

APPELLANT'S APPEAL ATTACHMENT



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February 8, 2019

Sent Via: Hand-Delivered

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

RE: Appeal of Zoning Determination #T19SA00010 of January 10, 2019

Dear City of Tucson Board of Adjustment Members,

The Mountain View Neighborhood Association (“MVNA”) is appealing the zoning determination (the “Determination”) dated January 10, 2019, and designated #T19SA00010. The arguments and materials supporting this appeal (the “Appeal”) include, by this reference, all of the materials submitted with the Appeal to the Board of Adjustment (“BOA”); all materials submitted to the BOA subsequent to the submission of the Appeal; and all materials, testimony, and argument presented during the BOA hearing on the Appeal.

ARGUMENTS AND DOCUMENTS IN SUPPORT OF THE APPEAL

I. Factual And Procedural Background Of The Appeal

The applicant for development plan submittal DP18-0201 plans to construct 76 detached, single-family residential units called the Mountain Enclave Subdivision (“MES”) on a 6.14 or¹ 6.29 acre site in the geographical center of the Mountain View Neighborhood. See **ATTACHMENT 1**, aerial photograph. The planned density for the MES is 12.37 or 12.08 residences per acre (“RAC”).

The zoning for the MES property is City of Tucson R-2², which permits a maximum density of 8.71 RAC, so the MES is utilizing the flexible lot development (“FLD”) option under the City of Tucson Unified

¹ See fn. 2 in letter dated October 19, 2018, attached to Appeal in “Attachments to Determination Request.”

² See **ATTACHMENT 2**, zoning map.



Development Code ("UDC"), which allows densities up to 22 RAC in the R-2 zone. However, the FLD provisions of the UDC contain an important mandate, the interpretation of which is the subject of this appeal:

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).

The Northside Area Plan ("NAP") is the area plan governing, amongst other areas, the MES property and the entire Mountain View Neighborhood, which is bounded by arterial streets Fort Lowell Road, Prince Road, and First Avenue on the south, north, and west and collector street Mountain Avenue on the east.

The NAP specifies an interior site like the MES site, which is located in the center of the square defined by Fort Lowell Road, Prince Road, First Avenue, and Mountain Avenue, is appropriate for low density development only, which the NAP defines as no more than 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.

NAP p. 10, Policy 2(a); NAP, p. 5 (emphasis added).

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** [...].

NAP, p. 10, Policy 2(b) and Policy 2(c); NAP, p. 5 (emphasis added).



MVNA, in a request for determination dated October 19, 2018, (the “Request for Determination”) requested the City of Tucson Zoning Administrator determine UDC § 8.7.3(C)(1) mandates the MES shall conform to the NAP and therefore the maximum density of the MES could be 6 RAC, if the MES continued to utilize the FLD option.³

All of the foregoing factual matters and documentation supporting those facts (including the NAP, the tentative plat package for the MES, and the City of Tucson Major Streets and Routes Map) were contained in the Request for Determination, and are attached to the Appeal in “Attachments to Determination Request.”

The Zoning Administrator issued the Determination on January 10, 2019, and found UDC § 8.7.3(C)(1) does not require the MES to comply with the NAP because:

[...]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.

Determination, attached to Appeal in “Zoning Administrator’s (ZA) Determination.”

II. The BOA Should Reverse The Determination And Require The MES To Comply With The NAP As UDC § 8.7.3(C)(1) Requires

The Determination is both wrong based on its own logic and dangerous precedent for future planning decisions.

Wrong because the Determination uses the primacy of the FLD provisions of the UDC to argue the nonbinding nature of the NAP, when it is the UDC *itself*, in provision 8.7.3(C)(1), which states the requirements of the NAP (or any other area plan or neighborhood plan) are mandatory for FLD developments.

Dangerous because the City of Tucson Planning and Development Services Department could arbitrarily require future FLD developments, planned area developments, developments in the urban overlay district, or

³ The Request for Determination pointed out the MES could abandon the FLD option and use the underlying R-2 zoning of the MES site, which allows 8.71 RAC.



developments using the UDC special exception procedure to conform or not conform to applicable area or neighborhood plans.

A. The Determination Incorrectly Ignores The Plain Meaning Of UDC § 8.7.3(C)(1)

The Determination is wrong because it is the UDC itself, not the NAP, that states “[a]n 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). The Determination’s reasoning, that neighborhood plans “are planning documents, not laws,” is not germane to the question of whether the “[c]ity’s land use code, the UDC, [which] is the codification of the [c]ity’s land use laws and regulations” mandates that an FLD must comply with an applicable, adopted area plan like the NAP. The UDC is clear an FLD must so comply.

To illustrate how the Determination’s reasoning is backwards, it is useful to compare the MES subdivision to a hypothetical subdivision on the same site using the underlying R-2 zoning to achieve a density of 8.71 RAC. The NAP would still require, for that same site, a density of 6 RAC or less. However, because the UDC does not require a development using the hard zoning of a property to conform to applicable area or neighborhood plans, the UDC would trump the NAP and the hypothetical developer could develop the MES site at 8.71 RAC using the R-2 zoning.

But, by using the FLD procedure, the MES subdivision has subjected itself to UDC § 8.7.3(C)(1), which requires the development conform to the NAP. The Determination would be correct if the MES were using the R-2 zoning of the site, but the Determination does not interpret UDC § 8.7.3(C)(1) correctly.

The Determination states it is the goal of the FLD provisions to provide for greater density allowances under certain situations, which is true. However, the goal of the FLD provisions was also to force FLD developments to conform to applicable area and neighborhood plans, as codified in UDC § 8.7.3(C)(1). This was true of the predecessor FLD code section in the previous City of Tucson zoning code,



the Land Use Code:

An FLD **shall** comply with the following criteria: [...] An FLD **must** be in conformance with the General Plan and any of its components, including any applicable adopted area and neighborhood plans.

City of Tucson Land Use Code (“LUC”) 2012 §§ 3.6.1.4; 3.6.1.4(A) (emphasis added). It was also true of the predecessor to the FLD option, the Residential Cluster Project (“RCP”) in the LUC:

RCPs **shall** comply with the following criteria: [...] The RCP **must** be in conformance with the design policies and criteria of the General Plan and any of its components, including any applicable adopted area and neighborhood plans.

LUC 2006 §§ 3.6.1.4; 3.6.1.4(A) (emphasis added).

It is noteworthy that UDC § 8.7.3(C)(1), the former FLD provision of the LUC, and the RCP provision of the LUC all use the word “shall” to require conformance with applicable area and neighborhood plans. “Shall” 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).

This is in contrast to other areas of the UDC that use different language to clarify applicable area and neighborhood plans are merely advisory. See UDC §§ 5.12.5(B)(2) (“In making this decision, the PDSD 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 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).

B. The Legal Precedent The Determination Cites Is Not Applicable

The Determination cites *Northeast Phoenix Homeowners’ A’ssn. v. Scottsdale Mun. Airport*, 130 Ariz. 487, 636 P. 2d 1269 (Ariz. App. 1981) for the proposition that general plans, area plans, and neighborhood



plans are subordinate to a city's adopted zoning code. See **ATTACHMENT 3**, *Northeast Phoenix Homeowners' A'ssn. v. Scottsdale Mun. Airport*, 130 Ariz. 487, 636 P. 2d 1269 (Ariz. App. 1981). That case involved a group of homeowners protesting the extension of an airport runway in Phoenix that would involve no change to the existing use of the property in question, which was an airport. Therefore, the Arizona Court of Appeals concluded no change to the general plan was necessary:

We find no indication in the statutory scheme relating to the adoption of general plans that specificity to the extent urged by plaintiffs was intended so as to require the invocation of the burdensome statutory mechanism for general plan amendments when construction or expansion within a previously set forth category of use is contemplated. **Obviously, here the contemplated use would remain the same**, and while any increase in air traffic will just as obviously affect the use and enjoyment by the plaintiffs of their property, such an increase in use should not have been entirely unexpected from a planning standpoint in view of the entire area's expanding development. In conclusion, we agree with defendants that a general plan is just that, a 'general' plan. **The statutes do not indicate any intent that the general plan go into such minute detail as to specify the precise length of an airport runway.**

Northeast Phoenix Homeowners' A'ssn., 130 Ariz. at 496 (emphasis added).

Northeast Phoenix Homeowners' A'ssn. does not hold or suggest a developer is free to ignore the plain language of the zoning code itself if the zoning code requires a project comply with an applicable area plan.

C. Upholding The Determination Would Set A Dangerous Precedent

The FLD option is not the only development tool in the UDC requiring a development to conform to applicable area and neighborhood plans. Planned Area Developments ("PAD") must comply with applicable plans. UDC § 3.5.5(C)(1) ("Each PAD must be in compliance with the General Plan and applicable sub-regional and neighborhood plans."). Projects using the Urban Overlay District ("UOD") must comply with applicable plans. UDC § 5.13.3(B) ("Each UOD shall be in compliance with the adopted General Plan and applicable sub-regional, area, and neighborhood plans."). Projects applying for the Special Exception Procedure must comply with applicable plans. UDC §§ 3.4.5(A); 3.4.5(A)(5) ("To grant a special exception the PDSD



Director and the Zoning Examiner must find that the requested special exception [...]omplies with the General Plan and any applicable sub-regional, area, or neighborhood plan.”).

A BOA decision confirming the Determination would excuse future compliance with the provisions of the UDC requiring conformance with applicable plans for any development using the FLD, PAD, UOD, or special exception procedure. That result would explicitly contradict the mandatory role the UDC states applicable plans should have in guiding those development options.

D. The MES Has Other Options To Achieve Its Desired Density

Properly interpreting the UDC and reversing the Determination would leave the MES with at least two options to avoid the density requirements of the NAP. First, as discussed *supra*, the MES could use the site’s underlying R-2 zoning to achieve a density of 8.71 RAC, greater than the NAP’s mandated density of 6 RAC. Second, the MES site owner could attempt to amend the NAP, which is permitted. UDC § 3.6 *et seq.*

The first option requires no consultation or input from surrounding community members, but would not result in the MES planned density of over 12 RAC. The second option would require support from the community but could result in the greater planned density of the MES.

E. The BOA Should Consider The Evidence, Reject The Determination, And Require The MES To Comply With The NAP

The BOA sits in a quasi-judicial capacity to review the Determination and make its own, independent findings based on the evidence presented to the BOA. The BOA is not limited to considering the materials presented to the Zoning Administrator in the Request for Determination:

We agree that the trial court was incorrect in concluding that the board was without authority to conduct an evidentiary hearing; the board has authority under A.R.S. § 9-462.06(A), (B), (C), (F) and (G) to conduct a public hearing and take evidence. See, e.g., *Boyce v. City of Scottsdale*, 157 Ariz. 265, 756 P.2d 934 (App. 1988); *Arkules v. Board of Adjustment of Town of Paradise Valley*, 151 Ariz. 438, 440, 728 P.2d 657, 659 (App. 1986) (‘The Board of Adjustment, though structured much like an administrative agency, acts in a quasi-judicial capacity’).



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Murphy v. Town of Chino Valley, 163 Ariz. 571, 575, 789 P. 2d 1072 (Ariz. App. 1989).

The BOA should use its authority to reverse the Determination and require the MES to comply with the UDC, which requires conformance with applicable area plans like the NAP. A proposed motion to accomplish this is included in **ATTACHMENT 4**.

Sincerely,

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