UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

23rd Annual Land Use Conference

April 25-26, 2019
Austin, Texas

Repurposing Golf Courses: Regulatory Hurdles

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I. INTRODUCTION

Golf course redevelopment can be politically controversial. Not surprisingly, many residents will oppose the replacement of a low intensity, visually pleasing natural environment with more traditional development bringing an increase in people, traffic, and structures. Golf courses are often viewed as important open space and recreational areas. Homes next to golf courses may be worth several times the value of similar homes not located next to golf courses. In an economic downturn, it can be expected that many public golf courses will close. When golf courses fail due to reduced play, then some type of redevelopment must be authorized or homeowner associations and/or conservation groups must raise enough funds to purchase and maintain the course. Otherwise, the course will likely be abandoned and not maintained, which is bad for everyone involved.

Litigation is expensive, which can be an impediment for members of the public opposing golf course redevelopment. An alternative available to most homeowners is to convince local governmental entities that regulate golf course development or redevelopment to deny the redevelopment or impose conditions acceptable to area landowners.

Every jurisdiction has different statutes and ordinances regulating land use. While the politics in each jurisdiction is different, the legal process is similar. Typically, the entitlement process for a new project will be as follows: zoning, platting, site improvements, building permit. The legal ability of the local governmental body to deny a development application largely declines the further down the entitlement ladder.

II. ZONING

We conducted a survey of the zoning statutes in the fifty states. It does not appear that any state legislature has imposed a specific statutory zoning requirement on golf courses. Virtually all U.S. municipalities of consequence have enacted general zoning ordinances at the local level that comply in some manner with the Standard Zoning Enabling Act ("SZEA"). The SZEA was adopted by all 50 states and is still in effect, in modified form, in about 47 states.

In Texas, the SZEA authorizes a municipal governing body to regulate the following:

1. height, number of stories, and size of buildings and other structures;

2. percentage of lot that may be occupied;

3. size of yards, courts, and other open spaces;

4. population density;

5. location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and

6. in designated places and areas of historical, cultural, or architectural importance and significance, the governing body may regulate construction, reconstruction, alteration and razing of buildings and structures.[1]

While every city has a different protocol, the zoning options for golf course property can be broken down as follows: (1) no zoning, (2) planned development, (3) specific use permit, (4) straight golfing district, (5) straight district zoning, (6) mixed zoning, and (7) overlay district. Zoning applications are subject to the legislative, discretionary decisions of the city council. Courts have established a strong, almost irrefutable

[1] TEX. LOC. GOV'T CODE § 211.003.

presumption of validity for legislative zoning decisions.[2] If issuable facts support a zoning vote, the court is not to subject the matter to a jury but to uphold the ordinance as a matter of law.[3]

(1) No Zoning Option: Texas authorizes cities to regulate land use within their boundaries. For land located outside of a corporate limit, zoning does not apply because Texas counties do not have the required statutory authority. The City of Houston is the largest city in the United States without zoning, but much of the land within the city limits is subject to deed restrictions. Those restrictions can be enforced by the City per statute.[4]

(2) Planned Development District: A planned development district ("PD") or planned unit district is a unique zoning district imposed by separate ordinance to allow a specific project on a particular tract of land. PD zoning is usually initiated by the developer and usually includes written conditions and a site plan in the PD ordinance. No land uses are authorized except for those stated in the PD ordinance. Adoption or rejection of a PD ordinance is typically construed to be a legislative act.[5]

Two public hearings are required for the rezoning application.[6] Notice is published in the newspaper and mailed to nearby landowners prior to the planning and zoning commission hearing.[7] If sufficient written neighborhood opposition is made, a super-majority vote is required pursuant to Section 211.006(d), Texas Local Government Code.

Most large mixed use developments with golf course components in Texas cities are zoned PD. An example is Paso Robles, which is a 1,338 acre development approved by the City of San Marcos.[8] The zoning authorized a mixture of commercial and residential uses, along with a 310 acre golf course and open space area. In addition to describing the golf course in the text of the PD ordinance, the conceptual land use and open space plans clearly show each golf course hole's fairways and greens. According to the PD ordinance, treated effluent will be used for golf course irrigation.[9] The ordinance requires that the golf course operation adhere to the standards of the *Audubon International Signature Program*. In addition, the PD ordinance states if the golf course closes, the land shall revert to open space.

In order to repurpose property zoned for a golf course PD, then a rezoning application must be submitted and approved by the appropriate governing body. The uniqueness and specificity associated with a PD will usually necessitate a rezoning.

In one instance, a city refused to even take action on a zoning request to permit redevelopment of a golf course.[10] In *Wake Forest*, the golf course at issue closed in 2007 and the owners submitted an application for a modification to its zoning to allow residential use.[11] The development plan attached to the PUD zoning approved in 1999 for the club designated the entire course as open space.[12] But the city's board of commissioners elected not to conduct a public hearing or otherwise consider the application.[13] The court upheld the city's refusal to call a hearing on the basis that the owners had voluntarily designated the golf course

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[2] *Mayhew v. Town of Sunnyvale*, 218 S.W.3d 60 (Tex. 2007).
[3] *City of El Paso v. Donohue*, 352 S.W.2d 713 (Tex. 1962).
[4] TEX. LOCAL GOV'T CODE § 212.151, *et seq.*
[5] *Wheatland v. City of San Marcos*, 157 S.W.3d 473 (Tex. App.—Austin 2004, pet. den.); *Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991), *cert. denied*, 502 U.S. 1060 (1992).
[6] *See* TEX. LOC. GOV'T CODE § 211.006(a),.
[7] TEX. LOC. GOV'T CODE § 211.007(c).
[8] San Marcos, Tex., City Code, Ord. No. 2010-59.
[9] *Id.* at 20.
[10] *Wake Forest Golf & Country Club, Inc. v. Town of Wake Forest*, 212 N.C. App. 632, 711 S.E.2d 816 (2011).
[11] *Id*.
[12] *Id*.
[13] *Id*.

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2019 Land Use eConference

First appeared as part of the conference materials for the
23rd Annual Land Use Conference session
"Repurposing Golf Courses: Regulatory and Common Law Challenges"