

Trouble in Paradise: Redevelopment of Golf Courses in a Changing Market

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Buying a home with a view of the 18th green is a major step, and can be a considerable investment.

That investment, both financial and emotional, can be shaken when a developer proposes to build a residential or mixed-use commercial development on top of the course. Often, when rumors that a golf course is being redeveloped begin to swirl, the first reaction is "they can't

do that!" Whether the developer can or cannot change the land use of a golf course depends on what type of golf course it is.

Golf course construction surged in the late 1990s and early 2000s to keep up with an increased demand for the game, so-called "ego courses" where developers sought to put their name on a prestige course, and the overall financial viability of golf courses as a profitable business. Many of these courses were developed adjacent to, and sometimes contemporaneously with, a residential community. There was a benefit to both the residents and the course; the course sat next to an existing pool of potential customers who had already shown an interest in being near a course, and residents got the benefit of lovely views and a convenient walk to the tee box. But the market for golf has changed. Fewer people play now than did ten years ago, and the glut of courses that were built over the past two decades have created an unfriendly financial environment for course owners. Faced with decreasing membership numbers and shrinking profits, many course owners have looked to redevelop their land into more viable uses. That decision naturally creates tension between a prospective developer and the homeowners who may have bought their property because of the golf course. Legal challenges to golf course redevelopment are common and determining whether a course must stay a course often hinges on the restrictive covenants that apply to the course.

Land use covenants restrict what landowners can do with their property. Residents of planned communities are familiar with homeowners associations ("HOA's") enforcing covenants for architectural design, landscaping decisions, fence heights, and more. There are also covenants that can restrict the use of a piece of property. For example, a developer of a golf course could restrict the land to only golf course use in perpetuity. Or, the developer could record a restriction requiring that the course be reserved as open green space whether people play golf on it or not. The different kind of land covenants result in three distinct types of golf courses. Which category an individual course falls into often determines whether it can be redeveloped.

Planned Community Courses

The most restricted courses, and the best case for a homeowner opposing development, are ones that have been created as an amenity for a planned community. These "HOA Courses" typically share a common developer with the planned community, and there is often language in the HOA's Declaration of Covenants that describes how the course and the community are designed to coexist. Not all HOA Courses are restricted to use exclusively by residents of the community, but members of the HOA typically have some type of preferred membership at the course. The defining characteristic of an HOA Course is that it was designed as an amenity for the community, and the land use covenants explicitly restrict the golf course property to use as a golf course in perpetuity (or in some cases for so long as the HOA exists). Redeveloping an HOA Course is extremely challenging because of those restrictive covenants. In most cases, the course cannot be redeveloped without the consent of every single member of the HOA which is practically impossible to attain.

Common Ownership Courses

Sometimes the developer of a planned community wants to construct a golf course next to the community but keep the flexibility to redevelop the course into more homes or some other use down the road. Or perhaps the intent was for the golf course to be an HOA Course with all of the land use covenants and connectivity that come along with them, but the developer failed to properly record the necessary covenants. In either event, there are times when a golf course appears to be an HOA Course, but the necessary land use restrictions do not exist. These situations result in a "Common Ownership Course" where the developer of the planned community also owned the golf course property and may have sold homes in the community by advertising the course as an amenity. Homeowners may have relied on marketing materials that showed lush fairways and manicured greens just outside their windows. Plans for redevelopment can threaten that picturesque view with fears of bulldozers and construction.

Redevelopment of a Common Ownership Course faces legal hurdles even in the absence of explicit land use covenants restricting the use of the course. Courts in North Carolina have sometimes found that a developer who owns both the course and the planned community, and who sells homes in the community by reference to recorded plat maps showing the course or with other marketing materials that depict the course as an amenity for the neighborhood, may have indirectly restricted the use of the course. This theory is known as an "easement by plat," and there are a number of nuances and factors that can determine whether it applies. Because of this, redeveloping a Common Ownership Course should be undertaken with experienced legal counsel who can help you navigate the process.

Third-Party Courses

"Third-Party Courses" are developed, and sometimes operated, by an entity that is legally distinct from the developer of the neighborhood or planned community adjacent to the course. Sometimes there are arrangements for the residential owners to get a special rate at the course, but they are only customers of the course and lack the rights that often accompany membership in a planned community with an HOA Course. Third-Party Courses are distinct from Common Ownership Courses because the golf course developer was different from the planned community developer so there is no reliance argument that can be used to later restrict the course. As a result, Third-Party Courses are the most easily redeveloped because there are no land use restrictions in place that restrict them to use as a golf course and the residents are unlikely to succeed in an action to restrict the course after it has been developed.

Conclusion

Golf Course redevelopment can be a source of anger and frustration for residents who see their view changed. Similarly, course owners who want to get out of the golf course business, or developers looking to repurpose the land to a higher and better use, are often challenged or delayed by legal obstacles to the free use of their property. No matter which side of the issue you're on, it's important to understand the legal status of the course. The 18th green looks the same no matter which of the three categories of courses it fits into, but experienced legal counsel can advise you on how that view may change in the future.

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