MEMORANDUM

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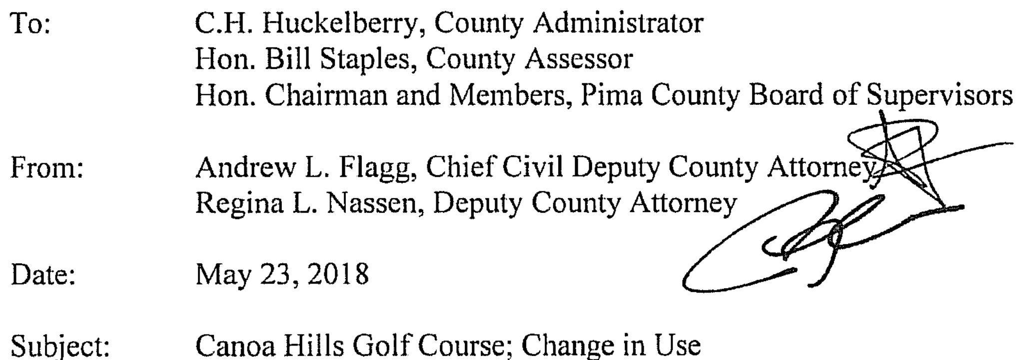

To: C.H. Huckelberry, County Administrator
Hon. Bill Staples, County Assessor
Hon. Chairman and Members, Pima County Board of Supervisors

From: Andrew L. Flagg, Chief Civil Deputy County Attorney
Regina L. Nassen, Deputy County Attorney

Date: May 23, 2018

Subject: Canoa Hills Golf Course; Change in Use

Chuck, we are responding to your inquiry regarding whether a penalty can be imposed on the Canoa Hills Golf Course under A.R.S. § 42-13154(D).

As you know, when different components of our organizational client, Pima County, have an interest in a legal issue, we address our advice to everyone concerned. We are therefore copying Mr. Staples on this memo, because we understand that he is considering imposing a § 42-13154(D) penalty. And, because we have also received an inquiry about the penalty from Supervisor Miller's office, we are copying the members of the Board of Supervisors.

A.R.S. § 42-13152 provides a taxpayer-favorable valuation methodology for golf courses. A.R.S. § 42-13154, however, provides that, in order to qualify for that type of valuation, a golf course owner must record a restriction requiring the property to be used as a golf course for at least ten years. The statute goes on to provide that this restriction "must be refiled as necessary to ensure that the deed restriction always applies for at least ten years." If the property is then "*converted to a different use* in violation of the covenant" (emphasis added), the assessor is directed to "add to the tax levied against the property on the next tax roll a penalty equal to the difference between the total amount of property taxes that would have been levied on the property for the preceding

ten years or the period of time the property was valued under this section, whichever period is shorter, if the property had not been valued under this section and the property taxes that were actually paid for the same period." The statute requires the penalty to "be paid before completion of the next property tax roll." In other words, if a golf course subject to a restriction is "converted to a different use," the County can recoup up to ten years of the owner's tax savings as a penalty.

The question is therefore what "converted to a different use" means, because that is what triggers the penalty. "Golf course" is statutorily defined as "substantially undeveloped land, including amenities such as landscaping, irrigation systems, paths and golf greens and tees, that may be used for golfing." A.R.S. § 42-13151. Although no reported Arizona decisions directly address what constitutes a "conver[sion] to a different use," the Arizona Court of Appeals has, in the land-use context, explained that a "change in use," for purposes of determining whether a nonconforming use is lost, occurs when "the basic nature or character" of the use changes. *Buckelew v. Town of Parker*, 188 Ariz. 446, 452 (App. 1996); *see also Blake v. City of Phoenix*, 157 Ariz. 93, 96 (App. 1988). A "change in use," therefore, is a change to a use of a different kind, rather than of a different intensity. *Buckelew*, 188 Ariz. at 453.

Although the "change in use" test applicable to land-use cases does not directly apply here, it is likely a court would look to that test by analogy given that the language "converted to a different use" and "change in use" appear to describe similar concepts.[1] And, if a court applied that test, it would very likely conclude that the golf course has not yet been "converted to a different use." A golf course that no one plays on anymore, and that is not maintained, is not a use different in kind from a golf course that's used regularly. It's still—for all intents and purposes—a golf course. Only the intensity of use has changed, albeit significantly. *Cf. Blake*, 157 Ariz. at 96 (mere change in intensity not change in use).

We also note that a fair reading of the statutory language supports that interpretation. A "golf course," as noted above, is defined as "substantially undeveloped land . . . which *may be* used for golfing or golfing practice," § 42-13151 (emphasis added); this appears to allow property to be valued as a golf course even if it is not currently actively being used. And A.R.S. § 42-13152(D)(6) requires the owner or manager of a golf course to annually report rounds played per month to allow the assessor to determine the improvement value of the golf course. Importantly, if an owner or manager were to report no rounds played, this would *not* result in a zero value—the land would still be valued at $500, and the replacement cost less depreciation of structures would still be added. Accordingly, the statute appears to at least allow the possibility that a golf course no one is playing on would still be valued as a golf course.

The legislature could have provided that the favorable valuation method ends when the property

[1]Admittedly, there is an important additional component of the nonconforming-use test not applicable here. A nonconforming use can be lost not merely by change to a different use, but also by abandonment of the nonconforming use altogether. *See City of Phoenix v. Aldabbagh*, 189 Ariz. 140, 142 (1997). But, as noted later in this memorandum, § 42-13154 applies only when there is a "conversion to a different use," not mere cessation of a use.

"ceases to be operated as a golf course," but it did not. It used the phrase "converted to a different use," and that implies more than mere non-use; it implies that the property has been altered in a way that makes it unsuitable for continued use as a golf course—or *at least* that it is *actively* being used for a clearly different purpose.[2] This interpretation makes even more sense when one considers the practical difficulty of interpreting non-use as a "conversion." As noted, the statute very specifically requires the assessor to add the penalty to the tax levied against the property "on the next tax roll," and requires the penalty to be paid before completion of the subsequent roll. But at what point should non-use be considered to be a conversion? How long must it last? What if it is temporary, while the operator makes improvements or seeks to sell the property? In contrast, a definitive *change* in use is much more easily identified. Indeed, in this case, it is our understanding that the Pima County Assessor's Office did not impose a penalty when operation of the golf course ceased several years ago, even though the owner or manager presumably either stopped reporting rounds played or reported zero rounds played.

There is a plausible counterargument that could be made based on the only reported court opinion interpreting these golf-course statutes, *Phxaz Ltd. P'ship v. Maricopa County*, 192 Ariz. 490 (App. 1998). There, the Court of Appeals rejected an argument by taxpayers that recordation of the required restriction was sufficient to qualify property for the favorable treatment, even before any golf course amenities or improvements had been built or installed. The court held instead that "the legislature intended the special golf course valuation method to be applied only to completed, operational golf courses." *Id.* at 496, ¶ 28. The court also noted that the statute applies to property that "may be used for golfing or golfing practice," i.e., property that people have "'permission' or 'liberty' to use . . . 'for golfing or golfing practice.'" *Id.* at 494, ¶ 21. Finally, the court also said that "[t]he statute requires the penalties to be paid precisely because the taxpayers' failure to use the land as a golf course has deprived the state of the economic benefits it would have realized *from an operational golf course*." *Id.* at 496, ¶ 30. Read and applied very broadly, that language might suggest that a non-operational golf course is no longer a "golf course" for purposes of these statutes, and that non-use is enough to trigger the penalty.

In our opinion, however, that is not a fair reading of the Court of Appeals' holding in that case; the court was considering when the favorable treatment could *begin*, not when it might end. It was not interpreting the portion of the statute that concerns us now—what it means for an established, completed golf course to be "converted to a different use." And, as explained above, in another similar context, courts require a transition to a different kind of use before they will find a "change in use."

The County clearly *plans* to convert the property to a different use *after* it acquires it. But that can only occur after acquisition, and nothing in the statute indicates that the penalty can be imposed *before* the actual conversion takes place. Once that occurs in this case, the property will already be exempt. *See* A.R.S. § 42-11102(A).

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[2]While not binding, the Arizona Department of Revenue's Assessment Procedures Manual further supports this interpretation—it provides that the penalty applies "[i]f a property qualifies and is taxed as a golf course and is used *for anything other than a golf course* during the 10 year period." Ariz. Dep't of Revenue, *Assessment Procedures Manual*, pt. 2, ch. 2, at 2.2.C10 (Rev. 1995) (emphasis added).