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November 14, 2011

By email: board@cochise.az.gov
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Attention: Board of Supervisors: Patrick Call, Ann English, Richard Searle
Michael Ortega, County Administrator
Katie Howard, Clerk

Cochise County Board of Supervisors
1415 Melody Lane, Bldg G
Bisbee, AZ 85603

re: Proposed Creation of Taxing District for Operation and Maintenance of Shadow Mountain Golf Course
Public Hearing: November 15, 2011

We act on behalf of a group of property owners whose properties fall within the boundaries of the proposed Special Taxing District you intend to form for the operation and maintenance of the Shadow Mountain Golf Course, the proposed name of which is "Sunsites Community Park Maintenance District."

We wish to address you at your public hearing to be held on November 15, 2011, pursuant to A.R.S. § 48-261(A)(8). Please find below our clients' objections to the formation of the Taxing District for your consideration in advance of the meeting.

SUMMARY OF OBJECTIONS

In sum, to tax the neighbors of this heavily-indebted privately-owned golf course to pay for its upkeep because its owners and tenants cannot afford to is nothing short of a bail-out. To undertake this extraordinary measure, which has never been done in Arizona's history, the tenants of the golf course (the proponents of this tax) need at a minimum to strictly comply with the statutory requirements for consent from the people from whom the Board expects to collect this tax. This they have not done. They have utterly ignored the requirement (both the Board's and the statute's) to gain consent from more than one-half of registered voters; they have failed to submit petitions from a sufficient number of property owners (as a result of the County

Clerk's mistaken calculation of the minimum number of petitions based on number of *parcels* within the proposed district and not on number of *property owners*, as required by statute); they have failed to justify why their golf course is necessary AND beneficial to the community; and finally, in any event, their golf course is not a "community park" as defined by the statute and thus this entire undertaking is unlawful.

PROCEDURAL BACKGROUND

During late 2010 or early 2011, the Board received a District Impact Statement for the proposed creation of a Special Taxing District, in particular a "Community Park Maintenance District" pursuant to A.R.S. § 48-1202, from the tenants of the Shadow Mountain Golf Course, an existing golf course owned by a Nevada corporation by the name of L-190 Shadow Mountain Plat, LLC. The tenants, the proponents of the Taxing District, wish to raise revenue for the operation and maintenance of their golf course. It is unclear what the terms of the tenants' lease are, notably for how long (believed to be until 2013) and with whom. In their District Impact Statement, the tenants failed to include that their golf course property has 43 debts recorded against it, and that it has failed to pay its taxes for at least 5 years.

In preparation for the public hearing, and as required by A.R.S. § 48-261(A)(3), the Board sent out written notices to each "owner of taxable property" within the boundaries of the proposed Taxing District, notifying them of a public hearing on the tenants' proposal to create the Taxing District. The County Clerk mailed the notice out to each property owner (not each parcel) in the affected area.

At or after the public hearing held on March 15, 2011, the Board approved the District Impact Statement submitted by the tenants, and authorized the circulation of petitions, the legislative mechanism by which the Taxing District could be created. The Board did this pursuant to its authority in A.R.S. § 48-261(A)(4).

On or about March 15, 2011, the County Clerk, Ms. Katie Howard, as she was required to do under A.R.S. § 48-261(A)(5), issued a written determination of the minimum number of signatures required for the creation of the Taxing District. In her Memorandum to the Board, she required "three thresholds" which the proponents of the Taxing District had to satisfy in order for their petitions to be valid:

(1) "Property Owners": it was determined that 556 "*property owners*" must sign, based on a total of 1,099 *parcels* within the boundaries;
(2) "Net Assessed Valuation": it was determined that "*owners*" of "at least $4,281,302.51 of the Net Assessed Valuation of the properties" must sign; and
(3) "Registered Voters": it was determined that 265 "Registered Voters" within the proposed Taxing District must sign.

These percentages were based on A.R.S. § 48-261(A)(7)(b), which demands that "more than one-half" of the "*property owners*" in the area must sign petitions. The third threshold is required by A.R.S. § 48-1206(A), which requires the requisite numbers of "registered voters". The Clerk referred to "conflict and lack of clarity in the relevant statutes", referring to the fact

that she had counted *parcels*, not "property owners", in calculating the minimum of 556 "property owners."

On October 31, 2011, the tenants of the golf course filed the petitions that are being considered by the Board at its November 15 meeting (having previously filed and withdrawn others).

On or about November 2, 2011, the Board submitted the October 31 petitions to the County Assessor for verification, as it was required to do under A.R.S. § 48-261(I). The County Assessor, in a "Petition Count" dated November 7, 2011, determined that 569 "Property Owners" signed petitions, and that the Net Assessed Value of those signatures was $4,320,259.00. No mention whatsoever was made of number of votes from "Registered Voters."

The Board is required to hold a public hearing on the October 31 petitions no sooner than November 15 and no later than December 14, 2011. (A.R.S. § 48-261(A)(8)).[1] The Board therefore set up the hearing for November 15, 2011.

The Board has indicated its intent to approve the petitions and create this Taxing District.

OBJECTIONS

1. Strict compliance with statute is imperative

The creation of a Special Taxing District is an extraordinary measure that permits the Board to impose additional taxes on a select group of property owners. The statute grants the Board this authority where proof of popular support is established by petition rather than by election. Thus the process by which petitions are gathered and verified, as well as each and every petition itself, must be scrutinized and determined to be above question. The process must be in strict compliance with the legislation, and the thresholds established by A.R.S. §§ 48-261, 48-266, and 1202 must be unequivocally met, before the Board can invoke this invasive power.

Here, the tenants of the Shadow Mountain Golf Course, who are attempting to persuade the Board to create a Special Taxing District for their benefit, have not complied with the statute. As argued below, the tenants have fallen far short of the statutory requirements for the following reasons: They have failed to submit petitions from "registered voters", as the Board required and the statute requires; they have failed to submit sufficient petitions from "property owners", as the statute requires; the tenants have failed to show why the Taxing District is necessary and in the paying public's best interest; and in any event their golf course cannot be the recipient of these special taxes because it is not a "community park."

2. Failure to include petitions from Registered Voters is fatal

A.R.S. § 48-1206(A) requires that petitions are received from "the requisite numbers of

[1] If the proponents of the proposed Taxable District attempt to file new or amended petitions before or at the November 15 hearing, these time periods must be calculated from the date of submission of the new petitions. A.R.S. 48-261(A)(8).

"registered voters". In compliance with this provision, the Board, via the County Clerk, set "Registered Voters" as a required third "threshold" that the tenants had to meet in order to create the Taxing District. In a memorandum dated March 15, 2011, the Board specifically demanded that "265 Registered Voters within the proposed district must sign." (A copy of the written memorandum is attached for the Board's ease of reference.) Supervisor Searle re-iterated this third requirement at the Board's March 1, 2011 public hearing (convened to determine the validity of the District Impact Statement[2]).

This third requirement has been utterly ignored by the tenants, who have failed to collect signatures from 265 registered voters within the proposed Taxing District. The Board has no evidence whatsoever presented to it that enables it to determine whether more than one-half of registered voters are in favor of this new tax. Without this evidence, the Board is unable to approve the proposed Taxing District. The tenants' failure is fatal to the creation of the Taxing District.

3. Failure to set the minimum number of "Property Owners" based on actual number of "Property Owners" is fatal

In the memorandum dated March 15, 2011, under the heading "Property Owners", the Clerk mistakenly set the minimum number of petitions required to create the District based on the number of *parcels* situated within the proposed district. This is contrary to statute, the number is invalid, and the tenants' attempt to create this Taxing District must fail.

The governing statute, A.R.S. § 48-261(A)(7)(b), demands that more than one-half of the "*property owners*" in the affected area must sign petitions (emphasis added). There is no ambiguity here. "Property owners" are the *people* who own parcels of land within the affected area. More than one half of the *people* who own property in the area must be in favor of the tax. There is no reason to read into this statute that *parcels of land* were intended as the determining number. Where a person owns multiple parcels, he or she gets *one* petition. Supervisor Searle specifically confirmed this meaning of the statute at the March 1, 2011, public hearing.[3]

To hold otherwise would result in owners of multiple parcels committing a crime if they signed more than one petition. Counting *parcels* means that single owners with multiple parcels can sign multiple petitions (one for each parcel). However, to do so would be in direct contravention of the statute itself. The statute makes it a criminal offense to "sign the person's name more than once for the same measure." A.R.S. § 266(A). Clearly the statute does not envisage one petition per *parcel*, but rather demands one petition per *property owner*.

This reading of the statute is supported by multiple sources, most notably by the Clerk's actions, the County Assessor's methodology, and other related statutes. The Clerk, in sending out the notices of the public hearings in this case, interpreted the statute to mean *one* notice per *property owner*, regardless of how many properties were owned by such owner. She did not send

[2] The Board determined that the tenants' District Impact Statement was invalid and gave them two weeks to rectify it.

[3] He stated this (correct) explanation of "property owners" v. "parcels" twice at the meeting. The County Attorney, who was present at the meeting, did not note any objections.

out Notices to each *parcel* within the affected area; rather she (correctly) sent out one notice to each "owner of taxable property", as A.R.S. § 48-261(A)(3) required her to do.

The County Assessor, too, in the spreadsheet attached to the Board's November 15, 2011 Agenda[4], assigned each *property owner* a single owner number, even where multiple properties were owned. The Assessor considers and labels all the petitions by "owner", not by "parcel number."

In A.R.S. § 9-471 (a statute which also requires the signature of petitions for government action), the methodology for determining the "sufficiency of the percentage of persons owning property" is expressly stated to include "If a person owns multiple parcels of property, such owner shall be deemed as one owner for the purposes of this section." A.R.S. § 9-471(F)(4). To the extent that the tenants and/or the County may argue that A.R.S. § 48-261(A)(7)(b) is ambiguous (which it is not), this provision casts light on the legislative intent behind the threshold provisions governing petitions.

There is no ambiguity regarding how to calculate the number of "property owners" within the proposed District. It is quite simply what the statute says it is, and what the Board has clearly said it is at a public meeting, namely, the number of *property owners* within the proposed District. For the Clerk to replace "property owners" from the statute with "parcels" is simply erroneous. The minimum number set in the Board's Memorandum dated March 15, 2011, is incorrect and needs to be re-calculated.

According to records that are publicly available, it appears that, currently, the entity that owns 107 parcels that include the golf course and many development parcels ("L-190 Shadow Mountain Plat, LLC") has been allotted 107 petitions by the Assessor. A Mr. and Mrs. Hesser, who own 109 parcels within the proposed District, have been allotted 109 petitions by the Assessor. Each of these "property owners" is only entitled to *one* petition. It is clear that, by looking at just these two property owners, the Assessor has over-counted petitions by at least 214 petitions.

According to the County Assessor's spreadsheet attached to the Agenda[5], there are **584** *property owners* within the proposed District. "More than one half" of 584 is **293**. Although the Assessor has not provided a formal list of property owners who signed petitions, it appears that the tenants obtained **227** signatures on petitions, representing 227 *property owners*. The current petitions fail the first threshold by **66** property owners.

To be in compliance with A.R.S. § 48-261(A)(7)(b), the Assessor must verify that 293 property owners within the proposed Taxing District have submitted valid petitions in support of creating the new tax. The Assessor has failed to do this and thus the tenants have failed to

[4] It is unclear what this spreadsheet is intended to represent. It is certainly *not* a list of all property owners within the proposed District. It appears to be a list of all property owners who did *not* sign petitions in favor of the new tax. For example, the entity that owns 107 parcels that comprise the golf course is missing from this list, as well as Mr. and Mrs. Hesser, who own 109 parcels, all of whom voted in favor of the new tax. It unclear why this list should be attached to the Agenda.

[5] As stated above, it is unclear what this document is. It appears to be a list of property owners *who did not* sign the petition.

comply with the statute. Their attempt at creating this Taxing District must fail.

4. <u>The Taxing District is not necessary and does not benefit the community that will have to pay for it</u>

The statute permits the Board to create the Taxing District if, after the hearing, it is satisfied that (in addition to the procedural requirements) the program is "necessary," and "that the public health, comfort, convenience, necessity or welfare will be promoted by establishment of the district." A.R.S. 48-1206(A). If there are insufficient valid petitions in support of the Taxing District, and if it is not necessary, nor will it benefit the public, the tenants cannot succeed in establishing the Taxing District.

Raising taxes to pay for the Shadow Mountain Golf Course is none of these things. It is simply a government bail-out of a failed private development.

The owners of the Shadow Mountain Golf Course, foreign corporations whose identities remain a mystery, clearly have no intent or ability to pay for the operation and maintenance of the golf course. The local residents who have leased the golf course from the owners also clearly have no intent or ability to pay for its operation and maintenance. So, simply as means to keep this private facility afloat during tough economic times, the tenants are asking the government to impose a tax on their neighbors to bail them out. This simply means that the local taxpayer must pay for their golf course.

Creating this kind of Special Taxing District in this manner is an extraordinary measure. In fact, there is no precedent in Arizona for any Special Taxing District such as this one. No other "Community Park Maintenance District" (A.R.S. 48-1201 et seq.) has been created in Arizona to date. And it is more extraordinary to do it to bail out a privately-owned golf course.

Moreover, as pointed out by supervisor Hall at the March 1, 2011 public hearing, the so-called "benefits" to the community have to date never been addressed. The issues that need to be comprehensively addressed include: whether this golf course is "necessary" for the community; whether the public's health, comfort, convenience, necessity or welfare are promoted by it; why its existence is dependent on the public's paying for its operation and maintenance; whether its existence is in fact dependent on the public's paying for it; whether the taxes will pay for the enormous amounts of water that are used to irrigate the golf course; whether that water could be better used elsewhere; whether the factors that have made this golf course "fail" will remain in place if the taxpayer starts pouring money into it.

These are questions and issues that have never been addressed by either the tenants in order to satisfy the statutory requirements to create this special tax on local property owners.

5. <u>In any event, the tenants fail to meet the definitional requirements of the Community Park Maintenance District statute and thus their entire proposal is unlawful</u>

Irrespective of whether or not the tenants have adequately met the threshold requirements governing the petitions collected in favor of this new tax, the golf course itself is not legally entitled to receive the taxed funds as it has not been dedicated to the public, and the tenants are not in a position to dedicate it to the public. It is not theirs to give.

As an initial matter, the tenants have asked for funding "to operate" the golf course. See District Impact Statement, p. 2. The Special Taxing Districts statute only at most permits "maintenance". A.R.S. § 48-1202(2) ("a district shall … be formed only for the purpose of maintaining existing community parks …"). Its very name is a "community park *maintenance* district" (emphasis added). To the extent that the tenants want money for anything more than maintenance, their proposal is invalid.

But primarily, the golf course is not a "community park" and thus cannot be the recipient of these special taxes. A "community park" is an area of land "which has been dedicated for unrestricted public use by a county, city or town or private entity." A.R.S. § 48-1201(5). The owner of the golf course has done no such thing, or anything vaguely resembling a dedication for unrestricted public use. All the owner has done was to enter into a lease with another private entity (the tenants). And all that private entity has done is to change the golf course's name to include the words "Park and Recreation Area", and to pass a resolution allowing some public access "for non-golfing activities."

There has been no dedication for unrestricted public use at a minimum recorded against the property to which the public is supposedly going to have unlimited access. Without such a recorded dedication, a tax will be extracted from local property owners to pay for uncertain and limited access at the whim of the property owner and its creditors.

Moreover, the tenants are not in a position to make such a dedication. They do not own the property and simply have the rights of a lessee. So, not only would the creation of this new tax be unprecedented, but it also would be to pay for something that neither the Board nor the public has any rights to. The tenants, by asking the Board to create this new tax, would be attempting to give away what is not theirs to give. On October 6, 2008, the tenants entered into a lease agreement with the owners of the golf course. In return for the payment of $1 per year, the owner granted them the use of their golf course for 5 years and 6 months. It is believed that the tenants entered into a new lease with the owners in March 2011 for a term of 2 years. In other words, the tenants propose to create a Taxing District and raise taxes to pay for the operation and maintenance of a facility to which they themselves only have access until 2013. That's for *two years*. And even those limited rights that they do have during those two years are revocable if the lease is terminated. And there is evidence that the tenants are currently in breach of their lease as they have not paid the taxes due on the golf course, an obligation which they undertook in their first lease. The owners of the golf course (and there is evidence that change of ownership has occurred already during the duration of the lease) may at any point in time terminate the tenants' right to occupy and use the golf course. Not only might the lease expire in a short time, but the

holders of the tax lien certificates held against the golf course can begin foreclosure of those tax liens in March 2012. If they are successful in foreclosing the tax liens, there will be a new owner of the golf course at that point. No undertakings from either the current owner(s) or the tenants can alleviate any of these very real concerns.

The golf course has 43 debts recorded against its title. Any of these creditors, in addition to the tax lien, could foreclose on the golf course at any time. Even if the owners had purported to dedicate their golf course for unrestricted public use, such a dedication would be subject to existing creditors' liens and would therefore be worthless. The County's new "public park" could be foreclosed upon and taken away at any time.

In sum, the tenants are not entitled to ask for operating costs; the Shadow Mountain Golf Course is not a "community park"; the tenants cannot turn it into a "community park" because they are not in a position to give unrestricted public access, and even if they do, it would be for at most 2 years, even assuming they were not in breach of their lease obligations; and even if the owners of the golf course purported to dedicate the property, it would be subject to at least 43 liens. This entire process has been an enormous waste of time and resources, and the Board should determinatively bring it to an end, by denying the tenants' proposal now.

6. Conflicts of Interest

The uniqueness of the tenants' proposal to raise a tax to pay for their golf course is highlighted by the unusual conflicts of interest that arise in the current situation. The issue of whether or not the "owner" of the park can sign a petition in favor of raising a tax to benefit the park is not contemplated by the statute. This is because the statute is based on the assumption that the proposed tax will be raised to maintain a *public* park, and it contemplates *public* ownership of the benefited property.

Here, however, the direct beneficiaries of this tax (the owners of the golf course) are able to sign a petition in favor of the creation of a Taxing District that will impose the tax. This is a classic conflict of interest situation that the statute did not even contemplate[6]. Essentially, the private landowner is able to vote for his own public bail-out. By contemplating this bail-out of a private landowner while allowing the private landowner to maintain his ownership without an effective dedication to the public (which the landowner cannot do in this case because its land is subject to 43 liens), the Board allows this untenable conflict of interest to continue.

I look forward to meeting the Board on Tuesday to address the concerns raised by the people who are expected to pay for this project. It will be beneficial to all parties, including the County, the proposed tax payers, the tenants of the golf course, the owners of the golf course (if known), and other affected neighbors, to air all the issues and ensure that the right thing is going to be done here in Cochise County.

[6] There have been no other Community Park Maintenance Districts created, to the author's or her clients' knowledge, in the state of Arizona.

Regards,

MUNGER CHADWICK, P.L.C.

/s/ Adriane Parsons

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