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## Repurposing Golf Courses and Other Amenities That Burden the Land: Covenants Running Forever – A Transactional Perspective, 52 UIC J. MARSHALL L. REV. 603 (2019)

Celeste Hammond

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# REPURPOSING GOLF COURSES AND OTHER AMENITIES THAT BURDEN THE LAND: COVENANTS RUNNING FOREVER – A TRANSACTIONAL PERSPECTIVE

CELESTE M. HAMMOND\*

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### *Abstract*

This article considers the implications of private land use restrictions – covenants running with the land, servitudes and negative easements at a time when there are serious challenges to the traditional American Property perspective that a land owner may do whatever he wants with his land, including restricting its use forever. The conclusions of other Kratovil Conference on Real Estate Law & Practice symposium authors show that it is not only the owners of the real estate but also society itself that have concerns about meeting future needs to develop land that is affected by private regulations/conditions/restrictions that limit use of land to golf courses. Part I provides an introduction to the public policy reasons to achieve a termination of private restrictive covenants or servitudes that bind a parcel of land to use as a golf course forever. Part I suggests why we may need to change our view of property rights at this inflection point in order to make changes long after the developer/landowner imposed them. We need to look at those current uses and determine what can be done to offset any negative impact where the regulations or restrictions did meet needs in the past but may not for the future. This article focuses on the changes in using land for golf courses that need repurposing, and how that can be accomplished with the needs of both the landowner and society in mind. It will consider litigation, legislation, and voluntary

action achieved through transactional negotiation and resolution as methods to facilitate the repurposing of golf courses at this inflection point.

Part II reflects on the declining business and activity of golfing which make the dedication of land to golf course use a burden on the land that will continue forever unless there is political, judicial or private action to allow changing uses. The author's personal interest stems from ownership of a house in a resort HOA that has four golf courses accessible to owners. Now, forty years after the developer's vision was reflected in the Declaration of HOA and other recorded documents that affect landowners into the foreseeable future, it makes sense to consider alternative uses of the golf courses and other amenities conceived and installed a long time ago. Part III describes how express private land use arrangements aka covenants running with the land are created, how courts have found implied covenants that require restricted uses and how both express and implied restrictive covenants limit the use of land. It also considers the overlay of public regulation, like zoning, that supports restricting the land to golf course use. Part IV considers the ways to terminate these restrictive covenants to allow repurposing of golf course land to alternative uses.

Part V provides examples of the many golf courses nationwide that that have been repurposed and argues for the need to deal with repurposing issues nimbly to meet current needs of land owners and the broader society, including responding to threats of climate change. Part VI presents the role of the transactional attorney in representing the parties affected by private land use restrictions when there is a proposal to repurposing golf courses. These parties include the owner of the golf course land, the owners of the dominant estate benefitted by the restrictive covenants and society.

## I. INTRODUCTION

The United States is at an inflection point for land use development. Much of the usable land has been dedicated to uses that seemed positive when they were made, but are now tying up use of the land in ways not imagined or considered at their inception. In effect, these private covenants running with the land benefitted and restricted the land forever. Other authors for this symposium issue of the *Kratovil Conference on Real Estate Law and Practice*, "An Inflection Point in Land Development? Private and Public Conditions Considered,"<sup>1</sup> consider the harsh impact that restrictions on the use of land in perpetuity have on the needs of

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1. Center for Real Estate Law at UIC John Marshall Law School held a national, academic conference on October 10, 2018 in Chicago, Illinois. This article, and others in this symposium issue of the *UIC John Marshall Law Review*, are from that Conference.

society. Susan French identifies two major needs: 1) affordable, decent housing that requires density not permitted by restrictions to single family housing and 2) a response to climate change limited by overuse of natural resources (here water).<sup>2</sup> Allowing repurposing of golf courses may allow additional affordable housing or not, but limiting alternative development of current golf course land may advance resilience where, for example, the land supports water management goals such as flood control. Richard Roddewig analyzes concerns that the conservation easement program has resulted in severe shortages of land available to meet current societal needs, especially in the south and southwest.<sup>3</sup> Julian Juergensmeyer and James Nicholas see the need for workforce housing in areas where overall development has led to luxury housing often via the impact of zoning and restrictive covenants that support/cause gentrification.<sup>4</sup> Paula Franzese deplores the way private restrictions have become obstacles to achieving Fair Housing goals.<sup>5</sup> Jo Anne Stubblefield argues that commercial development of land affected by private land use restrictions must respond to future trends if we want to maintain the retail, office and industrial uses society craves even in light of the disruptions of technology.<sup>6</sup> Evan McKenzie examines the political science issues facing the new private governments created by private covenants running with the land that create the ubiquitous homeowner communities<sup>7</sup> and the inability of these HOAs to respond to current needs that follows from the “dead hand of the law” imposed by private restrictions running to perpetuity.

We need to look at those current uses and determine what can be done to offset any negative impact where the restrictions did meet needs in the past but may not for the future. This article focuses on the changes in using land restricted to golf courses that now need repurposed uses and how that can be accomplished with the needs of all the affected parties in mind. The article will consider litigation, legislation and voluntary action achieved through transactional negotiation and resolution as methods to facilitate

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2. Susan French, *Inflection Point: Private Land Use Covenants, the Housing Crisis and the Warming Planet*, 52 UIC J. Marshall L. Rev. 741 (2019).

3. Richard Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . And Should it Be?*, 52 UIC J. Marshall L. Rev. 677 (2019).

4. Julian Juergensmeyer & James Nicholas, *A Rational Nexus Approach to Workforce Housing Land Development Conditions*, 52 UIC J. Marshall L. Rev. 647 (2019).

5. Paula Franzese, *An Inflection Point for Provision of Affordable Housing: The Promise of Inclusionary Mixed Use Redevelopment*, 52 UIC J. Marshall L. Rev. 581 (2019).

6. Jo Anne Stubblefield, *The Impact of Private Covenants and Equitable Servitude on Commercial Development and Redevelopment*, 52 UIC J. Marshall L. Rev. 783 (2019).

7. Evan McKenzie, *Private Covenants, Public Laws, and the Financial Future of Condominiums*, 52 UIC J. Marshall L. Rev. 715 (2019).

repurposing golf courses at this inflection point.

Changes in what is the “highest and best use of land” take us from a public policy where development is always best to one where a return to vacant land may meet needs better. The Social Function of Property/Social Obligation Norm that has been adopted in Europe and Latin America offers an alternative way to look at ownership of property.<sup>8</sup> While the shift in social development from rural to urban is the trend requiring building up of suitable housing, commercial and industrial uses to replace an agrarian society, a return to vacant land may be needed to respond to the threats of climate change – for resilience.

Until the Industrial Revolution, land primarily was kept open and irrigated to support agriculture sufficient to feed the population near the land. Now, agriculture is a most efficient industry and smaller parcels of land supply sufficient food and other products for global as well as local society. Nevertheless, much of the land once devoted (and restricted mostly by zoning) to agriculture has been transformed and developed often leaving little open land to meet its function of dealing with increasing rain and sea level rising. With the prospect of having significant areas of land throughout the United States – golf courses – becoming available for different uses, there will be consideration of what those new uses should be.

There is a tension. Because of the decline in the golf business and activities that makes repurposing desirable, landowners restricted to such use, as well as society, generally need to determine what the repurposed uses should be. New ways to use that golf course land should be determined in light of current and future needs of society. Indeed, this may require a contemporary restrictive use of land to meet broad societal goals. For example, the need to have denser housing may require a removal of some private restrictions that have led to urban sprawl and to unavailability of affordable housing.<sup>9</sup> Reconfiguring land restricted to traditional shopping malls/centers that are on the decline should reflect the Town Center approach espoused by Jo Anne Stubblefield in her article. Land subject to restricted use as conservation easements may need to be kept vacant with restricted uses to meet societal needs for storm water management and to reduce the spread of wild fires caused by climate change even though the article by Richard Roddewig analyzes concerns that current restrictions are burdensome on those wishing to develop their real estate and make it more economically valuable to the individual landowner.<sup>10</sup> Although this article will show how the decline in the golfing industry and the increase in cost of maintaining golf courses suggests repurposing that land for alternative uses, keeping golf

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8. Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Law Perspective*, 80 *FORDHAM L. REV.* 1003 (2011).

9. Juergensmeyer & Nicholas, *supra* note 4.

10. Roddewig, *supra* note 3.

course land restricted to open space may be just what society needs to deal with effects of climate change as Susan French argues in her article.<sup>11</sup>

Nevertheless, the goal of this article is to consider how to remove those private land use restrictions, the covenants running with the land<sup>12</sup> that require land to be used only for golf courses. Repurposing golf courses from that single restricted use to permit alternative uses must be achieved within the context of the legal rules that determine litigation outcomes as well as transactional solutions. What those repurposed uses should be or will be is left for another study and a future article.

## II. GOLFING AND THE BUSINESS OF GOLFING ARE IN STEEP DECLINE EVEN AS GOLF COURSE DEVELOPMENT HAS PROLIFERATED IN THE UNITED STATES

A marked reduction in golfing is occurring because of the serious time commitment and the costs of membership, equipment and other fees, which is reflected in fewer rounds played per year.<sup>13</sup> Three reasons are cited by even the National Golf Foundation (“NGF”). The golf costs are high because with lower numbers playing and fixed costs to maintain the courses, the costs are split between fewer players.<sup>14</sup> Second, it takes too much time. That it takes about four and one-half hours to play a round of golf in a current society that is working longer hours explains why there has been a drop in the number of rounds played by about twenty percent and why the number of closures of golf courses is greater than the building of new ones.<sup>15</sup> Third, golf is too hard. Even with better equipment and technology, the “average score has not improved in decades[.]”<sup>16</sup>

Blake Jeffrey Conant provides much of the data to explain why repurposing has become a goal.<sup>17</sup> While participation peaked in

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11. See Marie Donahue, *Anything but Par for the Course – Exploring the Natural Capital Value of Golf Courses*, NAT. CAP. PROJECT (Oct. 9, 2017), [naturalcapitalproject.stanford.edu/anything-but-par-for-the-course/](http://naturalcapitalproject.stanford.edu/anything-but-par-for-the-course/) (exploring how Community Value of Golf Course Project may even help to keep the land green and open).

12. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1 (2000) [hereinafter RESTATEMENT].

13. F. Kaid Benfield, *Could Placemaking Become the New Golf? Repurposing Obsolete Courses*, HUFFINGTON POST (May 16, 2015), [www.huffintongpost.com/f-kaid-benfield/coud-placemaking-become\\_b\\_6873934.html](http://www.huffintongpost.com/f-kaid-benfield/coud-placemaking-become_b_6873934.html) (discussing the decline of golf and surplus courses).

14. Bobby Clampett, *What is Wrong with Golf Today?*, IMPACT ZONE GOLF (Jan. 25, 2016), [impactzonegolf.com/can-golf-be-saved/](http://impactzonegolf.com/can-golf-be-saved/).

15. *Id.*

16. *Id.*

17. Blake Jeffrey Conant, *Bankrupt Golf Courses: An Historical Analysis and Strategies for Repurposing* (May 2013) (unpublished thesis, University of

2003 with 30.6 million golfers, thirty-eight percent played between one and seven rounds per year, leaving only 18.9 million (sixty-two percent) players completing more than eight rounds per year.<sup>18</sup> Although recent reports of the NGF that he cites hope the participation is levelling off, there is no doubt that golfing has shrunk.<sup>19</sup> The trend has resulted in more golf courses closing than opening.<sup>20</sup> And “the sport is suffering the biggest decline from younger players, according to the National Golf Foundation, with 200,000 players under 35 abandoning the game last year.”<sup>21</sup> With more than 1,000 courses closed between 2003 and 2013 and the NGF expecting that 1,500 to 2,000 would need to close to deal with overbuilding,<sup>22</sup> the prediction is that that this would yield 250,000 to 400,000 acres of land by 2023.<sup>23</sup>

The high costs of maintaining the land to meet golfing requirements and the overbuilding of golf courses especially as amenities in private homeowner associations exacerbates the problems and the need for repurposing the golf course land. The evidence is that many owners of housing within homeowners’ associations that include a golf course as an amenity no longer want that amenity. For example, there are reports that “Retirees Want More Dogs and Gardens, Less Golf and Pickle Ball.”<sup>24</sup> A 2019 article in the Wall Street Journal explains how buyers are concerned about the condition of the courses as a result of the maintenance costs and are shunning golf course communities where it is mandatory for HOA owners to become members of the golf club where those annual

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Georgia) [athenaeum.libs.uga.edu/handle/10724/28702](http://athenaeum.libs.uga.edu/handle/10724/28702).

18. *Id.* at 8.

19. One report is that the total number of golfers fell from 24.7 million to 24.1 million in 2015 alone. Kiley Bense, *Report: More People Are Trying Golf, But It’s Not Sticking*, GOLF (Mar. 8, 2016), [www.golf.com/tour-and-news/report-more-people-are-trying-golf-its-not-sticking](http://www.golf.com/tour-and-news/report-more-people-are-trying-golf-its-not-sticking).

20. Lindsey Rupp & Lauren Coleman-Lochner, *How Golf Got Stuck in the Rough*, BLOOMBERG (June 19, 2014), [www.bloomberg.com/news/articles/2014-06-19/golf-loses-players-as-millennials-find-it-expensive-time-consuming](http://www.bloomberg.com/news/articles/2014-06-19/golf-loses-players-as-millennials-find-it-expensive-time-consuming).

21. Lindsey Rupp & Lauren Coleman-Lochner, *Golf Market Stuck in Bunker as Thousands Leave the Sport*, BLOOMBERG (May 22, 2014), [www.bloomberg.com/news/articles/2014-05-23/golf-market-stuck-in-bunker-as-thousands-leave-the-sport](http://www.bloomberg.com/news/articles/2014-05-23/golf-market-stuck-in-bunker-as-thousands-leave-the-sport); see also Bob Cook, *How a Declining Middle Class is Killing Golf*, FORBES (May 23, 2014), [www.forbes.com/sites/bobcook/2014/05/23/how-a-declining-middle-class-is-killing-golf/#5de76c2f77c1](http://www.forbes.com/sites/bobcook/2014/05/23/how-a-declining-middle-class-is-killing-golf/#5de76c2f77c1) (blaming the reaction of millennials because they have no interest in the sport).

22. Rupp & Coleman-Lochner, *supra* note 21.

23. Conant, *supra* note 17, at 3.

24. John Burns, *Retirees Want More Dogs and Gardens, Less Golf and Pickle Ball*, JOHN BURNS REAL EST. CONSULTING (May 15, 2018), [www.realestateconsulting.com/retirees-want-more-dogs-and-gardens-less-golf-and-pickle-ball/](http://www.realestateconsulting.com/retirees-want-more-dogs-and-gardens-less-golf-and-pickle-ball/); see also, *Out of Office*, WALL ST. J., Oct. 12, 2018, at M15 (citing Burns report that out of 24,000 new home shoppers, only about 10% of retirees wanted a golf course home whereas 73% wanted walking trails and 29% wanted bike paths).



fees are increasing.<sup>25</sup> An early owner of the Fountains of Palm Beach reports that “homes that had previously sold for around \$400,000 traded for less than \$200,000” as the annual fees climbed from \$5,000 to around \$24,000 by 2016.<sup>26</sup> Some members refused to pay, leading to litigation and down spirits. And the impact of the Tax Cuts and Jobs Act in 2017 may also be negative for buyers of housing with golf courses. That legislation limits deductions for mortgage interest and property taxes and doubled the automatic standard deduction. Some suggest that it might make owning expensive housing of the sort that is located in a golf course community less desirable than renting.<sup>27</sup>

At the same time owners/operators of the golf courses see a way out for their declining, less profitable business. In many locations, the fair market value for the land is greater with many other uses, including sometimes just green space.<sup>28</sup> The economic and societal burden of golf course restricted use means that repurposing is being considered widely.

The Galena Territory in northwest Illinois is an example/case study of a golf course(s) that originally served the goals of the developer of a resort community but no longer meet the needs of the owner of the golf courses or the HOA owners of housing benefitted by the restrictive covenants.<sup>29</sup> The Galena Territory includes a large HOA established over forty years ago. Since then an 18-hole golf course and a 9-hole golf course have been added to the resort that now has three 18-hole golf courses and one 9-hole golf course located throughout the 8,000 acres of the Territory. The HOA, luckily as far as many members are concerned, does not own those golf courses. Instead, a separate entity owns a hotel with restaurants, swimming pool, gift shops, a spa, a cross country ski shop, etc. and the four golf courses.<sup>30</sup> The developer’s vision was to create a community on “rolling acres of pristine woodlands and open countryside” in an area described as in the “Driftless Area” which did not get levelled by the glaciers.<sup>31</sup> The developer envisioned a resort inn with golf courses, a riding stable and a homeowners’ association consisting of

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25. Candace Taylor, *Golf-Home Owners Find Themselves in a Hole*, WALL ST. J. (Jan. 10, 2019), [www.wsj.com/articles/golf-home-owners-find-themselves-in-a-hole-11547135191](http://www.wsj.com/articles/golf-home-owners-find-themselves-in-a-hole-11547135191).

26. *Id.*

27. Tim Gavrich, *A Golfer’s Market? New American Tax Laws Might Influence Your Golf Course Real Estate Purchase*, GOLF ADVISOR (Apr. 13, 2018), [www.golfadvisor.com/articles/a-golfers-market-new-american-tax-laws-might-influence-your-golf-course-real-estate-purchase/](http://www.golfadvisor.com/articles/a-golfers-market-new-american-tax-laws-might-influence-your-golf-course-real-estate-purchase/).

28. See Chris Lewis, *When Golf Course Closures are Driven by Higher and Better Uses*, NAT’L GOLD FOUND. (Aug. 2017), [www.thengfq.com/2017/08/when-golf-course-closures-are-driven-by-higher-and-better-uses/](http://www.thengfq.com/2017/08/when-golf-course-closures-are-driven-by-higher-and-better-uses/).

29. Part of the author’s interest in this topic comes from her ownership, since 2004, of a house within the HOA.

30. See EAGLE RIDGE, [www.eagleridge.com](http://www.eagleridge.com) (last visited September 3, 2019).

31. *Id.*

single family houses, townhouses and even a few condominium apartments scattered throughout those acres.<sup>32</sup>

Ownership of the resort property has transferred several times since its development with a goal of each buyer being a turnaround of the business. The most recent sale is to a member of the HOA.<sup>33</sup> These sales respond to problems of the industry.<sup>34</sup> With questions looming about the need for so many courses, the practical real estate question today is “can the owner of those golf courses repurpose them in 2019?” Although the courses are separately owned, the HOA has a veto power for any changes in that use. But, then again, Eagle Ridge has a veto power for any change of use by the HOA of the riding stables that were gifted to the HOA by the developer when it realized that asset was not profitable. While there is an abundance of green space in the Territory and not much of a market for building development, there may be uses that maintain the openness and yet avoid the costs of maintaining some of the golf courses. It looks like a perfect site for community solar panels or wind farming or storm water wetlands<sup>35</sup> or even traditional farming.<sup>36</sup> How making any changes on use of these restricted parcels happen will be interesting to watch.

### III. CREATING PRIVATE GOLF COURSE RESTRICTIONS TO LAND REQUIRES AN UNDERSTANDING OF THE LAW OF COVENANTS RUNNING WITH THE LAND

The basics of covenants running with the land involves privately created limitations on the owner’s right to use the property however he wishes. Understanding such private restrictions and obligations affecting a particular piece of real estate used as a golf course is important for developing strategies for repurposing the land to another use.

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32. NORENE HARBER, *THE HISTORY OF THE GALENA TERRITORY* (1986).

33. Hillary Dickerson, *Eagle Ridge Sold*, *THE GALENA GAZETTE* (May 20, 2019), [galenagazette.com/stories/eagle-ridge-sold,43518](http://galenagazette.com/stories/eagle-ridge-sold,43518).

34. H. Lee Murphy, *Can Regional Resorts Survive?*, *CRAIN’S CHICAGO BUS.* (Apr. 20, 2018), [www.chicagobusiness.com/article/20180420/ISSUE01/180419847/midwestern-full-service-resorts-struggle](http://www.chicagobusiness.com/article/20180420/ISSUE01/180419847/midwestern-full-service-resorts-struggle) (quoting the Bricton Group, that owns Eagle Ridge: “It’s very competitive out there. For every success in turning around a resort, there will probably be a failure somewhere else”).

35. Kris Bass, Mike Burchell, Robert Evans, Bill Hunt, Daniel Line, & Danesha Seth Carley, *Stormwater Wetlands for Golf Courses*, *NC STATE EXTENSION* (Aug. 1, 2012), [content.ces.ncsu.edu/stormwater-wetlands-for-golf-courses](http://content.ces.ncsu.edu/stormwater-wetlands-for-golf-courses).

36. A.G. Sulzberger, *As Crop Prices Soar, Iowa Farms Add Acreage*, *N.Y. TIMES*, (December 30, 2011), [www.nytimes.com/2011/12/31/us/in-iowa-farmland-expands-as-crop-prices-soar.html](http://www.nytimes.com/2011/12/31/us/in-iowa-farmland-expands-as-crop-prices-soar.html); Rosemary Parker, *Ostego Golf Course Goes Back to Farmland Under New Owner*, *KALAMAZOO NEWS*, (Feb. 2, 2015), [www.mlive.com/news/kalamazoo/2015/02/otsego\\_golf\\_course\\_goes\\_back\\_t.html](http://www.mlive.com/news/kalamazoo/2015/02/otsego_golf_course_goes_back_t.html).

### *A. Covenants Running With the Land May Be Affirmative or Negative*

The basic features of covenants running with the land may be negative in restricting use of the land to a purpose or may be affirmative, imposing a duty on one bound by the covenant to use the land in a certain way or to pay an assessment.<sup>37</sup> Although they are analyzed as being different, in reality they overlap. Thus, a covenant by which an owner promises not to use the land for anything but residential housing is restrictive. A promise to pay an assessment to a homeowner's association where the house is located is considered affirmative. These private covenants running are common features of modern commercial real estate development. They are important aspects of homeowners' associations, shopping centers, industrial complexes and planned unit developments. They are used instead of the common law defeasible estates in land such as fee simple on condition subsequent (with its right of reentry held by the party able to enforce a restrictive use), fee simple determinable (with its possibility of reverter held by the party able to enforce a restricted use) and the fee simple on executory limitation (with its right to enforce in a third party) because the Rule Against Perpetuities does not apply;<sup>38</sup> nor do Marketable Title Acts enacted in some jurisdictions. Therefore, covenants running with the land may affect the use of a parcel of land forever.

### *B. Covenants Running With the Land Bind the Original Parties*

Covenants running with the land bind and benefit the original parties. Often these original parties would be the developer and the buyer of part of the parcel. The covenants running also bind and benefit subsequent transferees of the affected land.<sup>39</sup> Express covenants will be created when the owner of the dominant estate that is benefitted and the owner of the servient estate to be burdened comply with the Statute of Frauds and execute a writing that complies. For example, the Mississippi Supreme Court sets forth the common law requirements to have a restrictive covenant run with the land.<sup>40</sup> The following criteria are required: "(1) the covenanting parties must intend to create such covenant; (2) privity of estate must exist between the person claiming right to enforce

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37. RESTATEMENT, *supra* note 12, at § 5.

38. *Id.* at § 3.3.

39. *Id.* at § 5.

40. *Hearn v. Autumn Woods Office Park Property Owners Ass'n*, 757 So.2d 155, 158 (Miss. 1999) (quoting *Vulcan Materials Co. v. Miller*, 691 So. 2d 908, 913 (Miss. 1997)).

the covenant and the person upon whom burden of covenant is to be imposed; and (3) the covenant must ‘touch and concern’ the land in question.” The effect of compliance with the requirements are that “[c]ovenants which run with the land may be enforced by subsequent assignees or successors in title to the original parties.”<sup>41</sup> While requirements vary by jurisdiction, the Restatement (Third) of Property: Servitudes provides recommendations.<sup>42</sup>

An unpublished California appellate opinion sets forth the language in the Declaration of a condominium association that provided standing to sue the successor to the developer of the condominium association and the public golf course.<sup>43</sup> Although the case does not deal with the issue of keeping the restricted land as a golf course where the golf course is not part of the common area of the condominium, it does involve keeping the land vacant, insuring a “pleasant view” over the public golf course for owners of the condominiums, as well as giving those condominium owners and the condominium associations the right to “dictate how and in what manner the golf course will be maintained regardless of the cost.”<sup>44</sup> The language is typical of what might be drafted to accomplish the goal of providing all owners with a “pleasant view.” According to the opinion, the Declaration clearly provides for an easement for a pleasant view across the golf course and requires a monthly assessment for all owners, even though some owners might not be golfers:

Declarant, its successors and assigns, shall have the exclusive right to administer, own and operate Upland Hills Country Club [the original owner and operator of the golf courses], and to develop and administer rules, regulations, and limitations regarding operation of the Golf Course, and use and enjoyment of the Golf Course Property. . . . (a) It is acknowledged that the Owner of each Condominium derives a benefit from the maintenance, upkeep and success of the Golf Course. All views from each Condominium across the greens, lakes and other amenities in the Golf Course, as well as the open space and reduction to overall density of the Project and the Golf Course when considered jointly, materially add to the quality of life in the project, and the value and attractiveness of each Condominium therein.

(b) Because of the interrelationship of the Project and Upland Hills Country Club, each Owner of a Condominium, by virtue of such ownership shall be an “Associate Member” of the Upland Hills Country Club. Upon acquisition of a Condominium by an Owner, each Owner shall acquire the following: . . . (2) a nonexclusive easement of use and enjoyment over the Golf Course, subject to the right of

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41. *Griffin v. Tall Timbers Develop., Inc.*, 681 So.2d 546, 550 (Miss. 1996) (citing *White v. Miss. Power & Light Co.*, 196 So.2d 343 (Miss. 1967)).

42. RESTATEMENT, *supra* note 12, at § 2.1.

43. *Upland Hills Country Club Condo. Ass’n v. Upland Dev.*, E036030, 2006 Cal. App. Unpub. LEXIS 2122 (Cal. Ct. App. Mar. 14, 2006).

44. *Id.* at \*3.

Declarant . . . to administer the use and enjoyment of those easements.<sup>45</sup>

The Declaration also provides a monthly assessment for each condominium to be paid to the original golf owner and its successors and assigns.<sup>46</sup> The Declaration is clear that no condominium owner may exempt himself from this obligation by “not playing golf or non-use of the Golf Course[.]”<sup>47</sup> The Declaration explains this by explaining that “Condominiums in the Project retain views of the Golf Course, not playing golf or non-use of the Golf Course has no bearing on the rationale for, or obligation to pay, the Golf Course Assessment.”<sup>48</sup>

When the document creating the express covenant or express easement is properly recorded under the relevant recordation act, that covenant or easement will benefit and burden successors in ownership to the original parties – hence the term “covenants running with the land” that is beyond the implications under ordinary contracts law. As this article will discuss in Part IV, where the restricted use as a golf course is created by an express covenant, the path for repurposing at least is clear from a legal standpoint.

### *C. Implied Covenants Running With the Land May Be Recognized*

However, even when there is no express covenant running with the land that restricts use of the land, implied covenants running with the land forever may be recognized by an equity court. Before looking at a group of cases that involve recognition of an implied covenant restricting land to use as a golf course, a review of the general rules is appropriate. The Restatement (Third) of Property: Servitudes provides a succinct summary of what its drafters decided should be the basis for recognition of implied covenants running with the land. The Restatement uses the word “servitudes” as a generic term that includes easements and covenants as legal devices private parties can use to create “rights and obligations that run with the land.”<sup>49</sup> The Restatement recognizes implied covenants (those recognized as exceptions to the Formal Requirements of complying with the Statute of Frauds).<sup>50</sup> The exceptions include implied servitudes by estoppel, implication, implied from prior use, implied from map or Boundary reference, implied from general plan, and created by necessity.<sup>51</sup> Courts in Arizona, Nebraska,

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45. *Id.* at \*19-22.

46. *Id.*

47. *Id.* at \*23.

48. *Id.*

49. RESTATEMENT, *supra* note 12, at § 1.1.

50. *Id.* at § 2.9.

51. *Id.* at §§ 2.10-2.15; *see also* Michael E. Buckley, *A Meditation on Implied Restrictive Covenants* (May 15, 2019) (unpublished document on file with the

Oregon, Alabama, Washington, and Nevada have found circumstances sufficient to recognize implied restrictions limiting use of the land to golf courses.

1. *Shalimar v. D.O.C. Enterprises*

This early case dealing with whether or not use of land is restricted to golf course and golfing is cited frequently for its presentation of all the facts relevant to the dispute, a careful analysis of those facts, its discussion of the public policy issues and its clear statement of the rationale of the appellate court's decision.<sup>52</sup>

A review of the facts is critical to understanding of the case. In 1960 when the original developer, Karl Guelich and Associates, acquired the land, it designed a golf course which was intended as an integral part of the general plan for the development and improvement of all the Shalimar property. The plan, including the golf course, was for the purpose of inducing people to buy property in the Shalimar subdivisions and was intended to be for the benefit of those purchasers and their successors in interest. A map showing the proposed development was shown to potential lot buyers and was recorded in the office of the Maricopa County Recorder.<sup>53</sup> Also, there the restrictions for the residential lots were recorded and made reference to the golf course but no restrictions were recorded against the golf course property itself. In addition, brochures and sales materials which depicted and described the golf course were placed on file as a public record with the Arizona Department of Real Estate.<sup>54</sup> The residential lot sales began and the brochures provided to lot purchasers showed a golf course surrounded by numbered home lots. Also, sales were made with representations that the golf course would be maintained as such until the year 2000, with provision for an extension of twenty-five years. A higher price was charged for lots adjoining the golf course, and they have a greater value because of the existence of a golf course. The homeowners chose lots after looking at the plat prepared by Guelich and Associates showing the golf course, and after considering the location of the lots with respect to the golf course.

The trial court found that when the homeowners acquired their property, sales materials, brochures, maps, and plats were shown and given to them and representations and statements were made to them on the basis of which they had reason to, and did,

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author) (last reviewed May 29, 2019) (discussing the Restatement (Third) of Property Servitudes and cases deciding issue of implied restrictive covenant or not based upon his representation of homeowner associations).

52. *Shalimar Ass'n v. DOC Enterprises, Ltd.*, 688 P. 2d 682 (Ariz. Ct. App. 1st Div. 1984).

53. *Id.* at 683-84.

54. *Id.*

understand and believe that the golf course would continue to be maintained and used as a golf course. The trial court pointed to evidence showing this marketing by the developer caused buyers to rely on the promise that the use of the golf course was restricted to that purpose for the term of the restrictions. The court also found that the homeowners who purchased lots adjoining the golf course would not have bought those lots except for the presence of the golf course and representations that its use was restricted to a golf course and that it would be maintained for that purpose for the term of the restrictions.<sup>55</sup>

The record showed that when the current owner of the golf course became interested in the purchase of the land in 1978, there was actual and constructive notice about the restricted use of the land. First, the current owner made an offer contingent on proof that there were no restrictions about the use of the land. This contingency was rejected by the real estate agent. Prior to closing the acquisition of the golf course land, DOC Enterprises saw the recorded plats which showed the golf course property, surrounded by residential lots. They also saw the restrictions, which contained numerous references to the golf course, which contains an easement for a golf cart path.

The golf course owners saw and drove on the golf course and knew that it was surrounded by homes with a view overlooking it. A preliminary title insurance report stated that it did not insure “against loss by reason of any facts, rights, interests, or claims which are not shown by public record but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.”<sup>56</sup> City of Tempe officials informed them in the due diligence phase that any development of the area would be “highly controversial” and would be vigorously opposed by the homeowners. Moreover, there was evidence that DOC Enterprises made no inquiry of and had no discussion with City of Tempe officials as to any legal restrictions on the property other than zoning. They intentionally made no inquiry of the original developer or of any homeowners in the area.<sup>57</sup>

On the basis of these facts, the trial court found that at or prior to the time they acquired their interest in the subject property, DOC Enterprises had actual or constructive notice, and they had information on the basis of which they had a duty to inquire and thereby would have learned of the golf course restrictions. In effect, they were not “bona fide purchasers without notice.” Still the trial court had to deal with legal issues including: 1) whether restrictions upon the use of land may arise other than by deed or written instrument so as to bind a purchaser with notice and 2) whether the

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55. *Id.* at 685.

56. *Id.* at 686.

57. *Id.* at 686.

requirements of the Statute of Frauds are applicable in this case.

As to the first issue, appellants argued that the Arizona Supreme Court long ago held that an equitable servitude in favor of one parcel of land and against another must be created by a written instrument.<sup>58</sup> The court rejected this argument and found that *Werner* does not apply to the facts of this case. In *Werner*, the lot owners were not seeking in common to enforce restrictions against the common grantor or his successor, but were seeking to enforce what were claimed to be recorded mutual restrictions against other lot owners. In the present case, the homeowners were seeking not to enforce among themselves mutual restrictive covenants, but to enforce the promise of the developer as to the use of land retained by him. The developer retained the land and sold surrounding lots with the promise that the land retained would be used only as a golf course.<sup>59</sup>

As to the second issue, the court acknowledged that an oral agreement for the sale of real property or an interest therein is unenforceable by reason of the Statute of Frauds, per A.R.S. § 44-101(6), and that equitable restrictions are generally considered interests in land which come within the provisions of the Statute of Frauds.<sup>60</sup> However, the court found that both the estoppel and part performance exceptions to the Statute of Frauds apply to the golf course restriction here. Here the original developer “orally represented to the homeowners that the golf course property retained by them was subject to restrictions which would ensure the existence of the golf course until the year 2025.”<sup>61</sup> “It would not be fair, under such circumstances, to permit the grantor (or the grantor's successors taking with notice) to raise the absence of a writing as a defense.”<sup>62</sup> Furthermore, the conduct of the previous owners of the golf course property can only be consistent with the claimed oral representations made by Guelich, and therefore part performance applies to take this matter out of the Statute of Frauds.<sup>63</sup> The Court of Appeals upheld the trial court’s findings that an implied covenant restricting the use of the property to a golf course arose from the sale of adjacent lots to the homeowners. The court found that it was enforceable against appellants as subsequent purchasers who took their ownership with notice of the restriction and there was an ample evidence to uphold this determination.

The Court held the implied restrictive covenant against appellants as successors in interest to the developer. The Court of Appeals found that the record showed beyond dispute “that the

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58. *Werner v. Graham*, 181 Cal. 174 (1919).

59. *Shalimar Ass'n*, 688 P. 2d at 687.

60. RESTATEMENT OF PROPERTY § 522 (1944).

61. *Shalimar Ass'n*, 688 P. 2d at 689.

62. *Id.* at 688.

63. *Id.*



intervening purchasers from the developers, the Randolphs and then the Hills, knew of the restrictions and complied with them, operating the golf course continuously during their ownership.”<sup>64</sup> As for appellants, the trial court found:

At or prior to the time the [appellants] acquired their interest in the subject property, they had an actual or constructive notice, they should have known, and they had information on the basis of which they had a duty to inquire and thereby would have learned, of the golf course restrictions. The defendants are not bona fide purchasers without notice.<sup>65</sup>

The Appellate Court sustained the trial court ruling against appellant’s next argument that economic frustration renders the golf course restriction unenforceable. The Court rejected the conclusion appellants argued that because the golf course historically had not been profitable to its owners, the restrictions should terminate. The Court was not persuaded by the argument of appellants that “to require them to actively operate the golf course, even at a loss, amounts to ‘outright bondage’ rather than just a negative restraint on the use of the land.”<sup>66</sup> The Court agreed with the determination of the trial court that the purpose of the golf course has not been defeated nor frustrated by any change affecting the golf course and the Shalimar subdivisions. A mere change in economic conditions rendering it unprofitable to continue the restrictive use is not alone sufficient to justify abrogating the restrictive covenant. The court noted that if the original purpose of the covenant can still be realized, it will be enforced even though unrestricted use of the property would be more profitable to its owner. The Court of Appeals acknowledged though that if problems arise regarding the operation of the golf course it may be necessary for the trial court to consider further orders relating thereto.<sup>67</sup>

Finally, appellants argued that the duration of the restriction should continue only for a reasonable length of time instead of the period fixed by the court. Based on evidence introduced at trial, the appellate court rejected that argument. Testimony showed that the developer represented to the homeowners that the golf course restriction would exist until the year 2000 and then would be renewed for an additional twenty-five years, unless rejected by the majority of the homeowners. The court determined that the duration of the obligation respecting the use of the property must be determined from the intent of the original promisor and promisee.<sup>68</sup> The only question left was whether appellants knew or should have known of the duration of the implied restrictive

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64. *Id.* at 690.

65. *Id.*

66. *Id.* at 691.

67. *Id.* at 692.

68. *Id.*

covenant, so that they should be held to the restriction for the same time period. The investigation made by appellants led to an examination of the restrictions recorded against the Shalimar subdivision property. The trial judge found that appellants did in fact become aware of these restrictions. The restrictions are for the specific purpose of enhancing the view of the golf course for the benefit of the homeowners. Thus, it was reasonable that the golf course use restriction was intended to remain in effect at least as long as the other related restrictions. Also, under its reasonable inquiry responsibility as a purchaser of real estate, DOC should have communicated with the homeowners themselves to learn their understanding of the restriction assuring the existence of the golf course. The Court of Appeals concluded that appellants were placed on inquiry notice and, had they made a reasonable investigation, would have learned of the duration of the implied restriction.

Therefore, the Court of Appeals upheld the trial court decision that a covenant restricting the use of the property is implied from the facts and circumstances and is enforceable against the new owners because they were not bona fide purchasers without notice of those restrictions limiting the use of the land to a golf course and requiring its operation until 2025.

## 2. *Skyline Woods Homeowners Association v. Broekemeier*

The Supreme Court of Nebraska upheld a district court decision that restrictive covenants survived bankruptcy sale of the golf course property in a case where homeowners of land adjacent to the golf course are protected by the implied restrictive covenants doctrine because of their reasonable reliance on developer's representations.<sup>69</sup> David Broekemeier and his company Liberty purchased the golf course land in a Chapter 11 bankruptcy sale. The bankruptcy court's order approved the sale of the property "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)."<sup>70</sup> David Broekemeier informed members of the Skyline Country Club that the bankruptcy sale released him and the company from the obligations to maintain the land as the golf course. One year later, after Broekemeier closed the golf course, the property deteriorated. The Skyline Woods Homeowners and Association brought a suit to compel the property's continued use and maintenance as a golf course.

The Nebraska court addresses the issue of the creation of

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69. *Skyline Woods Homeowners Ass'n v. Broekemeier*, 758 N.W.2d 376 (Neb. 2008).

70. *Id.* at 381.

restrictive covenants, and found that the record is replete with testimony supporting the existence of a common scheme of development establishing implied restrictive covenants.<sup>71</sup> The developer testified that the golf course was the “center and the heart” of the residential development project.<sup>72</sup> The court also concluded that these homeowners should be protected by implied restrictive covenants not only because the homeowners relied on the existence of the golf course when purchasing their property, but they also have been required to take certain precautions for their property because of the golf course which supports the existence of a common scheme or plan giving rise to an implied restrictive covenant.<sup>73</sup> Like the homeowners in *Shalimar* case, “restrictions placed on their properties referencing and affecting the golf course, which supports the existence of a common scheme or plan giving rise to an implied restrictive covenant.”<sup>74</sup>

Liberty and Broekemeier argued that restrictive covenants running with the land were unenforceable because they were not recorded in the accordance with Nebraska’s statute. However, the court finds that argument without merit since “implied restrictive covenants are only enforceable against a subsequent purchaser who buys the property and has knowledge of the covenants.”<sup>75</sup> Here, Broekemeier had notice of the implied restrictive covenant and failed the duty of inquiry as a prudent purchaser. He knew that land was used only as a golf course for a long time before the bankruptcy sale.<sup>76</sup> Moreover, his company obtained title insurance that listed as an exclusion from the policy the unrecorded easements that could have been ascertained by an inspection of the land.<sup>77</sup>

Additionally, Liberty and Broekemeier argued that the bankruptcy sale extinguished any covenants running with the land as “free and clear of any interest under 11 U.S.C. § 363(f) (2000).”<sup>78</sup> The trial court determined that the bankruptcy order authorizing the sale to Liberty did not extinguish the implied restrictive covenants limiting the property to the use as a golf course, because such interests are not within the meaning of “any interest” in the bankruptcy code.<sup>79</sup> The restrictive covenants create property, non-monetary interests, and the bankruptcy code does not apply to

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71. *Id.* at 390.

72. *Id.*

73. *See* *Walters v. Colford*, 900 N.W.2d 183, 191 (Neb. 2017). In this more recent Nebraska case, the Nebraska Supreme Court refused to enforce restrictive covenant by implication against owners of the adjacent property because the property of the Defendants was outside of the planned development thus distinguishing the Broekemeier case. *Id.*

74. *Skyline Woods Homeowners’ Ass’n*, 758 N.W. 2d at 390.

75. *Id.*

76. *Id.* at 391.

77. *Id.*

78. *Id.* at 392.

79. *Id.* at 393.

them.<sup>80</sup> The trial court view was approved on appeal.

3. *Mt. High Homeowners Association v. J. L. Ward Construction Co.*

The plaintiff HOA brought the action against defendant, the developer and owner of a golf course and, in part, sought a declaration that an equitable servitude existed restricting use of the golf course property. In response to this claim, Defendant argued that the evidence presented at trial was insufficient to satisfy the requirements for an equitable servitude by estoppel, as set forth in the Restatement (Third) of Property: Servitudes § 2.10 (1998).

The appellate court determined that equitable servitude by estoppel is created when either an express or implied representation is made under circumstances where it is reasonably foreseeable that the person to whom the representation is made will rely on it, when that person does so rely and such reliance is reasonable, and the establishment of a servitude is necessary to avoid injustice. The record showed that the Mountain High subdivision was marketed to prospective purchasers as a “golf course community,” with flyers, brochures, and advertisements touting the golf course as one of the benefits of living in Mountain High. A monument at the entrance to the community included a sign reading “Mountain High Golf Villages,” and a fence encircled the entire development, including the golf course.<sup>81</sup> Defendant represented to buyers that Mountain High was and would continue to be a golf course community. That representation was made both expressly and impliedly.

It was reasonably foreseeable that, in deciding whether to purchase land within Mountain High, a prospective buyer would rely on those representations and substantially change position as a result of that reliance. It was reasonable for buyers to rely on the representations of the developer of Mountain High and the owner of the Mountain High golf course in making their decisions to purchase in the community. The plaintiff owners did, in fact, purchase property in Mountain High, substantially changing their positions as a result of defendant's representations. Members of the homeowners' association testified that they paid a premium to have property in such a community and that the presence of the golf course was essential to their decisions to purchase.<sup>82</sup> The Appellate Court held, therefore, that it would be unjust for defendant to benefit from the successful marketing of Mountain High as a “golf course community” without the imposition of the servitude.<sup>83</sup>

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80. *Id.*

81. *Mt. High Homeowners Ass'n v. J.L. Ward Constr. Co.*, 209 P.3d 347, 349 (Or. Ct. App. 2009).

82. *Id.*

83. *Id.* at 355.

#### 4. *Heatherwood Holdings, LLC v. HGC, Inc.*

Like the *Skyline Woods Homeowners Ass'n v. Broekemeier* case, here the owner/operator of the golf course filed for Chapter 11 Bankruptcy protection. Heatherwood, the owner, operator and manager of the Heatherwood Golf Club filed for Chapter 11 bankruptcy protection against a bank and the HOA, seeking a determination that Heatherwood could sell the real property free and clear of all liens, encumbrances and restrictions. The HOA responded by asserting that the golf course property was subject to an implied covenant running with the land and restricting its use as a golf course.<sup>84</sup> The HOA relied on the decision from the Arizona Court of Appeals in the 1984 *Shalimar* case. Because the facts in this case were similar to the facts in *Shalimar* and because of the lack of clear Alabama precedent, the bankruptcy court certified questions to the Supreme Court of Alabama, including whether Alabama law recognizes or will imply a restrictive covenant as to a golf course constructed as part of a residential development consistent with a case with similar facts.<sup>85</sup>

The Alabama Supreme Court responded to those questions by finding that the holding and rationale of *Shalimar* are consistent with Alabama law regarding implied restrictive covenants.<sup>86</sup> The Alabama Supreme Court explained that Alabama case law has recognized at least five methods of establishing that an original grantor of property to be developed as a subdivision intended a common scheme of development. Proof of one or more of the following should be offered: universal written restrictions in all of the deeds of the subdivision; restrictions in a substantial number of such deeds; the filing of a plat showing the restrictions; actual conditions in the applicable subdivision; or acceptance of the actual conditions by the lot owners.

The Alabama Supreme Court then noted the evidence that had been presented to the bankruptcy court. That evidence included recorded plat maps, recorded restrictive covenants, general information documents that included references to the property as a golf course and which explained that each owner of a residence would be required to be a member of the golf club and marketing materials, advertisements and a sign describing the subdivision as a golf-course community and was sufficient to indicate that the original grantor intended a common scheme of development that included the golf-course property as an integral part of that development and as an inducement to purchasers of the residential

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84. *Heatherwood Holdings, LLC v. HGC, Inc.*, 746 F.3d 1206 (11th Cir. 2014).

85. *Shalimar Ass'n*, 688 P. 2d at 687.

86. *Heatherwood Holdings, LLC v. First Continental Bank*, 61 So. 3d 1012 (Ala. 2010).

lots.<sup>87</sup> The Alabama Supreme Court expressly disagreed with Heatherwood’s suggestion that “an express unambiguous restriction must exist in some of the documents of record in order for a common plan or scheme and an implied covenant to exist.”<sup>88</sup>

With the answers to the questions about Alabama property law in front of it, the bankruptcy court determined that there was an enforceable implied restrictive covenant and found that the “initial development and marketing of the Heatherwood subdivision, as well as the sign, street names, easements, plat maps and actual use created an implied restrictive covenant restricting the use of the golf course property to use as a golf course.”<sup>89</sup> The bankruptcy court held that there was “ample evidence that [Heatherwood] had actual as well as constructive and inquiry notice of the implied restrictive covenant restricting the property at issue to use as a golf course.”<sup>90</sup> The bankruptcy court rejected the estoppel by deed defense brought by Heatherwood based on the “availability of information in open view and for public viewing.”<sup>91</sup> The bankruptcy court denied Heatherwood’s application to sell the real estate free and clear of liens, interests and encumbrances. The Federal District Court affirmed the decision of the bankruptcy court; and, the Eleventh Circuit Court of Appeals affirmed the Federal District Court.

##### 5. *Riverview Community Group v. Spencer & Livingston*

In a case of first impression, the Supreme Court of Washington held that a restrictive covenant may be created by the property developers’ representations about a property anchoring a development, and that such representations may impose a servitude if, among other things, they are made by someone with the authority to burden the property.

The facts surrounding development of the land owned by plaintiff, a community group of homeowners which the Court held had standing to bring the lawsuit, and the land owned by defendants who had developed the land over a twenty year period starting in the 1980’s as the Deer Meadows Golf Course Complex including a golf course, restaurant, hotel, store and club, are important to the Court’s ruling that an implied restrictive covenant may be imposed on the land.<sup>92</sup>

Plaintiff, Riverview Community Group, many of the

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87. *Heatherwood Holdings, LLC v. HGC, Inc.*, 746 F. 3d 1206 (11th Cir. 2014).

88. *Id.* at 1215.

89. *Heatherwoods Holdings LLC v. First Commercial Bank*, 454 B.R. 495, 527 (Bankr. N.D. Ala. 2011).

90. *Id.* at 528.

91. *Id.* at 530.

92. *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn. 2d 888 (Wash. 2014).

homeowners in the development, but not an HOA, sought to bar the developer partnership from selling off the former golf course as sites for individual homes. The Spencer & Livingston partnership had been developing the land for over twenty years before the lawsuit. This partnership built the Deer Meadows Golf Course Complex, platted several nearby parcels of property into subdivisions, and sold lots to private land owners for homes and vacation properties. The recorded plat indicated a golf course, and an image of the plat was used to help advertise the development. At the time, one of the partner had acknowledged that they built the golf course complex “so it would help sell the residential lots around here,” and the lots were advertised accordingly.<sup>93</sup> After those twenty years, the remaining partner closed down the golf course complex and began the process of platting the course into new residential lots. Many homeowners at the time of the purchase believed they had been promised that the golf course complex would remain a permanent fixture of their community, and they had made the decision to purchase homes based in part on that promise.<sup>94</sup>

Plaintiff sought to impose an equitable servitude on the golf course property that would limit its use to a golf course or, if that was untenable, for other equitable relief. It also sought injunctive relief.<sup>95</sup> Defendant argued that equitable servitudes were not available in Washington unless created in writing. The trial court issued an order stating that “the legal issue of whether an equitable servitude can be created by implication is a question of first impression in the State of Washington” and granted summary judgment in favor of the defendants.<sup>96</sup> The Court of Appeals concluded that Washington recognized equitable covenants and the Supreme Court affirmed.

In its analysis, the Washington Supreme Court relied on the precedents in determining that the Statute of Frauds does not bar the creation of a covenant because the homeowners’ relief did not rest on creation of an interest in the disputed land but on “equitable principles” and the Statute of Frauds is no barrier, at least when there is some writing, such as a plat, that supports the imposition of the burden. The court recognized in the previous cases that words on the face of a plat, such as “golf course” on one of the recorded plats here, can establish an equitable covenant limiting the use of land and that “it is even possible for covenants to be enforced against those who have no covenant appearing on their title.”<sup>97</sup> In its rationale, the court adopted the reasoning in the similar case from Oregon.<sup>98</sup> In that case homeowners who made decisions to buy

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93. *Id.* at 891.

94. *Id.*

95. *Id.*

96. *Id.* at 892.

97. *Id.* at 897-98.

98. *Mountain High Homeowners Ass’n v. J.L. Ward Co.*, 209 P.3d 347 (Or.

their properties based on developers' representations sought restrictions on the use of land as golf course. The court in Oregon imposed an equitable servitude after found that developer made representations, and the buyers reasonably relied on those representations when they made decision to purchase the properties and it substantially changed their positions. The Oregon court held that it would be unjust for the defendant to benefit from the successful marketing of Mountain High as a "golf course community" without the imposition of the servitude.<sup>99</sup> In the *Mountain High* case, the court found that plaintiff had presented sufficient evidence to prove that those with the power to burden the property induced purchasers to purchase lots on the promise that the golf course would remain a permanent fixture of the community.<sup>100</sup> Thus, the court held both equitable and injunctive relief may be available. Agreeing with the analysis and considering the facts in the *Riverview Community Group* case, the Supreme Court of Washington held that plaintiffs had presented sufficient evidence to survive the summary judgment motion and remanded the matter to the trial court.<sup>101</sup>

6. *Frederic & Barbara Rosenberg Living Trust v. MacDonald Highlands Realty*

Nevada law has not recognized implied restrictive covenants based on a common development scheme, and the Supreme Court of Nevada refused to adopt the doctrine in a case decided in 2018.<sup>102</sup> Michael E. Buckley, an experienced transactional attorney who represents HOAs in Las Vegas that are affected by golf course repurposing proposals, provides the following summary of the facts of the case:

The case involved two lots within the MacDonald Highlands master-planned community in Henderson, Nevada. The lots bordered each other as well as the Dragon Ridge Golf Course....In 2012 Shahin Malik desired to purchase an undeveloped lot, and insisted that the lot be expanded to include a portion of the golf course constituting and out of bounds area between the lot and the ninth hole of the golf course. The Court observed, there was no express agreement that the out-of-bounds parcel would remain part of the golf course, or even that the golf course would remain a golf course in perpetuity. Further there was no public dedication for the golf course.

In order to include the out of bounds parcel in the sale, the property had to be rezoned. Relying on the seller's broker's commitment to

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Ct. App. 2009).

99. *Id.* at 355.

100. *Id.*

101. *Riverview Cmty. Grp.*, 181 Wn. 2d at 899.

102. *Frederic & Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC*, 427 P. 3d 104 (Nev. 2018).



proceed with the rezoning, Malik purchased the lot in August, 2012. The MacDonald parties gave notice and held a homeowners' association meeting to discuss rezoning. This was followed by public hearing before the Henderson planning commission and City Council, both of which approved the rezoning without objection. In January 2013 the city adopted a new map reflecting the zoning change and the final map was recorded in June 2013.

During the period Malik was acquiring the lot and the golf course parcel, Bank of America owned the neighboring lot. Bank of America received notices of the rezoning, but did not object. In February 2013 Barbara Rosenberg sent a letter of intent to Bank of America expressing an interest in purchasing the lot and the Rosenberg Trust acquire the property in May 2013. The court specifically notes that the sale was "as is," "where is," and "with all faults."

The deed conveying the out of bounds parcel to Malik was recorded on June 26, 2013. When the Trust learned that Malik had purchased the out of bounds parcel, it filed a complaint seeking, among other things, the imposition of an implied restrictive covenant prohibiting Malik from constructing anything on the out of bounds parcel.

Each side filed a motion for summary judgement.<sup>103</sup>

In response to the claim the trial court determined that under Nevada law, "there is not an implied easement or implied restrictive covenant requiring property formerly owned by a golf course to remain part of the golf course indefinitely, especially where that property was not a part of the playable grass area of the golf course."<sup>104</sup> The district court also concluded that the Trust did not provide evidence demonstrating that an implied restrictive covenant would preserve anything other than its view, light, or privacy.<sup>105</sup>

On the appeal the Trust argued that Nevada actually recognized implied covenant and cited two cases to support this argument. The Supreme Court rejected this argument and explained that recognition in the first case was given in a situation, where there was an express agreement and a public land dedication. As for the second precedent, the court pointed out that Trust erred when used the term "implied easement" interchangeably with "implied restrictive covenant." The court explained the difference between these two property interests and defined implied easement as right "to use in some way the land of another" whereas the Trust was seeking the restriction of the use of land by another of his or her own property because "[t]rust claimed that a restrictive covenant should be implied from the existence of the common development plan, requiring the out-of-bounds parcel to remain

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103. Michael E. Buckley, *A Meditation on Implied Restrictive Covenants* (May 15, 2019) (unpublished document on file with the author) (last reviewed May 29, 2019).

104. *Frederic & Barbara Rosenberg Living Trust*, 427 P. 3d at 109.

105. *Id.*

part of the golf course in perpetuity.”<sup>106</sup> In its analysis, the court emphasized that it never previously acknowledged implied restrictive covenants in the context of a common development scheme, nor has it stated that one exists under Nevada law.<sup>107</sup> The court noted, that even though other jurisdictions recognized them, implied restrictive covenants are generally disfavored.<sup>108</sup>

Even though Trust was arguing its claim basing on the elements of implied easement, the court acknowledged that restrictive covenant by implication may arise when the “following elements are established: (1) there is a common grantor; (2) there is ‘a designation of the property subject to the restrictions;’ (3) there exists a general plan or scheme of restriction for such property; and (4) the restrictions run with the land.”<sup>109</sup> Thus, there must be evidence of a scheme or intent that the entire tract should be similarly treated, so that once the plan is effectively put into operation, the burden placed upon the land conveyed is by operation of law reciprocally placed upon the land retained. Implied restrictive covenants, the court noted, are enforceable against the grantor or a subsequent purchaser of the lot from the grantor with notice, either actual or constructive. Trust was able to prove only the first element because MacDonald Highlands was the common grantor of the residential lots as the developer of the master planned community. However, Trust failed to establish the remaining elements: there was no evidence presented of developer’s intent to restrict the use of the out-of-bounds parcel, or any evidence in the record demonstrating that the out-of-bounds parcel was used as part of the golf course or that the sale of the out-of-bounds parcel diminishes the ability to use the golf course, or of that developer ever expressed, implied, or intended that the out-of-bounds parcel would perpetually be part of the golf course or that Malik or his predecessors in interest were on either actual or constructive notice of such a restriction.<sup>110</sup> In sum, the court found that Trust failed to demonstrate that the elements of an implied restrictive covenant were met in this case and concluded that trial court correctly granted summary judgment on this claim on behalf of Defendant.

#### IV. THERE ARE A VARIETY OF WAYS TO TERMINATE THESE RESTRICTIVE COVENANTS TO ALLOW OTHER USES<sup>111</sup>

Restatement (Third) of Property: Servitudes provides a section

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106. *Id.* at 110.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See RICHARD POWELL, POWELL ON REAL PROPERTY § 60.10 (1968) (listing eight types of conduct by the parties, including release, that can result in termination of a restrictive covenant); see also DAVID A. THOMAS, 7

on “Modification, Extinguishment and Termination of Servitudes” which, while not binding authority, does provide current thinking on this topic. These sections appear to be most relevant to dealing with private restrictive covenants that inhibit repurposing of golf courses, including those that expire where the life of the servitude expressly is limited.<sup>112</sup> The voluntary extinguishment by the parties emphasizes that the release must comply with the Statute of Frauds.<sup>113</sup> While a servitude benefit may be modified or extinguished by abandonment, the latter is purposely difficult to prove because it “creates a windfall in the owner of the servient estate, often without any corresponding benefit to the abandoning beneficiary[.]”<sup>114</sup> Nevertheless, the most developed section on modification and termination of a servitude is “because of changed conditions.”<sup>115</sup> Research shows how complicated and difficult modification or termination of private restrictive covenants may be in situations where repurposing golf courses are involved.

### A. Release

The power to voluntarily release the benefits or burdens of a covenant voluntarily are available to the parties who benefit from a restrictive covenant in order to permit those owning the golf course property to repurpose the land to alternative uses. Amending or terminating covenants that run with the land affect all of the landowners, including owners in an HOA. Parties to the covenants may release the burdens and benefits voluntarily. However, releasing the original covenants in a large neighborhood is nearly impossible. Covenants running may include amendment or termination clauses, but they require the owners of the dominant tenement to release their benefits to be effective. In many situations, the number of owners who must agree for such an undertaking to occur is impossible for the burdened party to achieve.

In a 2017 Florida case<sup>116</sup> plaintiff purchased a golf course in 2006 that had been operating since the 1970s on land burdened by express restrictive covenants requiring its use as a golf course for a specified time unless “amended, modified or terminated by the affirmative vote of the owners of not less than two-thirds (2/3) of the

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THOMPSON ON REAL PROPERTY § 61.07 (Thomas Editions 1998) (discussing Termination of the Covenant or of the right to enforce it).

112. RESTATEMENT, *supra* note 12, at § 7.2 (this approach is generally accepted and compares with Restatement of Property § 554).

113. *Id.* at § 7.3 (noting that release may be partial or complete).

114. *Id.* at § 7.4.

115. *Id.* at § 7.10.

116. *Victorville West Ltd. P’ship v. The Inverrary Ass’n, Inc.*, 226 So. 3d 888 (Fla. Ct. App. 4<sup>th</sup> Dis. 2017), *rev. denied*, No. SC17-1729, 2018 Fla. LEXIS 575 (Fla. Mar. 5, 2018).

land area.”<sup>117</sup> The golf course was burdened by an express restrictive covenant limiting its use to “recreational purposes.” Because golf course membership, particularly among young members of the Inverrary community, had dropped off dramatically and Victorville had suffered economically, Victorville asked the HOA benefitted by the restrictive covenants to hold a vote on a proposal to terminate them. But the Inverrary Association refused to hold a vote on the matter of terminating the restrictive covenant to allow the golf course to be repurposed. When Victorville attempted to hold its own vote on the matter, only one to two percent of residents attended. The residents indicated that they enjoyed the benefits of having the golf course, even if they did not play golf because “it provided a tranquil view, prevented overcrowding, and preserved the nature of the community.”<sup>118</sup>

Victorville demonstrates how the size of a community often creates barriers to the voluntary termination of benefits. The situation is analogous to deconversion of condominiums into rental units, especially in urban areas where the condominiums are neglected and in need of expensive renovation. As with the golf course restrictions, the declaration of condominium restricts use of the units and common area and likely has an affirmative covenant requiring payment of assessments. Unless there is a smaller than unanimity vote required for deconversion, there can be none if there is even one holdout.<sup>119</sup> Perhaps, having a time limit on the life of the condominium association or HOA<sup>120</sup> would enhance the possibility of repurposing, though benefitted land owners might still argue they have an implied restrictive covenant protecting their property rights.

And, a 2016 Florida case<sup>121</sup> held that a statute allowing deconversion of condominiums was an unconstitutional imposition on the unit owners’ contractual rights. The Declaration of the condo association required unanimous approval to deconvert the condominium community into apartments. An amendment to the existing deconversion statute required only eighty percent of owners to vote in favor of deconversion. The court determined that because the deconversion amendment applied retroactively to

117. *Id.* at 889.

118. *Id.* at 890.

119. See, e.g. Alby Gallun, *No Deal Is Good Enough for these Condo Insurgents*, CRAIN’S CHI. BUS. (July 16, 2018), [www.chicagobusiness.com/article/20180713/ISSUE01/180719926/condo-deconversions-hampered-by-holdouts-in-chicago](http://www.chicagobusiness.com/article/20180713/ISSUE01/180719926/condo-deconversions-hampered-by-holdouts-in-chicago) (describing condo owners who will not sell to developers that want to turn their buildings into apartments).

120. See, e.g. Brian Meltzer, Martin A. Schwartz, & Matthew J. Leeds, *Time to Rehab the Aging Condominium Concept: Fixing Problems Uncovered by the Great Recession*, 33 PRAC. REAL EST. LAW. 37 (Sept. 2017) (suggesting ways to deconvert and other transactional solutions).

121. *Tropicana Condo. Ass’n, Inc. v. Tropical Condo.*, 208 So. 3d 755 (Fla. Ct. App. 2016).

existing condominium communities and because the condo Declaration did not provide “as amended from time to time,” the legislation impaired the express the veto rights of condo owners who do did not want to deconvert and was not valid.<sup>122</sup>

The Victorville parties ended up in this litigation when the attempts to have a vote on release failed. The golf course owner argued that changed circumstances terminated the covenants restricting use of the land to golf courses. The court held that lack of profitability is an inadequate reason to terminate an express restrictive covenant, as it does not prove the restriction is null and the owners of the dominant estate may still benefit from enjoying the golf course property in its open/restricted form.

### *B. Abandonment*

Property owners benefiting from the restrictive covenant on a golf course could abandon the benefits they receive by burdening the land. The benefiting property owners could express or imply by action to the owner of the golf course that they no longer plan to use the benefits bestowed by the restrictive covenants and have no plan to use them in the future. Abandonment of the benefits releases the restrictive covenant allowing the golf course to be repurposed.<sup>123</sup>

### *C. Changed Circumstances*

While owners of servitudes from restrictive covenants may lose those property rights upon a showing by the owner of the burdened land that conditions have changed,<sup>124</sup> this approach to terminating the restriction to allow repurposing of golf courses is challenging. A North Carolina appellate case ruled against the golf course owner who argued that “radical changes” and “frustration of purpose” principles entitled it to close the golf course.<sup>125</sup> The court stated it could not find a single case where radical changes were proved by financial hardship within a community as golf course owner defended.<sup>126</sup> The court ruled that frustration of purpose is not available where the frustrating event is reasonably foreseeable.<sup>127</sup> Still, in a later bankruptcy action by the golf course owner, the judge ruled that the restrictive covenant was only a personal covenant that did not run with the land to subsequent owners and that bankrupt golf course owner had proved changed circumstances

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122. *Id.* at 756.

123. *See* RESTATEMENT, *supra* note 12, at § 7.4.

124. *Id.* at § 7.11.

125. *Fairfield Harbour Prop. Owners Ass’n v. Midsouth Golf, LLC*, 215 N.C. App. 66 (N.C. Ct. App. 2011).

126. *Id.* at 75.

127. *Id.* at 78-79 (citing *Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 602 (N.C. Ct. App. 2002)).

sufficiently to eliminate it.<sup>128</sup>

Will the “changed circumstances” caused by climate change affect a court’s decision here? A federal district court case considering the defendant golf course owner’s argument that it should be excused from performance of express, recorded restrictive covenants requiring use only as a golf course because of drought conditions in Nevada in not reported footnotes ruled that defendants provided no evidence of “any water restrictions or increased costs due to the drought or any associated water shortage.”<sup>129</sup> Whether proof of drought caused by climate change as the cause of water restrictions imposed on a golf course would be sufficient to convince a court that this comes within the changed conditions doctrine of servitude modification or termination is yet to be explored.

To the extent that the parties can work successfully to negotiate an agreement by which all or part of golf course land is available for repurposing, the need to litigate with its resulting expense and time lag may be avoided. Part V presents several examples and Part VI proposes ways transactional attorneys can help clients meet such goals.

## V. EXAMPLES OF CONVERSIONS OF GOLF COURSES NATIONALLY DEMONSTRATE THE WIDE VARIETY OF GOLF COURSE DEVELOPMENTS AND ACCOUNT FOR THE NEED TO DEAL WITH ISSUES ARISING FROM REPURPOSING NIMBLY

Golf courses impact the fair market value of real estate around them. The National Association of Realtors reported in 2015 that golf courses boosted home values on an average of \$8,849.<sup>130</sup> As a society, we highly value the utility that parks and other recreational open spaces bring to us. So why repurpose such land? Perhaps through applying the doctrine of “highest and best use” of the land under the analysis of Social Function view of property ownership described in Part I the value of not developing golf course real estate an argument can be made. In analyzing the transactional legal aspects of repurposing golf courses, one must consider the variety of golf course types, their unique functions, and issues that arise like the argument that repurposing is a “Taking” under property law.

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128. In re Midsouth Golf, LLC, 549 B.R. 156 (Bankr. E.D.N.C. 2016); see Brian S. Edlin, *Fore! Golf Courses and Housing: Drafting for the Hole in One, Avoiding Judicial Sand Traps*, ACREL NEWS & NOTES (Nov. 2018) (discussing the inconsistent results in cases where the golf course owner argues termination of the restriction).

129. *Hellerstein v. Deseert Lifestyles, LLC*, No. 15-cv-01804-RFB-CWH, 2015 U.S. Dist. LEXIS 152736, at \*28 (D. Nev. Nov. 10, 2015).

130. Dona DeZube, *9 Surprising Things That Add Value to Your House*, HOUSELOGIC BY REALTORS, [www.houselogic.com/remodel/windows-doors-and-floors/9-surprising-things-add-value-your-house/#ixzz3UeIOJdGt](http://www.houselogic.com/remodel/windows-doors-and-floors/9-surprising-things-add-value-your-house/#ixzz3UeIOJdGt).

### A. *The History of American Golf Courses*

Country clubs have dated back as far as pre-1900,<sup>131</sup> helping to create golf courses throughout the last century-plus. The first period of sustained golf course growth was in the 1920s, where an estimated 600 golf courses were opened each year between 1923 and 1929.<sup>132</sup> A golf course's inclusion with a homeowners' association became a popular industry product starting around the 1970s.<sup>133</sup> A third boom started in the 1990s, fueled by high expectations that "baby boomers" would increase demand for the sport as they retired.<sup>134</sup> Throughout time we have seen different purposes drive the desire for golf course use. It centers on marketing to your audience and image. Historically, the country club in the United States was created for members to recommend friends to join with whom they preferred to associate. This drew economic, racial, cultural, and ethnic lines across the country.<sup>135</sup> As time progressed, the purpose began to evolve into more than a social association. A 1979 *New York Times* Article titled "Country Clubs Sell a New Image," exemplified this idea as it noted, "country clubs must accommodate [a new generation] in order to survive."<sup>136</sup> The same has held true in real estate communities, like the recent 2015 opening of Bluejack National – a 755-acre luxury golf community in Texas that includes features like gardens, a movie theatre, bowling alley, skate park, fishing ponds, and more.<sup>137</sup> Multipurpose use has become the recent trend in golf course development to achieve great success.

### B. *Many Examples of Repurposing Are Reported*

So how does a repurposing occur? One method is through

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131. Jennifer Jolly-Ryan, *Chipping Away at Discrimination at the Country Club*, 22 PEPP. L. REV. 495 (1997-98).

132. R. Adams & J.R. Rooney, Jr., *Evolution of American Golf Facilities*, 75 GEOGRAPHIC REV. 419, 419-38 (1985).

133. Mary Richardson, *Golf Course Living Is Appeal of These Communities*, GAINESVILLE SUN, Oct. 13, 1985, at 4C, [news.google.com/newspapers?nid=1320&dat=19851013&id=0CURAAAIAIBAJ&sjid=zukDAAAIAIBAJ&pg=4545,3939509&hl=en](https://news.google.com/newspapers?nid=1320&dat=19851013&id=0CURAAAIAIBAJ&sjid=zukDAAAIAIBAJ&pg=4545,3939509&hl=en).

134. David Hueber & Elaine Worzala, "Code Blue" for U.S. Golf Course Real Estate Development: "Code Green" for Sustainable Golf Course Redevelopment, CLEMSON RICHARD H. PENNELL CENTER FOR REAL ESTATE DEVELOPMENT (2010), [www.josre.org/wp-content/uploads/2012/09/Sustainable\\_Golf\\_Courses-Hueber-JOSRE1.pdf](http://www.josre.org/wp-content/uploads/2012/09/Sustainable_Golf_Courses-Hueber-JOSRE1.pdf).

135. Cecile Rohwedder, *In Real Estate, Golf Ups Its Game*, WALL ST. J. (May 28, 2015), [www.wsj.com/articles/in-real-estate-golf-ups-its-game-1432820897](http://www.wsj.com/articles/in-real-estate-golf-ups-its-game-1432820897).

136. Kelsey Lawrence, *Why Won't Millennials Join Country Clubs?*, CITYLAB (July 2, 2018), [www.citylab.com/life/2018/07/will-millennials-kill-the-country-club/563186/](http://www.citylab.com/life/2018/07/will-millennials-kill-the-country-club/563186/).

137. Rohwedder, *supra* note 135.

conversion that commences with termination of the entity for transfer of ownership. In the state of Florida, where condominiums and other HOAs often own the golf courses, Chapter 718.117 of the state statute prescribes the requirements for termination of a condominium association. Section (2) outlines the basic termination premise due to economic waste or repair cost to restore or impossibility to operate or reconstruct to its prior physical configuration.<sup>138</sup> Section (3) gets into the optional termination requirements but recent reform to Section (3) of the statute in 2017 have made it more difficult for a Plan of Termination of the condominium association to be passed.<sup>139</sup> It now requires: a fewer number of unit owners to reject a termination plan, postponement on the time until another plan can be proposed, and that the plan be approved by the state regulatory department.<sup>140</sup> These function as barriers to the termination of a condominium association in the state of Florida.

In Oregon, the repurposing of the Colwood Property in Portland reflects the potential for meeting goals of many players. In 2013, the Trust for Public Land acquired the Colwood Golf Course, a 120-acre parcel with tremendous natural resources and recreational value.<sup>141</sup> After the Trust for Public Land acquired the property, it had thirty-five acres rezoned for industrial use. It sold the remaining eighty-five acres to the City of Portland<sup>142</sup> that added amenities to enhance user experience. In addition to marketing attractions to funnel footstep activity to the open space, these changes increase the utility of the property. The project has modified the golf course, while restoring the natural area throughout the process.

The repurposing of Tradition Golf Club in Royal Palm Beach, Florida shows the effect of restoration efforts by mitigating a golf course's soil and ground water contamination that had accumulated over a prolonged period of time. Tradition Golf Club declared bankruptcy in 2003. The land was burdened by a latent arsenic contamination from herbicides and pesticides applied to the course over decades.<sup>143</sup> Soil borings of various depths found exceedingly high arsenic levels of soil contamination in the uppermost two feet

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138. Real Estate and Personal Property, Condominiums, FLA. STAT. § 718.117 (2019).

139. Siegfried Rivera, *Legislative Update: Condominium Terminations Bill Signed into Law*, SIEGFRIED RIVERA (June 19, 2017), [www.floridahoa.com/lawyerblog.com/legislative-update-condominium-terminations-bill-signed-law/](http://www.floridahoa.com/lawyerblog.com/legislative-update-condominium-terminations-bill-signed-law/).

140. *Id.*

141. PORTLAND PARKS AND RECREATION, [www.portlandoregon.gov/parks/65530](http://www.portlandoregon.gov/parks/65530) (last visited Sept. 15, 2019).

142. *Id.*

143. Dana Gillette, PE & Christopher Marsh, PE, *Polluted Golf Course to Regional Attraction*, CONCRETE CONSTRUCTION (Nov. 8, 2013), [www.concreteconstruction.net/projects/infrastructure/polluted-golf-course-to-regional-attraction\\_o](http://www.concreteconstruction.net/projects/infrastructure/polluted-golf-course-to-regional-attraction_o).



of soil.<sup>144</sup> The environmental assessors worked with the village to afford flexibility to resolve the area's arsenic issues. They engineered a design that draws groundwater back toward the site to lower offsite contamination levels.<sup>145</sup> In the case of Tradition Golf Club, the property was suffering from a lack of maintenance until it was restored. As we will explore in more detail later, technology in the form of ecosystem services can rectify a golf course back to a functional, safe condition.

*C. Repurposing Planning Must Reflect the Legal  
Circumstances of the Golf Course Owners, Owners  
Benefitted by the Restrictions Placed Upon the Golf  
Course Land and the Broader Community*

*1. Legislative efforts to respond to repurposing*

There has been little state legislation provided for governing the repurposing of golf courses according to the recent study done by the American College of Real Estate Lawyers (“ACREL”), Land Use and Environmental Law Committee.<sup>146</sup> In contrast, local governments have been active in responding to attempts to repurpose golf course properties. Public regulation of land may affect repurposing golf courses, to the extent that a significant aspect of litigation may be required to authorize repurposing. The concern here begs the question as to whether government planning constitutes a taking. The primary authority for this law is the Fifth and Fourteenth Amendments to the United States Constitution, under the Takings and Equal Protection clauses.

A pair of landmark United States Supreme Court cases illustrate regulatory takings that may infringe upon a private landowner's property rights. In *Lucas v. South Carolina Coastal Council*, regulation that puts a landowner at loss of all economically beneficial or productive use, under the guise of mitigating serious public harm, constitutes a taking.<sup>147</sup> The landowner in that case, David Lucas, paid close to one million dollars for two residential lots on the Isle of Palms in South Carolina. He was later prohibited by local legislation two years later from building on either of the two lots. So long as the landowner's initial title or legal rights when acquiring the property are intact, a taking will be found where property rights are entirely abrogated; and the extent of regulation

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144. *Id.*

145. *Id.*

146. A survey conducted by the Author showed the following states had no statute on repurposing golf courses: Colorado, Connecticut, Illinois, Indiana, Louisiana, Maine, Montana, Ohio, South Dakota, Texas, Vermont, and Wyoming (email survey results on file with Author) (May 26, 2019).

147. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

interferes with distinct investment backed expectations. The state of South Carolina ended up not being permitted to restrain Lucas' development plan; and the case was settled with Lucas receiving \$1,575,000 in exchange for conveying his lots to the Coastal Council.<sup>148</sup>

In *Penn Central Transportation Co. v. New York City*, Penn Central owned the historic Grand Central Terminal and wanted to build a fifty-plus story high rise on top of the terminal; conflicting with New York City's Landmarks Preservation law adopted in 1965. It is here that the court introduced a balancing test to make the distinction between the benefit against the harm, in consideration of government regulation.<sup>149</sup> Factors for consideration include: economic impact of the regulation on the owner, extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation. A typical measurement of impact can be made based on diminution in market value, reasonable expectations, and amount of physical invasion compared against a regulation's promotion of common good.

Based upon this Takings analysis, the repurposing may be affected by legislation in a way that is objectionable. The City of Las Vegas is considering an amendment to its Unified Development Code to establish a required procedure in connection with the repurposing of golf courses. The amendment entails a Public Engagement Program that is to apply to all open space or golf course repurpose projects within the city. The program minimally includes four components: the Alternatives Statement, Neighborhood Meetings, Design Workshops, and a Schedule.<sup>150</sup> An applicant for repurposing must submit an Alternatives Statement to address the applicant's options and intentions.<sup>151</sup> It will evaluate the alternatives if the space is not repurposed, and the rationale for the repurposing. In addition to the applicant's proposal as it relates to both pertinent portions of any Covenants Conditions and Restrictions and any changes in flood control, drainage easements, public infrastructure, and public safety. The applicant must engage in Neighborhood Meetings to initially provide a minimum of two informational meetings to the neighborhood, one summary report meeting, and one pre-public hearing neighborhood meeting as part of the formal application process.<sup>152</sup> Once the applicant has initial feedback from the Neighborhood Meetings, they may proceed to Design Workshops to provide conceptual development plans to

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148. *Id.*

149. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

150. City of Las Vegas, Agenda Item No. 82; Agenda Summary Page to City Council Meeting of: February 21, 2018 (last visited Mar. 13, 2019).

151. *Id.*

152. *Id.*

gather input from stakeholder groups.<sup>153</sup> Those stakeholder groups are comprised of: property owners in the master development plan area, adjacent to the plan area, and local neighborhood organizations and business owners. The Schedule component of the proposed amendment's requirement mandates that all activities include the anticipated submittal date of the reports and land use applications.<sup>154</sup>

The question becomes whether the Public Engagement Program amendment to the building code in Las Vegas constitutes a taking. There is economic harm to applicants wanting to repurpose golf course land and encountering statutes to restrict them from freely accomplishing their goal. But as we know from *Penn Central*, success in such a case would be unlikely because of the balancing test that the courts utilize. The Las Vegas building code regulations are structured to meet highly valued public policy objectives. Factors for consideration include: economic impact of the regulation on the owner, extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation. Typical measurement of impact can be made based on diminution in market value, reasonable expectations, and amount of physical invasion compared against a regulation's promotion of common good.

Another example of such legislative efforts is seen in California as golf courses close. The Palm Springs Planning Commission is staying on top of citizens' concern about potential loss of green space that could accompany any conversion of a golf course into a developed property. The Planning Commission's proposed ordinance included a requirement that fifty percent of open space remain after any golf course conversion project.<sup>155</sup> Developers would also be required to first consider keeping the land as a golf course, then attempt to keep part of the property as a golf course, also consider selling the land to a conservancy organization, until finally proposing full conversion of the land while maintaining some open space.<sup>156</sup> This plan addresses the citizens' concern due to loss of green space. By mandating prospective developers to consider keeping the land a golf course, and then through other uses that keep the space "green," only then will meritorious development plans be permitted to fully convert the golf course land.

Other local governments have paused repurposing operations from proceeding through placing a moratorium on the golf course's

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153. *Id.*

154. *Id.*

155. Larry Bohannon, *How Much Open Land Should Be Saved from a Closed Golf Course Still Hot Issue in Palm Springs*, DESERT SUN (June 27, 2018), [www.desertsun.com/story/sports/golf/2018/06/27/palm-springs-residents-debate-open-space-closed-golf-courses/732084002/](http://www.desertsun.com/story/sports/golf/2018/06/27/palm-springs-residents-debate-open-space-closed-golf-courses/732084002/).

156. *Id.*

repurposing. Shadow Lake, a golf course in Rochester, NY, was zoned for residential development. Taxpayers were quick to voice their concerns about the areas being repurposed for a residential development, citing property values, aesthetics of the area, and overcrowded schools and highways that were already near maximum capacity.<sup>157</sup> The moratorium unanimously passed later that month, placing a one-year ban on any redevelopment of the land in question.<sup>158</sup>

2. *Generally, courts show great deference to local government actions whether those are approving or denying repurposing*

The Minnesota Supreme Court set a succinct standard in the case of *Mendota Golf v. City of Eagan*. In addressing the validity of the City’s decision to deny a comprehensive plan amendment, the court set forth that, “a party challenging that decision [must] establish that the decision is ‘unsupported by any rational basis related to promoting public health, safety, moral, or general welfare . . . [the state having] legitimate interests in protecting open and recreational space.’”<sup>159</sup> And federal courts in many jurisdictions have held that they have no jurisdiction to consider local and state regulation issues that arise from government regulation of land. For example, Judge Easterbrook of the Seventh Circuit proclaimed that “federal Courts are not boards of zoning appeals,” as part of his explanation on why property owners are not to use the federal judges to handle their claims in lieu of state judges.<sup>160</sup> And in a later Seventh Circuit case out of Indiana, the U.S. District Court granted motions to dismiss federal claims brought by homeowner’s whose permits to construct seawalls on Lake Michigan were revoked by the local government and “relinquished supplemental jurisdiction over the state claims[.]”<sup>161</sup>

But what happens when the local government goes too far? Will the use of spot zoning, an invalid zoning amendment use within the local government’s authority, occur? Spot zoning will be raised when

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157. Amy Hudak, *Penfield Town Board Holds Public Hearing for Golf Course Moratorium*, WHAM (Mar. 2, 2016), [13wham.com/news/local/penfield-town-board-holds-public-hearing-regarding-shadow-pines-shadow-lake-moratorium](http://13wham.com/news/local/penfield-town-board-holds-public-hearing-regarding-shadow-pines-shadow-lake-moratorium).

158. *Moratorium Passed for Shadow Lake, Pines*, WHAM (Mar. 23, 2016), [13wham.com/news/top-stories/moratorium-passed-for-shadow-lake-pines](http://13wham.com/news/top-stories/moratorium-passed-for-shadow-lake-pines).

159. *Mendota Golf LLP v. City of Mendota Heights*, 708 N.W. 2d 162, 180-82 (Minn. 2006).

160. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994).

161. *John C. & Maureen G. Osborne Revocable Family Tr. v. Town of Long Beach, Ind.*, No. 3:17-cv-227 JD, 2018 U.S. Dist. LEXIS 49239 (N.D. Ind. Mar. 26, 2018); *but see Knick v. Twp. of Scott*, 129 S. Ct. 2162 (2019) (holding to the contrary).

government singles out a parcel of land for different treatment than other similar land, primarily for the benefit of the private owner rather than public, or in a manner inconsistent with the general plan for the community. In the case of *In re Realen Valley Forge Greenes Associates*, the appellant challenged the local government's zoning ordinance that restricted his parcel to agriculture use in an area where surrounding parcels had been rezoned for significant commercial use.<sup>162</sup> The court held that by freezing the appellant's property status to golf course use while allowing surrounding properties to benefited from rezoning to commercial use constitutes reverse spot zoning.<sup>163</sup> In *Realen Valley Forge*, the isolation of the appellant's property use was frozen by the Township. While the judiciary system is favorable to local governments, there are legitimate arguments property owners can make to challenge government conduct.

Even where local government approved repurposing of a golf course but denied approval of a similar repurposing plan in the same small town, the courts approved the local action. In 2006, the Town of Mount Pleasant, South Carolina amended its zoning ordinance to create the Conservation Recreation Open Space zoning district.<sup>164</sup> It imposed land-use restrictions on all golf course properties in the town, permitting only recreation and conservation uses. Dunes West Golf Club was denied its request to have its property rezoned to allow residential development, while developers on a neighboring golf course had their rezoning petition granted.<sup>165</sup> Dunes West claimed Equal Protection violations under the Fourteenth Amendment. The trial court granted summary judgment, which was affirmed by the Supreme Court of South Carolina. It found that there were significant differences between the two rezoning petitions, with no discriminatory animus shown. The approved rezoning petition made less change to the golf course area, along with community support. Under an arbitrary and capricious standard, the town's exercise of authority in creating the zoning district was rationally related to the legitimate land-use goal. There was no equal protection violation under the United States Constitution nor any categorical or regulatory taking.

A New York appellate court rejected an argument by a golf course owner seeking rezoning of that land to permit construction of multi-family housing. The developer argued that denial of the application for rezoning based upon the zoning ordinance was unconstitutionally exclusionary, but the court pointed to studies and plans of the government that showed the developer's request

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162. *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 722 (Pa. 2003).

163. *Id.* at 721.

164. *Dunes W. Gold Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601 (S.C. 2007).

165. *Id.*

was “contrary to sound environmental policy.”<sup>166</sup> *Fresh Meadow Country Club, Inc. v. Lake Success* is an early case reflecting the social function role of property.

3. *Land use policy has been developed throughout the case studies of conversion disputes*

Governments in urban areas have already taken action to create land use policies to mandate prerequisites in order to allow an open space conversion.<sup>167</sup> In Broward County, Florida, an amendment to the County’s comprehensive plan was recommended to create policies to discourage loss of open space.<sup>168</sup> One of the County’s implementation strategies includes municipal development and adoption of “transfer of development rights” (“TDR”) programs. Essentially, a TDR program aims to remove the right to develop unbuilt permitted uses from land in a defined “sending zone,” and transfers such permitted development rights to land in a defined “receiving zone,” which permits the use.<sup>169</sup> TDR programs promote a public purpose, like conservation of a golf course, desiring to achieve demand for the rights to be sold.<sup>170</sup> With such little open space in urban areas, protecting what remains in the natural resource systems is reflects a great public policy concern in which the government and its citizens have a significant interest.

4. *Ecosystem services are the recent trend for analyzing the best use for converting open land, like a golf course, to other uses, including those responding to the threats of climate change*

Threats to human essential goods from natural ecosystems are increasing, and as such, ecosystem services are likely to be in greater demand. Ecosystem services refer to a variety of conditions and processes through natural systems, and the species that form them, to help sustain and fulfill human life.<sup>171</sup> Ecosystem Services are comprised of four categories: provisioning (e.g. supply of natural products), regulatory (e.g. filtering elements of nature), supporting (services that maintain the former), and cultural (intangible benefits obtained from contact with nature).<sup>172</sup> When an ecosystem

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166. *Fresh Meadow Country Club, Inc. v. Lake Success*, 158 A.D. 2d 581 (N.Y. Sup. Ct. 1990).

167. See Steven J. Wernick, *Golf Course Conversions: The Challenges of Urban Reuse*, in 13 POWELL ON REAL PROPERTY § 79D.08 (2018).

168. *Id.*; Adams & Rooney, Jr., *supra* note 132.

169. *Id.*

170. *Id.*

171. Gretchen C. Daily, Susan Alexander, Paul R. Ehrlich, et al., *Ecosystem Services: Benefits Supplied to Human Societies by Natural Ecosystems*, 2 ISSUES IN ECOLOGY 2 (Spring 1997).

172. *Id.* at 2–16.

has been exploited beyond its ability to provide its purpose, the implementation of technology can restore the land to its beneficial use.<sup>173</sup> The ecosystem's degradation can be tied to widespread under-appreciation, and financial consideration, of the environmental capital for human well-being.<sup>174</sup> We can begin to appreciate the cultural development of ecosystem services through various instruments that have been created. To explore implications of alternative land-use scenarios, software like the Stanford Daily's InVEST program produces models evaluating tradeoffs among environmental, economic, and social benefits.<sup>175</sup> In a systematic effort to measure the human health impacts of changes in an ecosystem, Health & Ecosystems: Analysis of Linkages ("HEAL") was created.<sup>176</sup> The nonprofit is a consortium of more than twenty-five conservation and health public institutions collaborating to understand the relationships between ecosystems and public health outcomes.<sup>177</sup> Constructed Stormwater Wetlands ("CSWs") are an example of ecosystem services that applies to golf course use. It is the practice of a water management plan for the golf course to meet requirements for water management design or retrofitting.<sup>178</sup> CSWs are popular due to their potential to improve water quality and reduce the quantity of runoff leaving a site. It is these services that allow a golf course to expand its environmental protection program involvement, which could lead to recognition or additional revenue.<sup>179</sup> Wetland planning entails designated areas for drainage outlets in areas of heavy rainfall, which includes the study of hydrologic conditions, referred to as, the movement and distribution of water on Earth.<sup>180</sup> Wetlands have proven to be an effective management area for golf course owners. A primary consideration in a transaction to consider is the condition of the land

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173. JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SURVIVE* (2005).

174. THE PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY ("PCAST"). Report to the President. *Sustaining Environmental Capital: Protecting Society and the Economy*. Washington, DC: White House Office of Science and Technology Policy, Executive Office of the President (July 2011). Available: [www.whitehouse.gov/sites/default/files/microsites/ostp/pcast\\_sustaining\\_environmental\\_capital\\_report.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast_sustaining_environmental_capital_report.pdf) (last visited Mar. 6, 2012).

175. The Natural Capital Project ("NatCap") Project is a partnership among Stanford University, the University of Minnesota, the Nature Conservancy, and the World Wildlife Fund.

176. WILDLIFE CONSERVATION SOCIETY, *HEALTH & ECOSYSTEMS: ANALYSIS OF LINKAGES* (2011) [www.wcs-heal.wcs-ahead.org/uploads/documents/ppl\\_heal\\_final\\_oct2011.pdf](http://www.wcs-heal.wcs-ahead.org/uploads/documents/ppl_heal_final_oct2011.pdf).

177. *Id.*

178. Kris Bass, Mike Burchell, Robert Evans, Bill Hunt, Daniel Line, & Danesha Seth Carley, *Stormwater Wetlands for Golf Courses*, NC STATE EXTENSION (Aug. 1, 2012), [content.ces.ncsu.edu/stormwater-wetlands-for-golf-courses](http://content.ces.ncsu.edu/stormwater-wetlands-for-golf-courses).

179. *Id.*

180. *Id.*

and potential need for retrofitting the land’s ecosystem.

Recognition of how keeping golf course land as open space, and undeveloped, may respond to threats of climate change. Clear Lake City in Houston, Texas provides a prominent success story. A golf course in the community had lost appeal over time, leading water authority officials and conservations the opportunity to turn the land into a detention area, in an effort to control flooding, with broader recreational options as well.<sup>181</sup> The town’s Water Authority planted wetland grasses along the edge to naturally clean the water of pesticides, fertilizer, etc. before they get into the waterways.<sup>182</sup> The president of the Water Authority, John Branch, noted the drainage and flooding areas previously around the course and through the system put in place, “adding more areas for water to flow keeps runoff from immediately overloading the bayous and takes certain areas that routinely experience high water out of the 100-year flood plain.”<sup>183</sup> As the planet continues to evolve through climate change, recognition of the need for open land that golf courses provide and CSWs to maintain the ecosystem ought to be a primary consideration for civilization.

VI. A TRANSACTIONAL APPROACH – A TRUE NEGOTIATION  
– TO MEETING REPURPOSING GOALS OF ALL  
STAKEHOLDERS MAY PROVIDE THE BEST SOLUTION TO  
THE DRAMATIC CHANGES IN THE GOLF COURSE INDUSTRY

*A. The Special Perspective and Role of Transactional  
Lawyer May Be The Key to Achieving Repurposing of  
Golf Courses*

Recent literature about the practice of law has described the distinct role of the transactional attorney<sup>184</sup> and lists the perspectives needed as 1) knowing the objectives, goals and expectations of the client; 2) understanding the goals and expectations of the non-clients who are parties to the transaction; and 3) the attorney’s own perspective of professionalism and economics of practice.<sup>185</sup>

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181. Cindy George, *Clear Lake Turns Ex-Golf Course Into Detention Area to Drain Floodwater*, HOUSTON CHRONICLE (Feb. 11, 2017), [www.houstonchronicle.com/news/houston-texas/houston/article/Clear-Lake-turns-ex-golf-course-into-detention-10926207.php](http://www.houstonchronicle.com/news/houston-texas/houston/article/Clear-Lake-turns-ex-golf-course-into-detention-10926207.php).

182. *Id.*

183. *Id.*

184. See Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 TENN. J. BUS. L. 9 (2009) (explaining the growing recognition of this distinct and valuable role).

185. *Id.* at 544.



In the context of repurposing transactions for the golf course owner/operator client, the transactional perspective would require the attorney to appreciate what it is that client wants to happen – anything from transferring the land to a conservation easement, to getting a federal income tax charitable deduction,<sup>186</sup> to persuading an HOA benefitting from the golf course restriction to give up that benefit (thereby allowing the golf course owner to develop high density housing or a shopping center), to reducing the number of golf courses from four to two (using the land on which the repurposed land for an entertainment venue or something else).

Understanding the perspective of the non-client, the HOA and the public generally are needed for the attorney to advise the owner/operator client about what is possible, considering the positions of the non-clients as well as the context of the rule of law in which the issues are considered. Would the HOA trade some open green space without golfing occurring there for one of the four golf courses on that piece of land? Does the HOA want an operating golf course or just the “pleasant view” provided by undeveloped land? Are there any continuing, long term relationships between the HOA and the owner/operator of the golf course that make sense such as using the land occasionally as a music venue or co-marketing the properties to recruit golfers and buyers of the HOA housing units?

And, keeping in mind the attorney’s professionalism and the economics of practice may mean that the attorney identifies and evaluates the interests of the public generally under the Social Function view of property and the Social Obligation Norm, discussed in Part I, in order to respond to the reality of rezoning delays unless the owner/operator client agrees to keep at least some of the land open and green and supportive providing ecosystem services. And, the transactional attorney is always aware of the advantages of avoiding litigation because of the time delays and costs. That awareness is a major part of the reality the transactional attorney must appreciate. Thus, the attorney comports with the goal of functioning as a “transaction cost engineer” who adds value to the transaction and when performed well, “shrinks the importance of the courts and formal law generally.”<sup>187</sup>

How and to what extent the public can benefit from the predicted availability of nearly 400,000 acres of land to be

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186. Peter J. Reilly, *Tax Court Rules Not Enough Conservation On Golf Course To Justify \$10 Million Deduction*, FORBES (Sept. 18, 2018), [www.forbes.com/sites/peterjreilly/2018/09/18/tax-court-rules-not-enough-conservation-on-golf-course-to-justify-10-million-deduction/#523a12a61673](http://www.forbes.com/sites/peterjreilly/2018/09/18/tax-court-rules-not-enough-conservation-on-golf-course-to-justify-10-million-deduction/#523a12a61673).

The tax court did not approve the land as acceptable for the deduction because the donated land did not provide a habitat for rare, threatened or endangered species nor was it a natural area that contributed to the ecological viability of a national forest. *Id.*

187. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

repurposed.<sup>188</sup> Will an enlightened view of property rights that includes basic obligations to society, not just the specific owner of the land, mean that this land can be used to mitigate climate change?<sup>189</sup> Will courts continue to defer to local government regulators that will find reasons to limit land development and protect open spaces at this inflection point in land use private restrictions? Will Susan French’s argument that dealing with climate change is one of the most important needs of our society be ratified by reality?

### *B. Transactional Attempts to Terminate Restrictive Covenants Have Succeeded*

The “tit for a tat” negotiated resolutions where both sides end up with something of value can be successful. For instance, in March 2018 a Houston developer compensated nearly 200 residents in a deed restricted neighborhood to approve its plan for a high-end shopping center in the Tanglewood area of Houston. The Oxberry Group “donated” \$100,000 to the community association and paid one year’s worth of association dues to any Briarcroft homeowner who voted in favor of the Shops at Tanglewood Project. This amounted to about \$625 per household per vote. And, those shops were built!<sup>190</sup> Of course there are likely problems with potential holdouts.<sup>191</sup> Drafting the underlying documents so that there is a time limit for the effectiveness of covenants running with the land and/or permitting amendments to those documents with a reduced number of approving votes can make changes after the restrictions are created easier to achieve. And, state legislation can provide that less than a total vote is adequate to make a change, at least for community associations created after the date the legislation becomes effective.

Other case studies of transactional solutions are playing out at Amelia Island and in St. Simons Island, Georgia where the Sea Palms West HOA has negotiated a successful agreement with the golf course owner. Their future reports may (hopefully) provide

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188. Conant, *supra* note 18, at 3.

189. See, e.g., Marie Donahue, *Anything but Par for the Course – Exploring the Natural Capital Value of Golf Courses*, NAT. CAP. PROJECT (Oct. 2017), [naturalcapitalproject.stanford.edu/anything-but-par-for-the-course/](http://naturalcapitalproject.stanford.edu/anything-but-par-for-the-course/) (describing the Community Value of Golf Course Project at Stanford University).

190. Paul Takahashi, *Oxberry Pays HOA Dues to Get Neighborhood Support for Luxury Retail Project*, CHRON (Mar. 16, 2018), [www.chron.com/business/article/Oxberry-pays-HOA-dues-to-get-neighborhood-support-12757202.php](http://www.chron.com/business/article/Oxberry-pays-HOA-dues-to-get-neighborhood-support-12757202.php).

191. Alby Gallun, *No Deal is Good Enough for These Condo Refuseniks*, CRAIN’S CHI. BUS. (July 13, 2018), [www.chicagobusiness.com/article/20180713/ISSUE01/180719926/condo-deconversions-hampered-by-holdouts-in-chicago](http://www.chicagobusiness.com/article/20180713/ISSUE01/180719926/condo-deconversions-hampered-by-holdouts-in-chicago) (describing condo owners who won’t sell to developers that want to turn their building into rental apartment-deconversions).

lessons on how to achieve our goal.

*C. Nevertheless, There Are Transactional Attempts to  
Repurpose Golf Course Restricted Land That  
Ultimately Failed*

For example, in *Victorville West Limited Partnership v. Inverrary Association, Inc.*, when a golf course operator could not get two thirds of the owners of the dominant estate property to abrogate the restrictive covenant, the golf course operator/owner went to court to argue “financial hardship” as changed circumstances sufficient to set aside the restrictive covenant.<sup>192</sup> After the Courts rejected that argument, he gave up on his repurposing plan.

*D. Lessons for Transactional Attorneys*

When the developer of land to include golf course use is created initially, the relationship between the owner of the land to be restricted to golf course use and the owners of the land that are to benefit from the restricted use must be in the forefront of the drafting of the documents. For both owners of housing sold to them by the developer who now owns the restricted land (or its successor) and for the golf course owner/operator, careful drafting to reflect the goals of both interests is critical. Brian S. Edlin in his suggestions designed to reflect the long-range needs of the owner of the golf course land, the document should “clearly allow other uses” and an indication that “the golf course is not part of the ‘common property’ and is not guaranteed for future use”<sup>193</sup> should be included. An express obligation by those dominant estate lot owners to contribute to upkeep of the golf course should be clearly designated as “running with the land,” so that future owners will be required to do so even if there is a change in circumstances.<sup>194</sup> And, Edlin advises developers “to offset density” required when seeking site approvals with other open or green space instead of designating the golf course to meet that requirement to avoid problems in the future if the use changes.<sup>195</sup>

Yet, Edlin warns that even with careful drafting, and a court that interpreted the word “requiring” literally,<sup>196</sup> once litigation

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192. *Victorville W. Ltd. P’ship v. Inverrary Ass’n, Inc.*, 226 So. 3d 888 (Fla. Ct. App. 4th Dis. 2017).

193. Edlin, *supra* note 129 (referring to the 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)).

194. *Id.*

195. *Id.*

196. *Id.* (discussing the opinion in *Fairfield Harbour Prop. Owners Ass’n*,

takes over the dispute resolution, the final result can be unexpected. In 2011 the Court of Appeals for North Carolina affirmed a summary judgment for the HOA holding that the golf course owner failed to show that there were “changes within the covenanted area that were so radical, that they would destroy the original purposes of the agreement.”<sup>197</sup> Five years later that golf course owner sought relief in the bankruptcy court. The Bankruptcy Court held that the restrictive covenant was just a personal covenant between the original parties that did not bind successors and that there were “radical” changes within the area justifying elimination of the covenants.<sup>198</sup>

All engaged in the transaction at the beginning of the relationship between the variety of property owners as well as when, as now, the relationship should be reexamined and modified to support sensible changes must be nimble.

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Inc. v. Midsouth Golf, LLC, 715 S.E.2d 273 (N.C. App. 2011) (where that clear language necessitated that the owner of the restricted golf course must operate the land as a golf course)).

197. *Fairfield Harbour Prop. Owners Ass’n, Inc.*, 715 S.E.2d at 281.

198. *In re Midsouth Golf, LLC*, 549 B.R. 156 (Bankr. E.D.N.C. 2016).

