

# STAFF REPORT

**DATE:** March 27, 2019

**TO:** Board of Adjustment

**FROM:** Zoning Administration  
Planning & Development  
Services Department

**ACTIVITY NO. T19SA00062**

**C10-19-08 MOUNTAIN ENCLAVE LOTS 1-76 / RUSSELL IMOGENE TR / 1117  
EAST HALCYON ROAD, R-2**

The appellant, Carl Sammartino on behalf of Mountain View Neighborhood Association (MVNA), is appealing the Zoning Administrator's Determination (T19SA00010), issued January 10, 2019 regarding the appropriate density for the proposed flexible lot development (FLD). The Zoning Administrator (ZA) determined that the Northside Area Plan (NAP) contains policies rather than laws and these policies provide guidance primarily for rezoning applications and do not supersede the regulations contained in the Tucson Unified Development Code (UDC) Section 8.7.3 that support the proposed density. The appellant contends that the UDC mandates that FLDs shall be in conformance with applicable area plans.

## **THE APPELLANT'S REQUEST TO THE BOARD**

The appellant is requesting reversal of the January 10, 2019 Zoning Administrator's determination.

## **ZA DETERMINATION DATED JANUARY 10, 2018**

Refer to Exhibit 1.

## **APPELLANT'S ARGUMENTS TO REVERSE THE DETERMINATION**

On February 8, 2019 the appellant filed the appeal to the Zoning Administrator's January 20, 2019 Determination. See appellant's submittal documents in the Board's application packet for Case C10-19-08.

The appellant identifies the following as the issues on Appeal:

1. An FLD shall be in conformance with the General Plan and any of its components, including applicable adopted area and neighborhood plans.
2. 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.

## **APPLICABLE TUCSON ZONING CODE SECTIONS**

Tucson *Unified Development Code (UDC)* sections applicable to this appeal include, in part, the following:

Section 4.7.9 *Residence Zone (R-2)* and Table 4.8-2 *Permitted Uses –Urban Residential Zones* which provide the use criteria in the R-2 zone;

Section 8.7.3 *Flexible Lot Development (FLD)*, which provides the standards for development when utilizing this option;

Section 1.5.1 *Zoning Determinations and Zoning Certifications by the Zoning Administrator*, which provides for the ZA to interpret the provisions of the UDC; and

Section 3.10.2 *Appeals*, which provides for the Board of Adjustment to hear and decide on appeals made to the ZA's decision.

### **APPLICABLE ADOPTED AREA PLAN**

The area plan applicable to the appeal is the Northside Area Plan, Resolution No. 14256.

### **GENERAL DEVELOPMENT INFORMATION**

#### **Zoning and Land Use**

#### **SITE: ZONED R-2; (single-family residential, undeveloped)**

North: Zoned R-2; (single and multi-family residential, 13 RAC)

South: Zoned R-2; (multi-family residential, 12, 12.5, 12.7 and 14 RAC)

East: Zoned R-2; (single and multi-family residential, 8.7 and 11 RAC)

West: Zoned R-2; (single-family residential, 8.5 RAC)

### **FLEXIBLE LOT DEVELOPMENT OPTION - UDC SECTION 8.7.3**

#### **A. Purpose**

*The purpose of the Flexible Lot Development (FLD) is to provide greater flexibility and creativity in the design of residential development by:*

- 1. Providing incentives to achieve community goals, such as historic and archaeological preservation, preservation of native vegetation, development within low-income areas, and in-fill housing projects;*
- 2. Implementing the goals and objectives of the General Plan, Area Plans, and Neighborhood Plans;*
- 3. Providing open space that is usable and includes suitably located active and passive recreational amenities, such as trails, walking paths, picnic areas, and playgrounds;*
- 4. Providing for visual, and where achievable, physical connections to open space areas on adjacent properties;*
- 5. Efficiently using land and public facilities by means of a more economical arrangement of buildings, circulation systems, land uses, and utilities;*
- 6. Preserving to the greatest extent possible existing Natural Undisturbed Open Space, environmentally sensitive areas, and landscape features and*

- amenities, such as significant topography, protected peaks and ridges, natural vegetation, washes, riparian areas, and floodplains, and integrating such features with structures and other improvements;*
7. *Coordinating architectural styles, building forms, and building relationships within the development and with surrounding land development;*
  8. *Providing high-quality sustainable development within the City that incorporates “green building” techniques such as water harvesting, solar access, and passive solar orientation;*
  9. *Mitigating the urban heat island effect by requiring such measures as canopy trees throughout the FLD project and other acceptable mitigation efforts; and,*
  10. *Creating incentives for appropriate urban infill development on lots with site constraints.*

**B. Applicability**

*FLDs may be developed in the following zones:*

1. *Single-family detached residential development in the SR, SH, RX-1, and RX-2 zones;*
2. *Single-family residential development, attached or detached, in the R-1, MH-1, and MH-2 zones; and,*
3. *Single-family attached or detached, and multifamily residential development in the R-2, R-3, O-1, O-2, O-3, C-1, C-2, and C-3 zones.*

**C. General Development Criteria**

1. ***Conformance with the General Plan and other Applicable Plans***  
***An FLD shall be in conformance with the General Plan and any of its components, including any applicable adopted area and neighborhood plans.***
2. *Applicability of General UDC and Technical Standards Manual Requirements*  
*Except as provided in this section, all applicable standards of the UDC and Technical Standards Manual apply to FLDs.*

**ZONING ADMINISTRATION CONSIDERATIONS**

On October 19, 2019, the Mountain View Neighborhood Association (MVNA) requested a Zoning Administrator Determination (ZAD) that the Mountain Enclave subdivision (Subdivision) Flexible Lot Development proposal shall conform with the Northside Area Plan (NAP) per UDC 8.7.3.C.1. and specifically, in accordance with NAP Residential Subgoal policy 2(b) and policy 2(c), this Subdivision is limited to low-density residential, not to exceed an average of six residences per acre (RAC). On January 10, 2019, the Zoning Administrator determined that the NAP contains policies intended to provide guidance primarily for rezoning applications and that

these policies do not supersede the regulations allowing flexible development that are contained in UDC Section 8.7.3. The MVNA has appealed the Determination.

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 FLD General Development Criteria (Section 8.7.3.C.1) states that an FLD shall be in conformance with the General Plan (Plan Tucson) and any of its components, including any applicable adopted area and neighborhood plans (NAP). The primary issue of this appeal is the meaning of the phrase “in conformance”.

This staff report seeks to clarify the Determination as follows: 1) the FLD conforms but cannot strictly adhere to Plan Tucson policies, including the Northside Area Plan (NAP); 2) the NAP has no 6 RAC requirement; and 3) per Arizona law, the FLD is in basic harmony with Plan Tucson and the NAP.

The Northside Area Plan (NAP) document, in its entirety, is included in the appeal case materials submitted to the Board of Adjustment (Case C10-19-08). The following annotated excerpts of the purpose, general goals, and implementation statements and policies are provided to facilitate reading of staff’s discussion. Please refer to the NAP document for complete context.

## **DISCUSSION**

*The Northside Area Plan provides policy direction for an area or approximately 3.5 square miles in the north-central portion of the Tucson metropolitan area.*

*The NAP is primarily implemented through the rezoning process and Plan policies are also used in evaluations of Residential Cluster Projects (RCP) [now FLDs], which are intended to encourage greater flexibility in residential development by incorporating such considerations as consolidated open space, historic and archeological preservation, recreational amenities, sensitive architectural style, and lower and moderately priced housing. The purpose of the NAP is to guide future development, while protecting and enhancing existing uses. The general goals of the Plan are to:*

- *Encourage a mix of residential and nonresidential land uses at appropriate locations, while protecting the integrity of existing neighborhoods.*
- *Protect existing and future residential neighborhood from non-local traffic and roadway improvements, while providing development of key city-wide transportation corridors.*

- *Promote, preserve, and enhance public open space along Rillito Creek.*

#### *Residential Policies*

*In the future, the Northside area may experience pressures for development that will impact existing residential uses. The large vacant and very low-density parcels in the area may be particularly attractive for new higher density residential development, given the proximity of the Northside-area to the center of the city. Planned transportation improvements may generate land use changes along upgraded streets.*

*The residential policies are intended to guide future development and to ensure harmony of new residential development with existing neighborhoods. These policies are consistent with the City's General Plan, which calls for preserving the integrity of established neighborhoods by requiring that proposed changes be in harmony with such neighborhoods and that care can be taken in the design and location of multi-family dwellings within proximity of existing single-family residences.*

*Policy 2: Promote appropriate residential infill in existing neighborhoods.*

- a. Low-density residential developments are generally appropriate within the interior of established low density neighborhoods and along local streets.*
- b. Low- or medium density residential uses are generally appropriate along designated collector streets.*
- c. Medium-and high density residential developments are generally suitable along designated arterial streets.*

The following definitions are provided in the NAP.

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

*Medium density: density from seven to 14 units per acre, including a variety of housing types, such as single family homes on small lots, duplexes, townhouses, mobile homes, apartments, and condominiums.*

*High density: density of over 14 units per acres, including multifamily developments, such as townhouses, apartment, and condominiums.*

#### **Conformance versus Adherence**

The project site is a mostly vacant 6.29 acres property located in the central area of the Mountain View Neighborhood, which is bounded by Prince Road to the north,

Mountain Avenue to the east, First Avenue to the west, and Fort Lowell to the south and is within the boundaries of the Northside Area Plan. Commercial development borders the neighborhood primarily along the arterial roadways of First Avenue and Fort Lowell Road with some commercial development at major intersections of Mountain Avenue. Residential development within the boundaries of Mountain View, north of the site and closer to Prince Road, consists primarily of single-family residential. Development to the south, east, and west, within the boundaries, consists of a mix of single and multi-family uses. It is important to note that in the interior of the neighborhood and along local streets, densities of existing residential developments vary from 8.5 to 14 RAC. Along Mountain Avenue, the only collector street, the highest density is approximately 16 RAC.

The NAP acknowledges the potential for development of large vacant parcels and states that its residential policies are intended to guide future development and ensure harmony of new residential development with existing neighborhoods consistent with Plan Tucson policies.

The appellant asserts the FLD is not in conformance as the site is limited to a maximum density of 6 RAC per NAP Policy 2(b). This policy provides guidance on what is generally appropriate to ensure harmony with existing neighborhoods. It does not require strict adherence as it does not restrict or prohibit specific densities to specific locations. It is general and requires general conformance.

Most of this neighborhood is zoned R-2, a medium density single family and multifamily residential district. The R-2 zone allows development with a density of 8.7 RAC for single family and 15 RAC for multifamily. By right, this project could be developed with 54 homes or 94 apartments. Strict adherence to a maximum density of 6 RAC would contradict the minimum standards afforded in the R-2 zone.

The project site is located in the interior of the neighborhood surrounded by existing development with densities varying from 8.5 to 14 RAC. This FLD proposes 30 percent open space which allows a density of 22 RAC and 75% lot coverage. However, the Subdivision is proposed with far less density of 12.1 RAC and 60% lot coverage. Access to the Subdivision is limited and designed to protect the neighborhood from non-local traffic.

The FLD incorporates consolidated open space (30%), and sensitive architectural styles with potentially 9 different elevations that will be located to create variation throughout the Subdivision and that are designed to preserve privacy of adjacent residences, as indicated in the Privacy Mitigation plan. The Mountain Enclave FLD is in harmony with the surrounding existing development through its sensitive design and its density is consistent with that of surrounding properties and existing neighborhood and as such conforms to the Plan policies.

### Legal Analysis

Pursuant to A.R.S. § 11-816 and UDC § 3.10.2(A)(1), the City of Tucson has authorized the Board of Adjustment to hear appeals of the Zoning Administrator's interpretation of the UDC. The Board may hold a study session and shall hold a public hearing where the appellant and all parties in interest may present in support and/or in protest of the determination. During the public hearing, the Board may hear all relevant facts, circumstances and conditions affecting the appeal, and may call for questions from members of staff. Upon closing of the public hearing, the Board may reverse, affirm or modify the decision being appealed and may impose conditions necessary and appropriate to implement the UDC (UDC § 3.10.2.D). The Board may also take the matter under advisement for later consideration, or may defer action if additional evidence is needed or further study is required.

MVNA requested that the Zoning Administrator determine that the NAP restricts the planned subdivision to 6 RAC. The issued ZAD states, and this staff report clarifies, that while an FLD must conform to the General Plan and neighborhood area plans, the General Plan and the NAP are policy documents that do not require nor do they support strict adherence. Both the NAP and Arizona case law supports this.

Appellant states that the NAP "mandates" no more than 6 RAC for the project site by emphasizing the "shall" of UDC § 8.7.3(C)(1). However, "shall" must be read in the context of "be in conformance with" to have meaning. As delineated above, the NAP is primarily a policy document, therefore the guidelines contained therein cannot be read to require strict adherence as it is nearly impossible to determine what strict adherence would be. As noted above, the NAP states that low-density residential developments are "generally appropriate" within the interior of "established" low density neighborhoods and along local streets. Neither "generally appropriate" nor "established" are defined by the NAP. Generally appropriate by its terms implies exceptions. See, e.g. *Mast v. Standard Oil Co. of California*, 140 Ariz. 19, 22, 680 P.2d 155, 158 (App. 1983), approved in part, vacated in part, 140 Ariz. 1, 680 P.2d 137 (1984) (affirming summary judgment even though "negligence issues...are not generally appropriate for summary adjudication"). Moreover, the NAP does not speak to how policies within it are to be ranked should they conflict. An example relevant to the current appeal is the possibility of a development that meets all the criteria of Policy 2 ("Promote appropriate residential infill in existing neighborhoods") but does not meet Policy 1(c) ("Encourage the orientation of new residential uses to take advantage of solar energy and to integrate solar technology into the design"). Policy 1(c) in and of itself requires interpretation to determine whether an appropriate level of encouragement has occurred.

Arizona courts have noted this difficulty in determining how to adhere to general and specific plans. In reviewing a rezoning required to be "consistent" with a general plan, the Court of Appeals found that a 500-foot tall building was in "basic harmony" with a general plan that limited buildings to 250 feet because the building met other policy goals. *Haines v. City of Phoenix*, 151 Ariz. 286, 291, 727 P.2d 339, 344 (App. 1986) (finding that "the developer could build two 20-story buildings which

would leave less open space and less potential recreational areas”). The Court of Appeals has also noted the difference between a legislative document, like the UDC, and a general plan, and thus its components, including the NAP. “The general plan concept...is not to be confused with the exercise by a municipality of its zoning powers.” *Ne. Phoenix Homeowners' Ass'n v. Scottsdale Mun. Airport*, 130 Ariz. 487, 496, 636 P.2d 1269, 1278 (App. 1981). While the former is a policy indicates intent and aspiration for the area it covers, the latter implements that intent in specific requirements that can be adhered to.

### **Conclusion**

In conclusion, an FLD must conform to the General Plan and neighborhood area plans, the General Plan and the NAP are policy documents that do not require nor do they support strict adherence. Both the NAP and Arizona case law supports this.

### **PLANNING & DEVELOPMENT SERVICES RECOMMENDATION**

Staff recommends upholding the Zoning Administrator’s Determination because the Subdivision is in conformance with the Northside Area Plan and per Arizona law the FLD project is in basic harmony with the Northside Area Plan and Plan Tucson.

Russlyn Wells, Zoning Administrator

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Attachment: Exhibit 1 Zoning Administrator’s Determination

# EXHIBIT 1



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.

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P.O. Box 27210 - Tucson, AZ 85726-7210  
Telephone: (520) 791-5550 - Fax: (520) 791-4340  
Website: [www.tucsonaz.gov/pdsd](http://www.tucsonaz.gov/pdsd)  
Email: [DSD\\_Zoning\\_Administration@tucsonaz.gov](mailto: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.

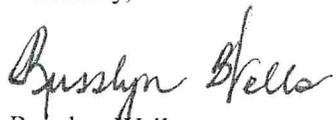
As noted above, plans are recognized both by state statutes (ARS 9-461.05 for the General Plan; ARS 9-461.08 for specific plans) and by the UDC (11.4.8, 11.4.20, 3.4.5.A.5; 3.5.3.B.2 and 3.5.3.D.3]. They have “standing” as plans – that is, they are planning documents, not laws. The City’s land use code, 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](mailto:Russlyn.Wells@tucsonaz.gov) or by telephone at 520-837-4948.

Sincerely,



Russlyn Wells  
Acting Zoning Administrator

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