appellant's Appeal Attachment"

B/A CASE NUMBER: C10- ___ - _____ ACTIVITY NUMBER: _____

LETTER OF AUTHORIZATION



SAMMARTINO | LAW | GROUP

February 7, 2019

Sent Via: Hand-Delivery

Board of Adjustment, City of Tucson
Planning and Development Services Department
P.O. Box 27210
Tucson, AZ 85726-7210

RE: Letter of Authorization

To Whom It May Concern,

By this letter and signature below, the Mountain View Neighborhood Association ("MVNA") authorizes its lawyer, Carl Sarmartino, to represent MVNA before the City of Tucson Board of Adjustment in the appeal of Zoning Administrator Determination #T19SA00010 and all related matters.

Sincerely,

Lisa Polito

Mountain View Neighborhood Association

Sammartino Law Group, P.L.L.C.

5240 E. Pima Street, #113

Tucson, AZ 85712

P. 520 955 5152

F. 520 577 7044

ZONING ADMINISTRATOR'S (ZA) DETERMINATION



CITY OF
TUCSON

PLANNING AND
DEVELOPMENT
SERVICES
DEPARTMENT

ZONING
ADMINISTRATION
DIVISION

January 10, 2019

Carl Sammartino
Sammartino Law Group, P.L.L.C.
5240 East Pima Street
Tucson, Arizona 85712

SUBJECT: FLD for Mountain Enclave (DP18-0201)
3401 N Fremont Avenue, Tucson, Arizona
Pima County Tax Parcel Numbers: 113-04-0380, 113-040-039B,
and 113-04-269E and 113-04-2700
Zoning Administrator Determination
Activity # T19SA00010

Dear Mr. Sammartino:

Thank you for your letter in which you requested a Zoning Administrator Determination on the appropriate density for Mountain Enclave subdivision, a proposed Flexible Lot Development (FLD) DP 18-0201. You assert that per UDC 8.7.3.C.1, the FLD for the Mountain Enclave subdivision shall adhere to the Northside Area Plan (NAP); and in accordance with the NAP Residential Subgoal policy 2(b) and policy 2(c) (page 10), the Mountain Enclave subdivision is limited to low-density residential, not to exceed an average of 6 RAC (residences per acre).

The purpose of the Flexible Lot Development (FLD) is to provide greater flexibility and creativity in the design of residential development (UDC Section 8.7.3.A). The General Development Criteria for the FLD (Section 8.7.3.C) states that an FLD shall be in conformance with the General Plan and any of its components, including any applicable adopted area and neighborhood plans.

The general development criteria also include standard and maximum density options which are listed in the Dimensional Standards Table for FLDs (Table 8.7.3-1). These dimensional standards reflect the purpose of the FLD by providing greater design flexibility. Per Table 8.7.3-1, density in the R-2 zone for the standard option is 8.71 and for the maximum density option it is 22.0. The flexibility of FLD dimensional standards is to the underlying dimensional standards contained in the UDC and not to the policies of the NAP. NAP only guides in a general manner, not specific, in this instance.

Planning and Development Services Department (PDSD) - 201 North Stone Avenue
P.O. Box 27210 - Tucson, AZ 85726-7210
Telephone: (520) 791-5550 - Fax: (520) 791-4340
Website: www.tucsonaz.gov/pdsd
Email: DSD_Zoning_Administration@tucsonaz.gov

The Principal City Attorney for the City of Tucson previously addressed the topic of applicability of Neighborhood and Area Plans and the UDC.

A “general plan” (GP) is a statutorily required (ARS 9-461.05) comprehensive, long-range “general” plan that is a statement of the goals and development policies of the City. Arizona statute [ARS 9-461(2)] defines the GP as “a municipal statement of land development policies, that may include maps, charts, graphs and text that set forth objectives, principles and standards for local growth and redevelopment enacted under the provisions of this article or any prior statute.” A GP is an “aspirational guide or statement of policies and preferences.” *Fritz v. City of Kingman*, 957 P.2d 337 (Ariz. 1998). Plan Tucson (our general plan, approved in 2013) describes itself as “a long-term policy document intended to guide decisions affecting elements that shape the city, such as housing, jobs, land use, transportation, water, and energy resources. Key to the Plan are goals and policies that provide a framework to guide future actions with the understanding that how the city has grown in the past will not necessarily work in the future.”

Both “area plans” and “neighborhood plans” are types of what state law calls “specific plans,” ARS 9-461(6). “Specific plans” are defined in AZ statute as “a detailed element of the general plan.” They are defined in the City’s UDC 11.4.20 as “A detailed policy plan or regulation that implements the General Plan or any of the elements of that Plan,” and include subregional, area and neighborhood plans. Specific plans are permitted by state law, but unlike the GP, are not required (ARS 9-461.08), and there is no time frame established for when they must be revised or renewed. Specific Plans are to be based on the GP, and serve to help implement the policies, goals and objectives of the GP; or as stated in the statute, “for the systematic execution of the General Plan.” Per Plan Tucson (*see* Chapter 4, Plan Implementation and Administration, p. 4.4), specific plans serve to “provide more detailed planning to allow systematic implementation of the General Plan through the use of detailed policy direction, in some cases at the parcel level, for smaller geographic areas of the city.

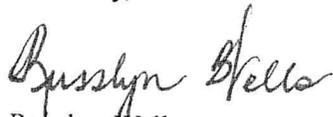
As noted above, plans are recognized both by state statutes (ARS 9-461.05 for the General Plan; ARS 9-461.08 for specific plans) and by the UDC (11.4.8, 11.4.20, 3.4.5.A.5; 3.5.3.B.2 and 3.5.3.D.3]. They have “standing” as plans – that is, they are planning documents, not laws. The City’s land use code, the UDC, is the codification of the City’s land use laws and regulations (with its

provisions, and any amendments thereto, adopted by Ordinance, and per the statutorily required process for land use laws as set forth in ARS 9-462 *et seq.*]. Plans (including both the GP and specific plans) are statements of policy, goals and objectives; and while zoning laws (including rezoning ordinances) must be consistent with and conform to the adopted plans, plans are “not to be confused with the exercise by a municipality of its zoning powers,” which is done through the City’s zoning ordinances, including the UDC. *See Northeast Phoenix Homeowners’ Ass’n v. Scottsdale Municipal Airport*, 130 Ariz. 487 (App. 1981).

In conclusion, the Northside Area Plan contains policies rather than laws and these policies provide guidance primarily for rezoning applications and do not supercede the regulations contained in UDC 8.7.3.C.1 allowing flexibility in the development of lots.

Should you require further information regarding this property, please contact me via e-mail at Russlyn.Wells@tucsonaz.gov or by telephone at 520-837-4948.

Sincerely,



Russlyn Wells
Acting Zoning Administrator

RW:S:\zoning administration\zoning\2019\3401 N Fremont Av Mountain Enclave FLD- ZAD T19SA00010.docx

Planning and Development Services Department (PDSD) - 201 North Stone Avenue
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Telephone: (520) 791-5550 - Fax: (520) 791-4340
Website: www.tucsonaz.gov/pdsd
Email: DSD_Zoning_Administration@tucsonaz.gov

ATTACHMENTS TO DETERMINATION REQUEST



SAMMARTINO | LAW | GROUP

October 19, 2018

Sent Via: Certified Mail

Zoning Administrator, City of Tucson
Planning and Development Services Department
P.O. Box 27210
Tucson, AZ 85726-7210

RE: Request for Zoning Determination

Dear City of Tucson Zoning Administrator,

I am a lawyer representing the Mountain View Neighborhood Association ("MVNA"). The MVNA requests your interpretation of various city ordinances and other regulations to determine how the Northside Area Plan ("NAP") limits the density of residences within a proposed subdivision developed under the City of Tucson Unified Development Code ("UDC") flexible lot development ("FLD") alternative. Check number 441 in the amount of \$236.50 is enclosed with this request. Please mail your determination to me at the following address:

Sammartino Law Group, P.L.L.C.
5240 E. Pima St., #113
Tucson, AZ 85712

**REQUIRED ITEMS FOR REQUEST FOR ZONING DETERMINATION PURSUANT TO UDC §
1.5.1(B)(1)**

1. The name and address of the person requesting a certification or determination:

MVNA, a person according to UDC § 1.5.1(B)(2) that does not have a specific address, but the boundaries of which are:

North: Prince Road

East: Mountain Avenue

Sammartino Law Group, P.L.L.C.
5240 E. Pima Street, #113
Tucson, AZ 85712
P. 520 955 5152
F. 520 577 7044



West: First Avenue

South: Fort Lowell Road

2. The ordinance, code or part therefore, or substantive policy statement that requires determination or clarification:

- A. NAP, City of Tucson resolution number 14256;
- B. UDC FLD alternative, UDC § 8.7.3; and
- C. Various other provisions of the UDC as cited herein.

3. The requesting party's proposed determination or clarification:

The UDC mandates adherence to the NAP pursuant to UDC 8.7.3(C)(1). The NAP requires low-density development "within the interior of established low-density neighborhoods and along local streets."

EXHIBIT A, NAP, p. 10, Policy 2(a). The Mountain Enclave Subdivision is located within the interior of an established low-density neighborhood and not along "designated collector streets" or "designated arterial streets." EXHIBIT A, NAP, p. 10, Policy 2(b) and Policy 2(c). Low-density development under the NAP is an average of 6 residential units per acre ("RAC"). EXHIBIT A, NAP, p. 5. The Mountain Enclave Subdivision may not exceed an average of 6 RAC using the FLD alternative.

4. Whether the issue(s) are currently being considered by the City in connection with a pending application or request for approval:

Yes.

5. The identity of the proposed project or development:

DP18-0201, Mountain Enclave Subdivision ("MES"), 3401 N. Fremont Ave.; Pima County Assessor Parcel Numbers ("APN") 113-04-0380, 113-04-039B, 113-04-2700, and 113-04-269E.



DISCUSSION OF THE REQUESTING PARTY'S PROPOSED DETERMINATION OR CLARIFICATION

The existing zoning for the MES site is City of Tucson R-2. **EXHIBIT B**, MES Tentative Plat Package ("TPP"), p. 1, General Notes 2. The City of Tucson R-2 zone permits one single family residence per 5,000 square feet, or an allowable density of 8.71 RAC.¹ UDC Table 6.3-2.A.

The MES proposes to place 76 detached, single family residential units on 6.14 acres² of land in the literal geographic center of the Mountain View neighborhood, such center being the southwest corner of APN 113-04-0380. **EXHIBIT G**. That is a planned density of 12.37 RAC.

The MES is attempting to use the FLD alternative maximum density option. UDC § 8.7.3(C)(3)(b)(4); **EXHIBIT B**, TPP, p. 1 General Notes 3. The maximum density option allows the use of Development Alternative B in UDC § 8.7.3(D), or an allowable density of 22 RAC. UDC Table 8.7.3-1.

However, the MES is within the NAP (**EXHIBIT A**, NAP, p. iii, Location Map), and the NAP limits the maximum allowable density for the MES site to 6 RAC:

Low-density residential developments are generally appropriate **within the interior of established low density neighborhoods and along local streets.**

Low Density: average density up through **six units per acre**, primarily single-family, detached residences, but may include attached housing units.

¹ Note that Mr. Scott Clark, Interim Director of the City of Tucson Planning and Development Services Department, stated "The base R-2 zone allows 15 units per acre," which is incorrect. **EXHIBIT C**. The City of Tucson R-2 zone allows 15 *multifamily* units per acre. UDC Table 6.3-2.A. The MES is "Single Family Residential, Detached," not a multifamily project. **EXHIBIT D**.

² Some confusion exists regarding the size of the MES site. The MES Development Package Application ("DPA") states the size of "Area/Disturbance" is 7.87 acres, then states an "Acreage" of 4.21. **EXHIBIT D**. Mr. Scott Clark, Interim Director of the City of Tucson Planning and Development Services Department, stated the MES sits on a "6.29 acre site." **EXHIBIT C**. The TPP for the MES states the "gross site area" is "6.29 acres." **EXHIBIT B**, TPP, p. 1, General Notes 4. Using the dimensions on the Pima County Assessor maps for the four parcels in the MES submitted with the MES DPA yields a calculated site size of 267,300 square feet, or 6.136 acres. **EXHIBIT E**. Using the stated parcel sizes from the GIS parcel info submitted with the MES DPA yields a calculated site size of 267,458.4 square feet, or exactly 6.14 acres. **EXHIBIT F**. The concordance between these latter two calculations suggests they accurately convey the size of the MES site. The correct site size calculation is vitally important to resolve a dispute for which the size of the site determines the permissible number of residences.



EXHIBIT A, NAP p. 10, Policy 2(a); EXHIBIT A, NAP, p. 5 (emphasis added). The MES is geographically in the “interior of [an] established low density neighborhood[...] and along local streets.” *Id.*, see also EXHIBIT H, City of Tucson Major Streets and Routes Map.

The NAP demonstrates densities greater than 6 RAC are inappropriate for the MES site by specifying where greater density *would* be appropriate:

Low- or medium-density residential uses are generally appropriate **along designated collector streets.**

Medium- and high-density residential developments are generally suitable **along designated arterial streets.**

[...]

Medium Density: density from **seven to 14 units per acre** [...];

High Density: density of **over 14 units per acre** [...].

EXHIBIT A, NAP, p. 10, Policy 2(b) and Policy 2(c); EXHIBIT A, NAP, p. 5 (emphasis added). Fort Lowell Road, Prince Road, and First Avenue are arterial streets; Mountain Avenue is a collector street. EXHIBIT H. Under the NAP, Densities greater than 6 RAC would be appropriate only along those four streets, which the MES is not – a minimum of five parcels separate the MES from Mountain Avenue. EXHIBIT G.

The UDC states that adherence to the NAP is mandatory for projects using any FLD alternative:

An FLD **shall** be in conformance with the General Plan and any of its components, including any applicable adopted area and neighborhood plans.

UDC § 8.7.3(C)(1) (emphasis added). “Shall be in conformance” indicates a mandate. *Walter v. Wilkinson*, 198 Ariz. 431, 10 P. 3d 1218, 1219 (App. 2000) (“[...]’S]hall’ generally indicates a mandatory provision.”) *citing In re Guardianship of Cruz*, 154 Ariz. 184, 185, 741 P.2d 317, 318 (App. 1987). The UDC relegates area plans to a mere advisory role in other articles³, which clearly indicates UDC § 8.7.3(C)(1) is a mandate, not a suggestion.

³ See UDC §§ 5.12.5(B)(2) (“In making this decision, the PDS Director **shall consider** the purpose statements of the IID, and the applicable General Plan and Area Plan policies”) (emphasis added); 7.6.1(B)(2) (“Where development is subject to neighborhood or



The NAP similarly states the density requirements of Policy 2 on NAP page 10 are mandatory for areas within the City of Tucson, in contrast to areas in Pima County the NAP also covers:

The Northside Area Plan provides policy direction for an area of approximately 3.5 square miles in the north-central portion of the Tucson metropolitan area (see Location map). [...] Northside plan polices serve in an advisory capacity for areas under Pima County and state jurisdictions.

EXHIBIT A, NAP, pp. 1-2.⁴

The NAP intended for the City of Tucson to take its policies into account when assessing developments like the MES under the FLD alternative. Under “Plan Implementation,” the NAP states:

Plan policies are also used in evaluations of Residential Cluster Projects (RCP), which are intended to encourage greater flexibility in residential developments by incorporating such considerations as consolidated open space, historic and archaeological preservation, recreational amenities, sensitive architectural style, and lower and moderately priced housing.

EXHIBIT A, NAP, p. 4. Residential cluster projects are the City of Tucson Land Use Code predecessors to flexible lot developments under the UDC. EXHIBIT C.

It is clear the NAP maximum allowable density for the MES and the maximum allowable density for the MES under the FLD conflict. Since UDC § 8.7.3(C)(1) mandates flexible lot developments shall be in

area plan standards, incorporate the adopted landscape policies of neighborhood or area plans **to the extent they are consistent with the provisions of this section.**” (emphasis added). Cf. U.D.C. §§ 4.7.19 (“Rural village centers **shall be developed** according to an approved site plan and located in accordance with adopted neighborhood, community, or area plans.”) (emphasis added); 10-01.6.1(F) (“The proposed development **will provide streets that conform** to all adopted neighborhood or area plans.”) (emphasis added).

⁴ The near-constant repetition in the NAP that its policies are *advisory* in Pima County strongly suggests the NAP policies are intended to be *mandatory* in the City of Tucson. See EXHIBIT A, NAP, p. 9 (“Northside Area Plan goals and policies are advisory in the County.”); p. 10 (“All policies are advisory in the County.”); p. 12 (“All policies are advisory in the county.”); p. 14 (“All policies are advisory in the county and for University of Arizona properties.”); p. 25 (“All policies are advisory in the County.”); p. 29 (“All policies are advisory in the county.”); p. 34 (“Plan policies are advisory in the County.”); p. 41 (“Policies are advisory in the county.”); p. 48 (“The subarea polices serve only in an advisory capacity in the county portion of the subarea.”); p. 49 (“Policies are advisory in the County.”); and p. 53 (“Policies are advisory in the County.”).

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SAMMARTINO|LAW|GROUP

conformance with applicable area plans, the maximum allowable density under the NAP controls. That density, for the MES, which is located only on neighborhood streets, not a collector or arterial street, is 6 RAC.

However, the MES could proceed under the default zoning for the MES site, City of Tucson R-2 zoning, rather than the FLD alternative. That zone allows for more density than the NAP – 8.71 RAC, or 53⁵ single family, detached residences. No provision of the UDC elevates the NAP over the permissible density allowed under a site’s standard zoning classification pursuant to UDC § 6.3.2. That is why the NAP confines its use to zoning decisions in derogation of a site’s standard zoning. **EXHIBIT A**, NAP, p. 3 (In addition to FLD (or, residential cluster project) decisions, “[t]he Northside Area Plan will be primarily implemented through the rezoning process [...]” [...] Policies are also used in staff reviews of requests for variances to the Land Use Code.”).

Under the FLD alternative and pursuant to the UDC, the NAP provisions restrict the allowable single family residences within the planned subdivision to 6 RAC. The zoning administrator should make this determination, which is correct, and require the applicant for DP18-0201 to resubmit the application with a demonstrated density for the MES of 8.71 RAC or fewer.

Sincerely,

Carl Sammartino

CC: Lisa Bowers, MES applicant (email only to: lisa@metroted.com) (without check number 441)

⁵ If the MES site *is* actually 6.29 acres in size, this number is 54 or, depending on rounding, 55. The exact size of the MES site is important.

Sammartino Law Group, P.L.L.C.

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Tucson, AZ 85712

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