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Implied Restrictive Covenant Prevents Conversion of Golf Course to Residential Lots

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A federal court of appeals held that a golf course was encumbered by an implied restrictive covenant, preventing the foreclosing lender from selling the golf course for residential development. The U.S. Court of Appeals for the 11th Circuit found in *In re: Heatherwood Holdings, LLC,* that the original marketing of a subdivision where the golf course was located played a significant role in establishing an implied restrictive covenant. Developers of projects that include a golf course or other significant amenities should consider disclosing in their marketing materials that these amenities may change or be discontinued if they cease to be financially viable.

The golf course at issue was in the center of a Birmingham, Alabama, subdivision with golf-themed street names and golf-related easements and restrictions in the covenants that encumbered the lots (but not the golf course). Homeowners were required to be members of the golf club, and original subdivision marketing materials included numerous references to the golf course.

The initial developer sold the golf course, and ownership changed hands several times while the course was in business. The chain of title to the golf course did not include any express restrictions limiting its use to a golf course. When the course was acquired by Heatherwood Holdings, LLC (Heatherwood), Heatherwood recorded a side letter agreeing to operate it for 25 years, which the court found to be merely a contractual agreement between the parties that did not run with the land or bind successor owners. Following repeated years of significant losses, Heatherwood's lender foreclosed on the property, intending to recover its debt by acquiring the golf course, redeveloping it, and selling it as residential lots.

Although the court found that there were no recorded covenants restricting the property's use to a golf course, it held that the property was limited to golf course use by an implied restrictive covenant, evidenced in large part by the testimony of homeowners who stated that the presence of the golf course was integral to their decisions to purchase in the subdivision. The court further found that Heatherwood had actual and constructive notice of the existence of the implied restrictive covenant. Consequently, any subsequent sale of the golf course would be subject to the implied restrictive covenant.

In this case, the court gave great weight to the expectations of homeowners and the reliance they placed on the original common promotional materials. Developers should be mindful of this case when including golf courses or other significant amenities in their projects.

Ballard Spahr will continue to monitor the development of this case and its implications. For more information, please contact Roger D. Winston at 301.664.6201 or winstonr@ballardspahr.com, Shelah F. Lynn at 301.664.6204 or lynns@ballardspahr.com, or Katherine M. Noonan at 301.664.6212 or noonank@ballardspahr.com.