

## GOVERNING DOCUMENTS FOR GOLF COURSE COMMUNITIES

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The governing documents for a planned community, like a computer's hardware and operating system, are the platform on which the system operates and the programs are run. They are the source of rights, powers and authority and yet also have limitations. They must recognize the relationships between various components and establish protocols to maintain them. When the planned community includes a golf course, it is critical that those governing documents are tailored to and able to meet the particular needs of that community.

As with computers, the governing documents for most communities look fairly similar and most are able to perform the basic essential functions. However, the savvy computer buyer knows that last year's model, although economically priced, likely will not have all of the features of a newer system or accommodate all of the software he wants to use. Thus, he identifies his current needs, attempts to anticipate his needs for the foreseeable future, and then selects a system that best meets those needs with room for expansion and flexibility to upgrade.

So it should be with the governing documents for a golf course community. There are many forms available that perform the basic functions of establishing the community, providing for a mandatory membership owners association, and creating assessment obligations and lien rights. The developer's goal, however, should not be just to fulfill the basic needs of *any* planned community, but to establish a governance structure custom tailored to the specific needs and desires--present and future--of his particular community.

The primary goals of the governing documents should be to provide for the long-term ownership, operation and maintenance of common areas and amenities in a mutually beneficial manner and to provide for the smooth and efficient operation and administration of the

community, both during and after the development period. They should fairly and accurately represent the community and the development plan while preserving developmental flexibility and minimizing potential liability for the developer and the association.

Satisfying these basic goals, however, is no longer enough to be a "cutting edge" community. Today, the leaders in community development are striving to facilitate the development of "community" in the true sense of the word through governing documents that *enable* more than they restrict, that emphasize *people* and not just property management, and that establish governance systems as concerned with *relationships* as they are with ownership.

Creating the governance structure for a golf course community today requires more than signing and recording a standard "one-size fits all" set of covenants and restrictions. The declaration of covenants, conditions and restrictions, the articles of incorporation and by-laws of the owners association, and the subdivision plats, as well as the marketing materials, contracts, and deeds used to sell and convey property, must all work together to reflect the developer's vision for the community and establish the mechanisms and procedures for implementation of that vision.

"Vision" requires forward thinking and advance planning. That planning must include a proactive, not reactive, approach to defining the community through its governing documents and establishing the interrelationships between the residential development and the golf course.

### **Putting "Community" in the Community Association**

Defining the community means more than just describing the boundaries of the land which is to be part of the community. It means using the governing documents as a tool to set the tone for the community, to educate and inform, to present the community as a pleasant and enjoyable place to live, and to encourage participation by residents. In short, the governing

documents are fundamental to the process of creating a sense of "community" for a golf course community.

Historically, developers and builders, their marketing staffs, and consumers have looked upon the governing documents for planned communities as necessary boilerplate, full of legalese that nobody really reads. Such will continue to be the case unless developers and their attorneys recognize and work to change this perception. The governing documents should be viewed, and used, much like a "constitution" for the community, a living document that forms and guides the community as it evolves and changes over time.

In order to accomplish that, the governing documents must be drafted with careful attention to form and format. They should use clear and concise, plain language that it is easily understood by the property owners and residents of the community who will be governed by, and will be administering, the documents. They must be in a user friendly format so as to encourage frequent reference to and reliance upon them. They should be explanatory as well as operational, including a mission statement to set the tone for the community and statements describing the purpose of various provisions to provide guidance to those charged with interpreting and applying them.

The governing documents for planned communities are commonly referred to as "restrictive covenants," evidence of another image problem arising from the fact that most contain page after page of prohibitions and restrictions on the owners' ability to do things on their property or on the common property. Yet in many of the country's most appealing communities, residents are motivated by community pride and neighborliness, not by restrictions and fear of sanctions. If developers are to repeat the success of these older communities, there

needs to be a change in mindset--in both documentation and practice--from one of restrictiveness and control to one that focuses on empowerment and participation.

Instead of long lists of prohibitions and restrictions, the governing documents should include only a few carefully selected restrictions addressing those matters which are extremely important or might otherwise be controversial if the board were to attempt to regulate them after homes have been sold, such as any restrictions on leasing or occupancy. The documents should then empower the board of directors and the membership to adopt regulations and to modify them so that the regulations can be tailored to the particular needs and desires of the community as it changes and evolves over time. The documents should also include a "bill of rights" for owners and residents to give them comfort that certain fundamental rights will not be impaired by future regulation.

Complaints about overly restrictive communities arise not only from the number and types of restrictions they have in place but also from the manner in which the associations enforce them. The misguided belief that the association has an obligation to take enforcement action whenever there is a violation of a restriction, no matter how inconsequential, often leads boards of directors to adopt a very heavy handed approach to looking for violations and imposing sanctions when they are found.

The governing documents should contain broad enforcement powers and an array of possible sanctions, in addition to legal action, to address violations. However, they should expressly grant the board of directors a "license to be reasonable" in taking enforcement action when a violation is brought to its attention. Such a provision authorizes the board to use its judgment in determining *not* to take enforcement action under circumstances where the board determines, in the exercise of its business judgment, that the violation is minor in nature and

would not be objectionable to a reasonable person, or that the nature of the violation does not justify expending the association's resources to enforce compliance, or that the association's legal position is tenuous.

If the board determines that enforcement action is appropriate in a particular case, the documents should provide for notice to the violator and an opportunity to cure the problem, if appropriate. They should also provide the violator with an opportunity to be heard before a final decision is made regarding imposition of sanctions.

Enforcement problems and other conflicts within planned communities can often be traced to a lack of understanding, a lack of sensitivity or miscommunication. Feelings get hurt or someone gets offended and then letters and accusations start flying, exacerbating the conflict and often leading to litigation in which nobody wins. The governing documents can help to avoid the financial and emotional costs to those involved in such conflicts and to the community by providing mandatory procedures to help resolve such conflicts without litigation. Such provisions might include requirements for negotiation and mediation of disputes. In addition, where the association is considering instituting non-routine litigation, they might include a requirement that the matter be put before the membership for a vote to ensure a sufficient level of support before committing the association's resources to the cause.

In addition to defining and presenting the community as a pleasant place to live, the governing documents should encourage residents' participation in the community and its governance. This should entail more than just the standard provisions for voting and service on committees. The governing documents should recognize and take advantage of the technology which is available in today's new communities to facilitate participation in a variety of ways.

Community home pages on the Internet are becoming commonplace. In many new communities today, every home is prewired for high speed Internet access and connection to a community intranet. The governing documents should recognize this technology and facilitate its use by providing for ownership and maintenance of a community intranet, and by authorizing the association to enter into bulk service contracts for the provision of technology services to the community.

Such technology also greatly enhances the opportunities for communication between the board of directors, voting representatives and residents on community issues. It facilitates dissemination of information and education regarding the community, its administration, and its activities, encouraging participation by residents in everything from special committees to schools to volunteer organizations. It makes it simple and fun to "be connected" and to participate in community efforts and events, helping to overcome the problems of apathy, misinformation, and feeling out of touch that are often detract from the developer's and the association's efforts to create a sense of community. The governing documents can facilitate this process by authorizing notices to be sent to members by e-mail and voting by e-mail, subject to any limitations that may exist under state corporate law.

Community developers today know that creating "community" requires more than just installing streets and utilities and building houses. Home buyers in suburban areas want opportunities for the same kinds of recreation, social interaction, and community involvement that are available to residents of older, established communities in urban areas. If there are not governmental bodies and private interests already in place providing these opportunities, the community developer may need to establish them.

One way to do this is to expand the traditional role of the community association to include provision of recreational and educational programs and sponsorship of clubs, civic and charitable organizations, environmental and conservation programs, the arts and cultural activities. Alternatively, the developer could create tax-exempt organizations to perform these roles, separating them from the traditional business and governmental roles of the community association and providing tax benefits as well. In either case, the governing documents will need to address the authority to engage in these activities and provide a source of funding.

One method that is increasingly being used to fund such activities, whether provided by the association or through one or more separate, tax-exempt organizations, is a transfer fee. In addition to assessments which an association regularly levies to fund expenses incurred in fulfilling its traditional responsibilities, the governing documents may authorize the association to collect fees from the transferring owner upon resale or other transfer of homes in the community to help fund community enhancement activities. Such fees might be based upon a percentage of the resale price or appraised value of the home, returning to the community a portion of the appreciation in value that the seller realizes on resale. This approach recognizes that such appreciation is enhanced by the desirability of the community in which the home is located and that the community is made more desirable by the types of activities that such fees support.

### **Relationship Between the Golf Course and the Community**

When the developer of a planned community chooses to provide recreational amenities and facilities for the community, whether through the association or through a separate operation, the governing documents should reflect the developer's plan for ownership and operation of those amenities, even if that plan initially is simply to preserve all options. This is

particularly true in the case of a golf course community, as the size of the golf course and the nature of its operations gives rise to a variety of issues and potential for conflicts. Moreover, the potential for misunderstandings regarding the home buyers' rights with respect to the golf course, and the potential impact of such misunderstandings, is great.

The developer needs to determine the extent of the relationship, if any, which will exist between the community association, the amenities, and the residents of that community, then ensure that the governing documents adequately establish and protect that relationship. Everyone involved in the development, marketing and sales process must understand the amenity plan in order to ensure that the governing documents and oral representations are consistent with and do not undermine it.

The first step in developing an amenity plan is to decide whether to submit the golf course property to the declaration of covenants, conditions and restrictions for the residential community and thereby subject it to the jurisdiction of the community association. The alternative is to address the relationship between the golf course and the community association in a separate document that sets forth necessary easements and covenants and provides for sharing of the costs of any properties or services provided by one that benefit the other.

Advocates for submitting the golf course to the declaration and the association's jurisdiction believe that the golf course is an integral part of the community and its owner should have a voice in operation of the community association. Some feel that this approach gives the residential owners needed protection and control over maintenance, use and aesthetic matters on the golf course property. They also like the simplicity of including all of the necessary covenants and easements relating to the community in a single document.

Experience has shown, however, that commercial owners and operators of golf courses typically do not want to be an integral part of the community. They have no interest in being involved in or subject to regulation by a community association controlled by residential property owners whose interests are likely to be very different from those of the commercial golf course operator. The "voice" which the golf course operator theoretically has by virtue of votes allocated to the golf course property is typically so small as to be meaningless. Thus, if the golf course is to be owned and operated on a commercial basis, or the developer wishes to preserve the option of selling the golf course to a commercial operator at some point in the future, it may be unwise to submit it to the jurisdiction of the community association.

Once this fundamental decision is made, the developer needs to consider the extent to which there is, or needs to be, a relationship between the golf course and the surrounding community. That relationship must then be established through appropriate easements and covenants set forth in a document that is binding on both the benefited and the burdened property.

There are a number of issues which need to be considered in defining the relationship between the golf course and the surrounding community. The documents should address or disclaim any rights or obligations relating to maintenance of landscaped buffer areas between the residential property and the golf course and protection of golf course views. They should address any architectural controls on the residential property adjacent to the golf course for the benefit the golf course, as well as any architectural controls on the golf course property for the benefit of the community. They should address or disclaim, in a very clear and conspicuous manner, any rights that residents of the community may have for access to and use of the golf course property, including the clubhouse, cart paths, lakes and ponds. Such provisions should

take into account not only rights with respect to golf play, but also any rights or limitations on use of golf course property for other recreational purposes, including walking, picnicking, fishing, and retrieving golf balls from water hazards.

A major area to be considered in this process is the ownership, maintenance and use of lakes and ponds. Will the lakes and ponds on the golf course property serve as detention basins for stormwater runoff or holding ponds for treated effluent from the community? Will the lakes and ponds on the golf course, and the system of pipes, lines and pumps that connect them, provide a source of water for irrigation of landscaped areas in the community or vice versa? If so, how will the competing demands for such water be balanced between the community and the golf course? Will either be allowed to draw down the water level to a point that the lakes or ponds become muddy eyesores? Who will be responsible for maintaining the water quality of the lakes and ponds, controlling insects and algae, and maintaining and insuring the bulkheads that retain the water? Each of these issues must be carefully thought through and, to the extent appropriate, addressed in the governing documents.

The documents need to include a variety of provisions for the benefit of the golf course operator. Such provisions should include easements over residential property adjacent to the golf course for errant golf balls and for access by golfers to retrieve such golf balls. They may need to include easements for overspray of irrigation water and chemicals from the golf course onto adjacent residential property. They should also include disclosures and disclaimers of liability regarding noise from golf course operations and the possibility of property damage or injury from errant golf balls landing on adjacent residential property.

If the streets providing access to the golf course are private, the governing documents will need to create an easement over such streets for access to golf course and for parking during

tournaments and other special events at the golf course that might draw more vehicles than can be accommodated in parking spaces on the golf course property. If cart paths will wind through the community over common property or residential lots, the governing documents will need to grant easements to the golf course operator for installation, maintenance, repair and use of such cart paths.

In many golf course communities, the community association provides services and facilities which benefit both the residential community and the golf course property. Likewise, the golf course operator may provide facilities which benefit the residential community. In addition to the sharing of facilities for stormwater drainage, effluent disposal, and irrigation as discussed previously, it is commonplace for the association to maintain entry features, street lighting, sidewalks and landscaping along the primary roads in the community. The community association may provide roving security patrols, or it may own and operate a private wastewater treatment facility that serves both the residential community and the golf course property, or it may provide other services that benefit the golf course property. In each of these cases, some arrangement for cost sharing between the association and the golf course operator may be appropriate.

The governing documents should acknowledge any sharing of such services and facilities and create enforceable obligations to continue to provide any such services or facilities which benefit both the community and the golf course, In addition, they should provide a reasonable method of allocating costs related to such services and facilities.

In determining an appropriate allocation of such costs, the developer should take into account the nature of the benefits given and received, the additional burden, if any, imposed on the provider by allowing the beneficiary to share such benefits, and the ability of the golf course

operator to share in such costs without creating an unreasonable financial burden. The developer should also consider the extent to which the golf course users are property owners in the development and already pay a share of such costs through the assessments which the association levies on their property.

The governing documents for a golf course community are not simply a formality for the lawyers take care of; they are a critical part of the process of creating and enhancing "community" in a golf course community. The drafting process should be viewed as a team sport, with participation and input from legal, marketing, management, construction and sales personnel.

If the team is to be successful in fulfilling the developer's vision for the community, everyone involved in the process must understand that vision, agree upon the objectives, and coordinate its implementation. They must understand the interrelationships between the golf course and the residential community and ensure that they are properly addressed not only in the recorded covenants, but also in the plats, marketing materials, sales documents and deeds used to convey property in the community. Finally, they must educate those involved in the marketing and sale of the community so that they accurately represent the vision, the development plan, and the interrelationship between the residential community and the golf course to prospective purchasers.

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