Making it Work:

Golf Course Conversions

BY MICHAEL E. BUCKLEY, ESQ.

It's no secret that the golf business is not a healthy one, yet converting golf courses to other uses presents a number of obstacles, as is evidenced by the recent histories of the Silverstone, Badlands and Legacy golf courses in Las Vegas. The problem is not unique to Las Vegas. Many golf courses are part of master planned communities, surrounded by homes with views or promised use of the golf course. Built as Las Vegas expanded into open spaces, these communities are now occupied by residents who have become accustomed to enjoying the benefits of golf course use and/or open space.

Public Restrictions

Golf course land may be burdened by public or private restrictions. Public restrictions include statutes and zoning ordinances, as well as constitutional protections. This article addresses basic restrictions affecting the "repurposing" of golf courses, though it probably raises more questions than it answers. Moreover, since, as zoning practitioners well know, land use decisions involve a mixture of politics and law, the existence of a large group of people who prefer the status quo means this article can only tell part of the story.

State law permits local governments to regulate land use through zoning ordinances adopted in accordance with the "comprehensive, long-term general plan."[1] If a golf course was built as part of the residential community surrounding it, a golf course most likely has a residential or public use general plan designation and zoning classification. Whether the general plan or the zoning classification must be changed in order to repurpose a golf course will initially be decided by the planning commission and the city council or county commission, based on their interpretations of the applicable statutes and ordinances. Interpretation is complicated, since master plans and zoning ordinances are evolving things, and they are likely to have changed since the golf course in question was originally built. For example, the R-PD zoning district, which applies to several golf courses in the City of Las Vegas, no longer exists.[2]

If a golf course has residential zoning, does this mean the owner of a golf course has vested rights to build residences on the golf course? Recall that, "In order for rights in a proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting project commencement, and the developer must prove considerable reliance on the approvals granted."[3] In most cases, the person proposing to redevelop the golf course

continued on page 12

continued from page 11

Making it Work: Golf Course Conversions

will have purchased the golf course from the original developer. Will this affect a vested rights argument?

Planned Community Law

A wild card is NRS chapter 278A, enacted in 1973, to permit flexible zoning of master planned communities, for example, permitting greater than allowable density in one area in exchange for more open space. The chapter provides for a plan, which may include a recorded final map. Once recorded, the plan may be enforced by the local government as well as the residents.[4] Does the identification or labeling of a parcel as golf course on a final recorded map constitute a plan that is enforceable by the residents? Modern development codes, presumably enacted under NRS Chapter 278, now permit the flexibility contemplated by NRS 278A. Does this mean planned community zoning is covered by the local development code rather than Chapter 278A? *Glenbrook Homeowners Association v. Glenbrook Company*[5] clarifies what constitutes a plan, but the interaction between zoning ordinances and NRS Chapter 278A is not clear.

Regulatory Takings

Whether a land use decision prohibiting a golf course conversion amounts to a regulatory taking in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and Section 8, Article 1, Paragraphs 5 and 6 of the Nevada Constitution, requires an "ad hoc, factual" determination as to whether "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."[6]

Wensman Realty Inc. v. City of Eagan[7] concerned an application by the purchaser of golf course property to amend the city's comprehensive plan to permit residential development of the property. The court concluded that denial of the plan amendment was not arbitrary or capricious, based on numerous findings, including concerns about burdening an already overcrowded school system, disrupting neighborhoods with significant increase in traffic, balancing the amount of residential and other types of land-use classifications, and maintaining the integrity of the comprehensive plan. Due to the disputed fact issues, the court declined to rule on the takings issue, but observed:

> the most appropriate method in cases like this, where the government chooses to maintain an existing comprehensive plan designation, is to determine whether the city's decision leaves any reasonable, economically viable use of the property.

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Express Private Restrictions

Golf courses may also be subject to recorded private restrictions, such as restrictive covenants or easements. Even if a restrictive covenant exists, however, the parties may disagree over its meaning. For example, does a restrictive covenant requiring land to be *developed* only as a golf course require it to be *operated* as a golf course? Do provisions in a master association's CC&Rs separating residential ownership from golf course membership free the golf course from its relationship to the residential community around which it was built? Private restrictions may also be subject to the ability of the bankruptcy court to sell the golf course free and clear of any restrictions under Section 363(f) of the Bankruptcy Code. Obviously, express restrictions provide no easy answer for either the residents or the developer.

Implied Restrictions

In the absence of recorded restrictions, a golf course may be burdened by implied easements for the benefit of neighboring homeowners. *Shalimar Assn. v. D.O.C. Enterprises* (1984)[8] affirmed a trial court's decision that the purchaser of a golf course, developed as an integral part of the residential development, was prohibited from building homes on the golf course, finding an implied restriction based on, among other things, homeowners' reliance on plats and sales materials. In reaching its decision, the court rejected the defense of economic frustration. *In re: Heatherwood Holdings* (2014) affirmed a bankruptcy court's determination that an implied restrictive covenant limited use of real property to a golf course, relying on the Supreme Court of Alabama's summary of state law that:

> A party seeking to prove that an original grantor intended a common scheme of development may do so by offering evidence of one or more of the following:
>
> 1. Universal written restrictions in all of the deeds of the subdivision;
> 2. Restrictions in a substantial number of such deeds;
> 3. The filing of a plat showing the restrictions;
> 4. Actual conditions in the applicable subdivision; or
> 5. Acceptance of the actual conditions by the lot owners.[9]

More importantly, the Nevada Supreme Court is presently considering "whether Nevada recognizes an implied restrictive covenant for use over golf courses in planned communities, especially where so many of Nevada's homeowners now live in common-interest communities surrounding golf courses and are induced to pay premiums for homes based on the master plan and the platted golf course."[10]

The Path Forward

While the buyer of a failed golf course is on notice of the relationship of that land to the surrounding community, economic necessity means efforts to convert golf courses to other uses will continue. There is, however, a path forward. Referring to a repurposing in Boca Raton that "resulted in over a decade of disputes at the county level and in the court system," a 2016 staff report on golf course conversions in Collier County, Florida (http://www.colliercountyfl.gov/home/showdocument?id=69574) concluded that, in the absence of consensus regarding the change, "the development may become contentious, litigious, and lengthy, none of which are in the best interests of the residential communities or the developer…." In other words, like most land use matters, it helps to get the neighbors on board. Recent enactments in Las Vegas (Bill No. 2018-5, May 16, 2018) and Henderson (Ordinance No 3469, February 20, 2018) represent the first steps to make seeking consensus part of the land use approval process. **NL**

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1. NRS 278.250, 278.150.
2. Title 19.10.050, City of Las Vegas Unified Development Code. The R-PD classification applies to the Badlands (R-PD7), Canyon Gate (R-PD-4), Painted Desert (R-PD-5), and Los Prados (R-PD9) golf courses.
3. *American West Development, Inc. v. City of Henderson,* 898 P.2d 110, 111 Nev. 804 (Nev., 1995)
4. See, NRS 278A.060 (definition of "plan"). NRS 278A.390 and 278A.400 address enforcement by local government and residents.
5. 111 Nev. 909, 901 P.2d 132 (1995).
6. *McCarran International Airport v. Sisolak,* 122 Nev. 645, 137 P.3d 1110 (2006).
7. 734 N.W. 2d 623 (Minn., 2007).
8. 688 P.2d 682 (Ariz. Ct. App. 1984).
9. *In re Heatherwood Holdings, LLC; Heatherwood Holdings, LLC v. HGC, Inc.,* 746 F.3d 1206 (11th Cir., 2014).
10. *Rosenberg Living Trust v. Malek,* Case No. 69399 (combined with 70478). See Appellant's Opening Brief, page xi.