ACREL News & Notes
November 2018

Fore! Golf Courses & Housing: Drafting for the Hole in One, Avoiding Judicial Sand Traps

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In 2015, ESPN reported that the United States was experiencing a gradual decline in the number of golf courses in the country, correcting an "oversupply between the 1960s and the early 2000s." The report was based on a study conducted by the National Golf Foundation which found 15,372 courses in the United States, down from a peak of 16,052 courses.[1] The following year, Bloomberg confirmed that more than 800 golf courses had closed nationwide in the last decade. The article noted that surviving operators must navigate "a declining interest in the sport, a glut of competition" and the corresponding decrease in revenues.[2]

Many former courses are in the middle of planned residential communities which built their respective identities around the game. As a result, the macro market "correction" has played out in courts across the country, pitting communities desperately trying to prevent their "souls" from being ripped from within against course owners, developers, and sometimes their lenders, with substantial land holdings either implicitly or expressly limited to a recreational sport that is, simply put, unprofitable and unmarketable in its current location. Compounding the economic and legal problems is the physical fallout. When nature takes over after the clubs are put away, clubs become unkept, disheveled and even hazardous. These conditions appear at the entries through and into the heart of a community.[3]

Common (but not universal) development practice for golf course communities have golf courses owned and operated by third parties and not necessarily a community association. The covenants for the community frequently refer to the golf course, particularly in the case of buffer areas for lots immediately adjacent to the golf course. Sometimes, developers will designate the golf course as "open space" which allows the developer to more densely develop other areas of the subdivision under local development ordinances. Recorded plats showing the lots may also refer to the golf course. And, of course, developers gladly market the communities as "golf course" communities, indeed charging lot premiums for lots closer to golf courses.

Certainly, with subdivision roads like "Tee Box Court" and "Shady Green Drive" lot owners are assured their golf community will remain a golf community, right? Unfortunately for the unsuspecting consumer, when times turn bad, the operator is left holding an unprofitable asset it must at least try to divest or develop. Owners of the

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[1] http://www.espn.com/golf/story/_/id/12461331/number-us-golf-courses-steady-decline-says-report
[2] https://www.bloomberg.com/news/features/2016-08-15/america-s-golf-courses-are-burning
[3] Some local governments have had to pass ordinances which require basic maintenance of abandoned or inactive golf courses.https://www.mypalmbeachpost.com/news/local/county-officials-defunct-golf-courses-mow-your-lawns/kK7odI9gPATDOLware94WL/

surrounding homes, however, wage aggressive court battles to prevent these golf courses from being used for other purposes. Often times, since the land is not expressly restricted itself in a recorded covenant, the question is whether an "equitable servitude" or some other implied theory may prevent the land from being used for other purposes. Courts are mixed on whether owners can limit the use of the land in this manner. If use is limited, courses may not be sellable and used for other purposes.

In situations where the golf course is either not expressly required to be operated or is required to be operated, the results are usually clearer. In other words, as practitioners have seen elsewhere, clarity of recorded documents, at least in hindsight, tends to lessen the likelihood of litigation. For instance, covenants tending to allow alternative uses will specifically indicate that the golf course use or appearance cannot be guaranteed for future owners. In most comprehensive covenants for planned communities with golf courses, text expressly state that the golf course is not part of the "common" property, and is not guaranteed for future use.[4] In these communities there is less chance of litigation years down the road should unforeseen circumstances arise necessitating a change in the use of the land.

Express restrictions limiting use for golf purposes is not a panacea, however, where other sections of the covenants are poorly worded. For instance, in communities where covenants *requiring* property to be operated as a golf course have been have been upheld, the victory was short-lived and stripped away by a bankruptcy judge years later due to "changed circumstances." In *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 715 S.E.2d 273 (N.C. App. 2011), for instance, a homeowners' association in a golf course community sued a golf course owner for damages, alleging that the owner's decision to close a golf course was a breach of the covenants requiring the owner to operate and maintain golf courses and their amenities. After finding that the enforcement language provided the association standing to enforce the covenants, the Court of Appeals affirmed a summary judgment for the association holding that the owner failed to rebut the showing that there were no "changes within the covenanted area that were so radical, that they would destroy the original purposes of the agreement"[5]

Years later the golf course owner sought relief in another forum, petitioning for bankruptcy relief. The bankruptcy court held the requirement that the debtor's land be operated as a golf course was just a personal covenant and, in any event, could be eliminated under the "changed circumstances" doctrine.[6] A series of appellate cases and decisions left the owner in an untenable situation – a substantial part of the community had been deemed to not owe any financial obligation to the operator to cover golf course operating expenses; however, the operator still had a concomitant obligation to operate the

[4] *See e.g.* Amended and Restated Declaration of Covenants, Conditions, Easements and Restrictions for Hasentree recorded at book 14414, page 266 of the Wake County Registry (Article VII, Section 1)
[5] *Id.* at 281.
[6] *In re Midsouth Golf, LLC*, 549 B.R. 156 (Bankr. E.D.N.C. 2016)

golf course under another express covenant.[7] According to the bankruptcy court in 2016, the changed legal landscape justified the evisceration of the express covenant requiring the land to be operated as a golf course.[8]

Where the golf course owner does not rely on mandatory assessment obligations from owners, cases are less messy and courts less sympathetic. In *Victorville W. Ltd. P'ship v. Inverrary Ass'n, Inc.*, 226 So. 3d 888 (Fla. Dist. Ct. App. 2017), *review denied*, No. SC17-1729, 2018 WL 1151803 (Fla. Mar. 5, 2018), a golf course owner sued a homeowners association to cancel a restrictive covenant. The course had been encumbered by a restriction since 1971 that provided, in part, that the property "shall henceforth be used solely for recreational purposes, including all sports as defined herein, and for the Facilities and amenities appurtenant thereto, such as clubhouses and recreational, maintenance, and storage facilities and equipment."[9] The covenant went on to list non-exclusive examples of what constituted "sports" such as tennis and golf.[10] A buyer bought the land in 2006, then sued the association in 2012 when golf became unprofitable on the land and the buyer wanted to use the land for other purposes. The trial court found the covenant was enforceable and the District Court of Appeal affirmed noting:

> "[t]he golf course continues to benefit the "dominant estate[s]," the surrounding residential properties. Although few Inverrary residents have memberships at the golf course, the golf course preserves the character of the community and provides residents with a pleasant view. These are reasonable objectives of a restrictive covenant.[11]

Problems also arise, however, when there are no formal covenants restricting property to golf course use and the operator desires to develop the land, close the golf course, or convey the land to a purchaser to use for purposes other than operating a golf course. Can the land be considered to be subject to an implied covenant that it will only be used for a golf course even though there are no express covenants applicable to the property? Courts in Oregon, Washington and Nebraska seem to think so. Courts in North Carolina are not convinced.

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[7] The unraveling started with the case of *Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, Inc.*, 187 N.C. App. 22, 652 S.E.2d 378 (2007), *writ denied, review denied*, 666 S.E.2d 123 (N.C. 2008) in which it was determined that a covenant in development's master declaration requiring payment of amenity fees for recreational facilities did not "touch and concern the land," and thus was not a real covenant which owner of recreational facilities could enforce against development's time share communities in action to collect allegedly past due amenity fees.

[8] The bankruptcy court noted that the North Carolina Court of Appeals decisions had "altered the structure and operation of the covenants and ultimately created a contractual landscape vastly different from that envisioned (and imposed) by the original declarants." The court noted that "removing half of that bargain" (the owners obligation to pay assessments), and requiring the golf course owner to continue to provide the amenities, for free, did not "make sense." *In re Midsouth Golf, LLC*, 549 B.R. at 187. Ultimately, the decision was appealed by the homeowners' association, but prior to that appeal being considered, the bankruptcy plan was confirmed allowing the golf courses to be conveyed to the homeowners' association. *See* Order Confirming Plan, In Re: Midsouth Golf, LLC, Case No. 13-07906-8-SWH (December 13, 2016). Nevertheless, it is a cautionary tale of what can happen if the covenants are not worded sufficiently to underpin any financial obligation from surrounding owners.

[9] *Victorville*, 226 So. 3d at 889.

[10] *Id*.

[11] *Id*. at 891.

In *Skyline Woods H.O.A, Inc. v. Broekemeier*, 276 Neb. 792, 758 N.W.2d 376 (2008), homeowners and their homeowners' association brought an action against the buyer of a golf course at a bankruptcy sale seeking a declaration that restrictive covenants limited property's use to a golf course. The owner of the golf course had filed for bankruptcy protection and the bankruptcy court approved a sale of the course "free and clear of all mortgages, liens, pledges, charges, ... easements, options, rights of first refusal, restrictions, judgments, claims, demands, successor liability, defects or other adverse claims, interests or liabilities of any kind or nature (whether known or unknown, accrued, absolute, contingent, or otherwise)."[12] The purchaser stopped operating the course and the condition of the golf course property deteriorated. The state trial court held that an implied covenant restricted the new owner's land to usage as a golf course. The state appellate court affirmed noting that the "record [was] replete with testimony supporting the existence of a common scheme of development establishing implied restrictive covenants" that the land would be used for the operation of a golf course.[13]

Finally, in *Mountain High H.O.A. v. J.L. Ward*, 228 Or.App. 424, 209 P.3d 347 (Or.App. 2009), the Oregon Court of Appeals held that certain land was restricted to golf purposes, and additionally, also entered a permanent injunction to prevent waste on the property "requiring restoration, maintenance, and operation of the burdened property as a golf course for 15 years."[14] In *Riverview Community Group v. Spencer & Livingston*, 181 Wash.2d 888, 337 P.3^{d} 1076 (Wash. 2014), the Supreme Court of Washington agreed with the Oregon Court of Appeals in *Mountain High* and likewise found a homeowners' association had standing to seek an equitable servitude on golf course property that would limit the property's use to a golf course.

Unlike Oregon, Washington and Nebraska, however, North Carolina will not impose an equitable servitude on a golf course under an implied theory where the declaration does not so restrict the land. In the case of *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc*., 802 S.E.2d 908 (N.C. App. 2017), *review denied*, 370 N.C. 281, 805 S.E.2d 687 (2017), the North Carolina Court of Appeals held a subdivision plat and community promotion materials did not impose an easement-by-plat which required golf course property to be perpetually used only for golf where the survey plat only carved out five un-subdivided tracts from the original tract, subdivision deeds did not reference that survey plat, recorded plats merely depicted a dotted outline of a golf course, and marketing materials could not, by themselves, encumber and restrict the use of the land.

Governmental entitlements may create longer lasting restrictions on use, especially if voluntarily imposed. If the planned community was originally approved with the golf course being shown as "open space" or some similar designation allowing for certain density elsewhere, then the developer may be prevented from making an inconsistent use out of the land by virtue of the previous conditions of approval. In *Wake Forest Golf &*

[12] *Broekemeier*, 276 Neb. at 795, 758 N.W.2d at 381.
[13] *Id*. at 809.
[14] Mountain High, 228 Or. App. 424, 440, 209 P.3d 347, 356.

Country Club, Inc. v. Town of Wake Forest, 711 S.E.2d 816 (N.C. App. 2011) *appeal dismissed, review denied*, 365 N.C. 359, 719 S.E.2d 21 (2011), for instance, a golf course owner deeded a small portion of its 165 acre tract of land to a developer to develop (16 acres), with the rest of the acreage being held by the golf course owner and used as a golf course. The original 1999 Town of Wake Forest approval for the smaller 16 acre townhome development showed the remaining 149 acres as "open space" in the PUD application. Thereafter, the golf course and country club became economically infeasible to operate and was closed in 2007 and litigation ensued after the Town of Wake Forest refused to grant a special use permit to remove the golf course from the coverage of the existing permit for the townhome development. The Court of Appeals affirmed the trial court holding the Town was under no obligation to re-consider removing the golf course from the original "open space" designation thus rendering the150 acres of land forever bound as "open space."[15]

What lessons are to be learned from these decisions? Clear and unambiguous drafting of a recorded covenant is paramount. In the context of a planned community, to protect the declarant golf course owner, a clearly worded declaration that allows the owner of the golf course to unilaterally change the uses of the land is imperative. Certainly, a court would be hard pressed to impose an equitable servitude or "implied" restriction restricting land to be used as a golf course which contradicts an otherwise express restriction.

To the extent there will be an express obligation to operate a golf course, it is important that the financial obligation of lot owners to contribute towards the course's upkeep be embedded in a recorded covenant that actually "runs with the land" so that current and future lot owners have a legally enforceable obligation to pay for the upkeep of the course. Where community's lot owners are to be financially obligated to a course operator, this obligation must be enforceable, lest the covenant be eliminated for "changed circumstances." The drafter should be mindful of arguments from future owners that the financial burden is merely a "personal covenant" and not one "running with the land." When seeking site approvals, developers should seek to offset density with other "open space" rather than using the golf course to fulfill "open space" requirements. The golf course should not be factored into the equation, or the developer may find itself years later unable to obtain the requisite government approvals for re-development regardless of what the restrictive covenants do or do not say.

[15] *Wake Forest Golf & Country Club, Inc*, 212 N.C. App. 632, 638, 711 S.E.2d 816, 819.