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September 7, 2016

CONFIDENTIAL ATTORNEY CLIENT MEMORANDUM
NOT TO BE DISSEMINATED TO NON-BOARD MEMBERS

Via Email
Texas National Property Owners Association
Attn: Sandy Russell, President
and Gary Hines, Director
P.O. Box 1150
Willis, Texas 77378

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Re: Legal Issues Pertaining to Texas National Golf Course

To all Board Members of Texas National Property Owners Association,

I had the opportunity to make a preliminary review of the documents that are in the court records, both as to the golf course and then as to the neighboring lots in the subdivision. I have set forth below a brief summary of these documents and how they impact the critical issues, specifically the obligation of the golf course owners to maintain the property and land use restrictions concerning the golf course.

State of the Court Records Regarding the Golf Course Property and Subdivision Lots-

I started my search back in the mid 70's(1976) when Coker deeded the land to Texas National Golf and Development, Inc. ("TNGDI"). There are no written provisions in this deed which restrict it to golf use only. However, the Deed of Trust (i.e. mortgage) states that so long as the indebtedness secured by the deed of trust remains unpaid, the mortgaged premised(i.e. golf course) shall not be used or occupied, without the prior written consent of O. Dean Couch, Jr., for any purpose other than as they are now so used and occupied, to wit; as a private club and golf facilities for the property owners in the adjoining real estate development of grantor. Although this is not a specific " deed restriction", it reflects on the original grantor's intent, to use the golf course as an aid for the development of the residential golf course community. Moreover, there are documents stating

that the club facilities and golf course may not be released until all sums owing to the bank have been paid in full.

In August 1976, almost a year and a half after the aforementioned conveyance, TNGDI filed of record "Restrictions and Covenants Governing Property and Lots" for sections 1-9 and Country Club Homes. These restrictions were imposed on all lots and were designed to create and carry out a uniform plan for the improvement and sale of property and lots in Texas National Subdivisions. The restrictions say that they are recorded with a desire to restrict the use and development of said lots in order to insure that it will be a high class restricted residential district. These restrictions reference the golf course and golf course lots in a variety of ways and impose a burden on the lot owners to use their property in a way that is compatible with golf course use. Specifically, dwelling size and construction is restricted such that golf course lots must be at least 1800 sq feet. Fences must be constructed with the approval of the architectural control committee. No clotheslines may be placed on lots adjoining the golf course and must not be visible from the golf course. Importantly, the deed restrictions call for a maintenance fund whereby a monthly maintenance fee is collected by the developer to pay for maintaining the golf course and clubhouse grounds and ad valorem taxes due on the golf course. These maintenance fees are to be collected against every lot owner until 80% of lots of all sections in the subdivision are sold or 10 years, whichever comes first. The administrator had discretion as to how the money is to be used, however, in no event shall be less than $60 per year per lot be used toward the maintenance of the golf course. The term of these restrictions ran through January, 1992; after which time they would automatically extend for successive periods of 10 years unless an instrument signed by a majority of lot owners was filed altering same. So, you can see how the golf course and the subdivision lots are tied together. I am unsure as to whether this provision was obliged or not, however, the documents support the concept that there was a common plan and scheme and plan for the development of a golf course community.

In December 1981, TNGDI sold the golf course and all other property in Montgomery County to Texas National Development, Inc. ("TNDI"). This appears to be a foreclosure sale.

In 1982, TNDI filed amendments to above described deed restrictions. These amendments do not delete the reference to the maintenance fund. To the contrary, they expand on it stating that in no event shall less than one half of all monies paid into the maintenance fund be applied to the maintenance of the golf course and clubhouse grounds. These restrictions call for the formation of the Association acting through a three member board once 80% of all lots have been sold by deed or ten years whichever comes first. The term of the restrictions run through 2002 and automatically renewed from year to year unless amended by a majority of lot owners.

In March, 1995, TNDI conveyed most of its remaining ownership interests in the subdivision to Merlin Lester, Trustee. This could be a bankruptcy sale.

In December, 1995, Texas National Inc. ("TNI") acquired the golf course property from the RTC, as receiver of Texas Bancshares, FSB. There are no deed restrictions in the chain of title restricting use of the golf course to "golf course use only". Shortly thereafter, in February 1996, TNDI conveyed its remaining interest in the subdivision to Merlin Lester, Trustee.

In June 2016, Willistar,LLC conveyed the golf course property to Nolley Lake Properties, LLC, ("Nolley"). Nolley is a Wyoming LLC. Willistar's manager is Dar Sheng Chen. Willistar was a byproduct of a merger with Brightstone Inc. Chen was president of Brightstone as well. Joe Nocito is listed as the governing person for Nolley. Ron Holley is listed as Nolley's registered agent.

Brightstone apparently acquired the golf course property through a merger with TNI.

From what I can tell at this point, there appear to be no references in any of the historical conveyance deeds which expressly restrict the golf course property to "golf course use" only. This is not dispositive for the reasons I mention below.

State of the Plat Records

I reviewed the plat records, specifically sections 1-9 and country club homes. Most of these plat records reference "golf course" on the land directly adjacent to the lots that are being platted, however there is no language restricting the golf course property.

The summary of Plat information on the sections is referenced below:

Section 1: Texas National Golf and Development. March 1975 41 lots
Section 2: Texas National Golf and Development. May 1976, 249 lots
Section 3: Texas National Golf and Development. 1977 100 lots
Section 4: Texas National golf and development. June 1978, 95 lots
Section 5:Texas National Development Co. March 1978, 63 lots.
Section 6: Texas National Development Co. April 1978, 100 lots
Section 7:Texas National Development Co. .April 1978, 92 lots
Section 8: Texas National Development Co April, 1978, 131 lots
Section 9: Texas National Development co. April, 1978, 63 lots
Country Club Homes: Texas National Golf and Development Inc. April 1976, 43 lots

Restrictions on the Golf Course Property? Express and Implied Restrictions.

The two key issues presented relate to the present owners lack of care and maintenance of the golf course property and whether the golf course and country club are deemed to be restricted

to "golf course use" either by written recorded restrictions or by implied easements which may be imposed by operation of law. I will first address and analyze the issue of whether there are any written "golf use only" restrictions on the golf course property.

After a review of the documents in the real estate records and the plat records, it appears that there are no express (written) documents in the chain of title that restrict the golf course property to "golf course use". Notwithstanding, there are references in the Plat records which state that all streets, alleys, and parks are dedicated for public use. It may be argued that the golf course is a "park" and that the intent of this language is to preserve the golf course and dedicate it for public use.

Although the golf course may not be bound by express (written) restrictions , it is likely burdened with implied easements which restrict the use of the golf course property for golf course use only. We refer to these as Implied reciprocal negative easements. The legal doctrine of Implied Reciprocal Negative Easements applies when an owner of real property subdivides it into lots and sells a substantial number of those lots with restrictive covenants designed to further the owner's general plan and scheme of development. The Texas Supreme Court case of **Evans v Pollack** gives a reasonably accurate general statement of the doctrine as follows: "Where a common grantor develops a tract of land for sale and pursues a course of conduct which indicates that he intends to inaugurate a **general scheme and plan of development** for the benefit of himself and the purchasers of the various lots, and by numerous conveyances inserts in the deeds substantially uniform restrictions, conditions, and covenants against the use of the property, the grantees acquire by implication an equitable right, variously referred to as an implied reciprocal negative easement or an equitable servitude, to enforce similar restrictions against that part of the tract retained by the grantor or substantially sold without the restrictions to a purchaser with actual or constructive notice." The kind of evidence usually established to show a common scheme and plan of development is advertising, maps, plats referencing golf course, brochures, deed restrictions on neighboring lots, etc.

In our case, it seems clear that the developer built a golf course community(i.e. a general scheme and plan of development) with the golf course at its foundation. I am sure that marketing materials and brochures were distributed to prospective buyers explaining that this was a magnificent place to live and play golf. Golf course lots were likely promoted at a premium price. The plats all mention the golf course as being on the perimeter or adjacent to the lots. The deed restrictions recorded by the developer on the lots all mention the golf course and restrict use of the lots in such a way that golf course use is maximized. Specifically, there are set backs and fencing requirements for golf course lot owners that are different than those folks who do not live on the golf course. More importantly there are references in the deed restrictions regarding a maintenance fund where home owners pay a fee for the maintenance of the golf course and payment of the ad valorem taxes on the

golf course. In sum, by virtue of the common scheme and plan of development established by the developer, there may be a symbiotic relationship between the lots and golf course such that the lot owners acquire an implied reciprocal negative easement to enforce similar (golf use only) restrictions on the golf course property. These arguments were utilized successfully by our firm in the Inwood, and other cases, and caused the court to impose golf use only restrictions on the golf course as a matter of law.

Obligation of Owner to Maintain the Golf Course Property?

Another critical issue is whether the owner of the golf course property has a legal duty to the homeowners to properly maintain the golf course property. My review of the documents does not indicate an express(written) duty to maintain the golf course or give lot owners express enforcement rights in the event the golf course becomes unruly. However, the maintenance fund in the deed restrictions mentions that the homeowners are paying sums of money to insure that the golf course is kept in proper condition. Specifically, not less than one half of the maintenance fund must be used to maintain the golf course and club house grounds. The documents also mentions that the lot owners are paying for the ad valorem taxes on the golf course property. The deed restrictions also put the burden on the lot owners to cut the weed and grass and keep **their** lots in a healthful, sanitary, and attractive manner. Given these provisions, I think it will be difficult for the golf course owner to argue there is no reciprocal obligation to the lot owners to maintain the golf course. As a caveat, I do not know if the lot owners ever paid these maintenance fees, however it may not matter because the covenant is in the documents, and may create a contractual duty.

In addition to the above, the owner of the golf course can be held liable for damages due to their violation of Texas private nuisance laws. Under Texas law, a nuisance is a condition that substantially interferes with the use and enjoyment of land by causing an unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it. A number of factors are considered in analyzing a nuisance claim, including the character of the neighborhood, the parties' land usage, the location of the land, the magnitude, extent, degree, frequency, or duration of the interference, and the interest of the public and community at large. Illegal nuisances can be committed through intentional acts, negligent acts, or through strict liability when the perpetrator engages in dangerous activities. Remedies available for unlawful nuisances include money damages and injunctive relief. If a nuisance is deemed to be temporary, the damages available are lost use and enjoyment that has already occurred. However, if the damage is permanent, the owner can recover lost market value of the property. Given the facts as presented, I feel like it would be reasonable to argue that the nuisance is permanent, thus a claim for lost market value of the homes could be brought.

Moreover, there are public nuisance laws (Health and Safety code) and Montgomery County ordinances which offer homeowners the right to bring an injunction action to address the illegal nuisance. Such laws allow the recovery of legal fees and court costs.

Do the Homeowners Have Any Claims?

Yes, the homeowners have rights under law to seek the enforcement of implied restrictions against the golf course which relate to both use and maintenance. This is because the original developer subdivided land into lots and sold a substantial number of lots with restrictive covenants designed to further a common scheme and plan of development, i.e. a golf course community. These restrictions created a legal bond between the lots and the neighboring golf course. Evidence of this plan and scheme is seen in the deed restrictions on the lots, advertising, marketing, plat maps and other instruments recorded of record. The enforcement of these implied restrictions would be through a suit alleging a declaratory judgment action.

The homeowners also have a right to seek damages for violations of private nuisance laws and may seek damages as well as an injunction to prohibit the golf course owner from continuously interfering with your use and enjoyment of your property. If the interference of the golf course owners is deemed to be permanent, damages can be sought for the loss in fair market value of the homeowners' property. If however, the interference is temporary, then the law allows you to recover the damages for loss of use and enjoyment of your property, plus special damages proximately caused by the nuisance such as the cost of removing debris deposited on the property. Exemplary or punitive damages are also recoverable for violation of the private nuisance laws. The enforcement of these rights would be through a suit for damages and possibly a request for an injunction.

The Homeowners also have a right to seek an injunction to abate public nuisances under the Health and Safety code, a state statute designed to protect landowners from deplorable property conditions. There are also Montgomery county ordinances which prohibit such conditions and allow claims for injunctive relief. Such injunctive relief provides an effective tool to compel the golf course owner to maintain the land in a sanitary and healthful manner. If the injunction is violated, the court can find the landowner in contempt, jail offenders, award fines, and other relief. Unlike private nuisance claims, these laws allow the recovery of legal fees if the injunction claims are successful.

What Are Our Options?

At this point, we can either send a demand letter to the owners of the golf course insisting that they remedy the nuisances(i.e. clean up and maintain the grounds properly) and honor the" golf use only' restriction which we seek to impose on their property, or file suit to enforce the implied restrictions and seek damages and/ or an injunction for the nuisance violations. Such a suit would

seek a judicial declaration that the golf course is restricted to "golf use only" and seek money damages and/or an injunction for the nuisance violations. We would also file a lis pendens in the real property records to give notice to the world that the golf course property is subject to our suit. There may be arguments for both of these options, but I think we can agree that our bargaining position would be a lot better if we had a suit on file. This important decision will obviously require further discussion with the board.

How Long Will This Take?

Unfortunately, there is no definite answer to this question. If a demand letter is sent in lieu of a suit, then it's up to the parties to meet and cut a deal regarding the use and maintenance of the golf course property. Under this scenario, there is no legal forum in which the dispute is brokered, and the negotiations could take weeks or months depending on the circumstances. Of course, if no agreement is accomplished, then all bets are off and other options may be considered. If a suit is filed, the defendant(s) will have 20 days to answer our suit, and then the court sets a schedule to manage the prosecution of the case. A case such as this will potentially be set on a 12-16 month tract. However, the courts do refer most cases to mediation well before they reach the trial ready stage.

What Will This Cost?

This is an important question that cannot be predicted at this point. Obviously, sending a demand letter will be cheaper than initiating a lawsuit, however, the letter is a low impact approach that will likely not yield as much return as a properly prepared lawsuit. It is my experience that the lawsuit will "frame" the issues for debate, and set the stage for more meaningful discussions. Moreover, the filing of the Lis Pendens, which is filed commensurate with the suit will likely prevent the sale of the golf course property while the suit is pending. So, the owner of the golf course will have no choice but to resolve these issues with the homeowners prior to selling or securing refinancing.

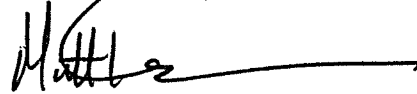
Are Attorney's Fees Recoverable?

Texas statutes do allow the recovery of legal fees if we are successful on our declaratory judgment claim which addresses the "golf use only" implied restriction claim. However, the court does have a fair amount of discretion in awarding such fees. There is no guarantee that fees will be amended if we are successful. Moreover, although there is no right to recover attorneys' fees when pursuing a claim for private nuisance, there is a right to recover attorneys' fees for a public nuisance claim.

As you can see, there are some complex issues here that will require debate before action is taken. I will be glad to discuss these matters with the board, if necessary. In the interim, feel free to contact me via email or phone with questions or concerns.

Sincerely,

HOOVER SLOVACEK LLP



Matthew A. Kornhauser