GOLF COURSE REPURPOSING: ADDRESSING THE ISSUES OF IMPLIED RESTRICTIONS

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INTRODUCTION: THE EVOLUTION OF RESIDENTIAL GOLF COURSES

Developers build residential golf courses in the belief that doing so will create premiums for surrounding residential lots and generate a higher profit for the development company than would be obtained by filling the same space with additional residential lots. This is often complemented by a belief that the timeframe within which lots are sold will be accelerated by the presence of a golf course.

There were early examples of golf courses being used as a central attraction to sell real estate before the 1960s, but in those cases the courses invariably were a distinctive separate entity, rather than interwoven with the real estate. There were two catalysts for the intimate symbiotic relationship that emerged between golf and real estate in the form of residential golf developments in the latter decades of the 20th century.

First was the master-planned community of Sea Pines Plantation on Hilton Head Island, South Carolina,

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which was developed in the late 1950s and early 1960s.[2] The golf course at the Sea Pines development introduced two major innovations. First, it demonstrated that golf courses could be designed so they created extensive amounts of green space and water around which building lots could be wrapped, and they could be threaded through less attractive land to enhance its value. Second, Sea Pines exercised private control over the development through extensive use of covenants and deed restrictions, which protected the integrity of the project. The considerable publicity Sea Pines received stimulated widespread imitation, emulation, and adaptation across the U.S.

Ostensibly, much of the enhanced land value and accelerated lot absorption rates arise from golfers' desires to have convenient access to a proximate appealing course. However, there are two other major contributing factors. The first is image. Golf has connotations of affluence and prestige, and some may seek to enhance their self-esteem or social standing by buying into a development with this image. A complementary source of enhanced value is the visual and physical access to attractive open space that persuades non-golfers to pay a premium price for their homes.

The second catalyst stimulating the symbiotic relationship was the embrace of golf by the upwardly mobile middle-class of the post-World War II economic boom. Increasingly, a large segment of the American population had the time, money, mobility, and desire to engage in more recreational activities. In 1950 there were 3.5 million golfers, but by 1970 the number had more than trebled to 11.2 million.[3]

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[2] Danielson, M.N. *Profits and Politics in Paradise: The development of Hilton Head Island*. UNIVERSITY OF SOUTH CAROLINA PRESS, Columbia, S.C:, 1995.

[3] National Golf Foundation & McKinsey and Co. A strategic perspective on the future of golf. NGF. Jupiter Florida, 1995.

In 1987, further momentum for residential golf courses was fueled by a report commissioned from the eminent McKinsey consulting company, *Strategic Plan for the Growth of the Game.*).[4] Their optimistic projections were based on the premise that a primary golf demographic was retirees and since the baby-boomers with relatively large amounts of both discretionary time and income would shortly be entering that life phase, golf demand was likely to grow substantially. The CEO of the National Golf Federation (NGF) at that time who commissioned the report subsequently recalled its impact:

> The centerpiece for that plan was a clarion call to build "A Course a Day" from 1990 to 2000 in order for the golf industry to meet the anticipated demand for golf. The slogan of "A Course a Day" was featured in PGA Tour television public service announcements (PSAs) and caught fire with the media. This led to the new perception in the business community that there was a great opportunity for profitable investments to be made in the golf industry. The promotional strategy worked.

	1970	**1980**	**1990**	**2000**	**2003**	**2016**
Golfers (millions)	11.2	15.1	24.2	28.8	30.6	23.8
Rounds Played (millions)	266	358	421	518	495	456
Golf Courses (HEQ)	7,516	9,582	11,178	14,268	14,827	13,927
Golfers Per Course	1,490	1,533	2,058	1,780	2,064	1,686
Rounds Per Course	35,370	36,345	40,340	36,300	33,378	30,542

[4] National Golf Foundation & McKinsey Company, 1987.

US Population (millions)	205.1	226.5	249.6	282.2	290.1	325.7
Percent Playing Golf	5.4%	6.7%	9.7%	10.2%	10.5%	7.3%

Table: U.S. Golfing Population, 1970-2016

The Table shows the number of golfers in the U.S. increased from 11.2 million in 1970 to 30.6 million in 2003. The NGF defines a golfer as an individual aged 18 or over who played at least one round in a year on a regulation length course. To accommodate this growing demand an average of 400 facilities a year opened through the 1990s, so by 2003, which was the peak demand year for number of golfers in the US, there were 14,827 eighteen-hole equivalent (HEQ) courses--an increase of 6,601 in the three decades since 1970.[5] It was variously estimated that 40%-80% of these new courses were in master-planned residential communities.[6]

After the peak year of 2003, there was a consistent annual drop in the number of golf players, so by 2017 there were 6.8 million fewer golfers: a loss of 22%. The number of eighteen-hole equivalent courses (HEQ) followed a similar pattern peaking in 2005 at 14,990. Between 2005 and 2017, the net number of HEQ courses declined by 1,063. A small number of new courses opened each year, but the much larger number of closures resulted in annual

[5] National Golf Foundation (2017). *Golf Participation in the US. 2017*. Jupiter, Florida, NGF

[6] Hueber, D. & Worzala, E. (2010). "Code Blue" for U.S. golf course real estate development: "Code Green" for sustainable gold course development. Clemson, S.C: Center for Real Estate Development. Burgess, D.H. (1991). Lending to golf course communities. Journal of Commercial Bank Lending. March 19-30; Kauffman, S. (2006). Community golf Washington DC: Urban Land Institute.

net reductions. For example, in 2017, 205.5 facilities permanently closed, while only 15.5 new courses opened.[7]

THE EVOLUTION OF GOLF COURSE CONFIGURATIONS

The emergence of residential golf courses led to the evolution of alternate configurations that were designed to maximize the amount of "edge" and, hence, real estate frontage. The Figures below show three common alternatives: core; single fairway; and single fairway with returning nines.

The early U.S. facilities built for the elitist private clubs were "core" courses characterized by relatively short holes located adjacent to each other with a typical footprint of 100 acres. Only 3% of these courses had any real estate around them. Golfers played the first nine holes, turned around and played the nine holes that were adjacent to the first nine.[8] Their edge was typically around 10,000 feet.

The newer configurations typically had a larger footprint of 175-200 acres to incorporate the buffer zones and longer holes which were deemed necessary to accommodate the improved technology of clubs and balls, and additional accoutrements such as driving ranges and other recreation amenities. The Figures below suggest they typically create about 45000 feet of edge.

[7] National Golf Foundation (2017). *Golf Participation in the US*. 2017. Jupiter, Florida, NGF

[8] Phillips, P.A. (1996). *Developing with recreational amenities: Golf, tennis, skiing, and marinas*. Washington DC: Urban Land Institute.

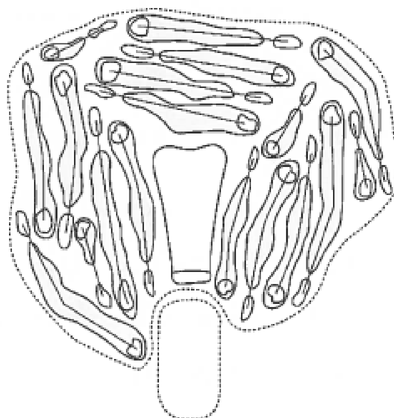

Fig.1: The Core Golf Course. In a core course, the holes are clustered together; either in a continuous sequence. Because it consumes the least amount of land, the core course is usually the least expensive to build. However, the only sites it provides for real estate development lie at its perimeter, and the length of lot frontage is ±10,000 feet.

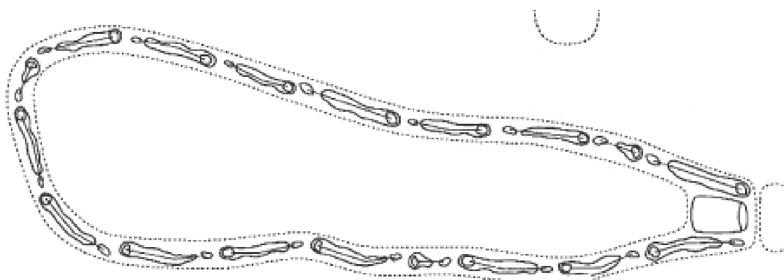

Fig 2: The Single Fairway. a single, open loop starting from the clubhouse and returning to the clubhouse. It consumes the greatest amount of land and offers the greatest amount of fairway frontage for development sites. It can be designed to wind its way through fairly difficult terrain. Length of available lot frontage is ±47,000 feet.

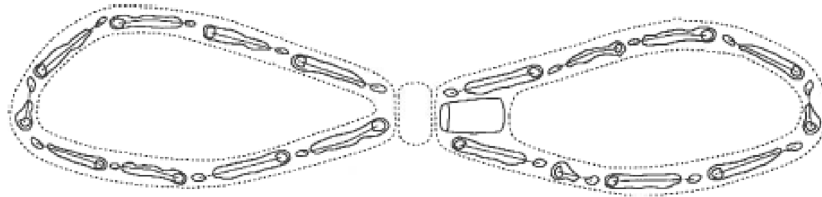

Fig. 3: The Single Fairway with Returning Nines. This configuration consists of two loops of returning nines, with the clubhouse in the center. Most flexible for play, slightly less frontage due to the concentration of tees and greens for holes 1, 9, 10, and 18. Length of available lot frontage is ±44,000 feet.

THE CORE CONUNDRUM

It would appear at first glance that the cause of the increasing number of residential golf course cases is that the number of golfing households is declining while the burden of subsidizing a course borne by a large majority of homeowners who are not golfers is increasing. According to this line of thinking, the golfers seek to retain rights to the maintenance of the golf course as such, arguing that such rights are implied in reciprocity with recorded deed restrictions on their homes, while the non-golfing majority seek relief from the increasing amount of "tax" needed to support them.

But this begs the question: Why would homeowners pay a substantial premium to live in a residential golf development when nobody in their home plays golf? When asked, non-golfing homeowners have generally answered that the cost of having a golf course is justified because the course enhances the beauty/aesthetics of the development.[9] Non-golfers are not paying for the golf course *per se,* i.e., a place to play golf. Rather, they are paying for the golf course as an attractive landscape, a heightened local

[9] Crompton, J. L. & Nicholls S. (2021). *The impact on property values of parks, trails, golf courses, and water amenities.* Urbana, Illinois: Sagamore Venture Press, pp 530. Chapter 11 "The impact on property values of golf courses".

atmosphere, a signal of prestige; an absence of the negative externalities associated with more proximate neighbors.

While the perceived nature of the benefits conferred on their subdivisions may differ, golfing and non-golfing residents alike are willing to pay a significant premium and subject themselves to uncommonly burdensome deed restrictions precisely because of the presence of a golf course in their back yard instead of additional residents.

The dispute giving rise to litigation is not as between golfing and non-golfing homeowners. In fact, the battle lines are generally drawn between the homeowners, who receive valuable benefits from the golf course, and outgoing golf course operators/incoming developers, who do not. The general decline in play has meant the general disappearance of profit for the companies tasked with owning and operating residential golf courses. Those looking to sell out are unlikely to recoup their losses from another operator under similar financial pressures.

Developers, on the other hand, may present the struggling operator with an opportunity to come out ahead. To a developer, the golf course looks like 120-200 vacant acres of prime residential real estate.[10] If he can be convinced that he will take the acreage more or less free from restrictions on residential development, the developer will pay orders of magnitude more than anyone whose offer is based on prospective income from golf course operations. Thus, where there are no express restrictions on the golf course property in the real property records, such deals between golf course operators and residential developers are increasingly being struck. For the reasons discussed above, their gain will impose an unmitigated loss on homeowners. Their interest in the golf course property may

[10] American Society of Golf Course Architects, "How much land do I need to build a golf course?" https://asgca.org/faq-how-much-land-do-i-need-to-build-a-golf-course/ (last visited on July 14, 2023).

be real, but the homeowners of a golf course subdivision cannot expect to be party to the sale of a golf course property in which their interest is not of record but only implied.

A PROPOSED SOLUTION

Fitting that in the context of preserving the use of land for a centuries-old British game, the dominant theory on which residential golf courses are being preserved is a centuries-old common law doctrine: the implied reciprocal negative easement.

A growing number of residential golf course developments in other states have been able to protect their golf courses and the benefits they confer by asserting the IRNE doctrine. Under the IRNE doctrine, a growing number of courts have Courts have upheld restrictions on subsequent bona fide purchasers from redeveloping residential golf courses despite the lack of any express notice of a negative easement in the real property records. This may hold true even in Texas, which has always been a recordation state.

I. TEXAS COURTS' TREATMENT OF THE IRNE DOCTRINE IN THE GOLF COURSE SUBDIVISION CONTEXT

Just over 100 years ago, in *Curlee v. Walker*, 244 S.W. 497, 498 (1922), the Supreme Court of Texas first adopted the IRNE doctrine.[11] In 1990, the supreme court

[10] *See Holloway Trust v. Outpost Estates Civic Club, Inc.*, 135 S.W.3d 751, 756 n.4 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (stating that "[t]he Texas Supreme Court has since clarified that implied reciprocal negative easement, equitable servitude, and negative implied restrictive covenant are alternative names for the same doctrine").

provided a "reasonably accurate" description of the IRNE doctrine, as follows:

> [W]here a common grantor develops a tract of land for sale in lots and pursues a course of conduct which indicates that he intends to inaugurate a **general scheme or 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 subsequently sold without the restrictions to a purchaser with actual or constructive notice of the restrictions and covenants.[12]

The doctrine can be used to establish a land-use restriction by implication.[13]. The doctrine has been analyzed and applied repeatedly in the courts of appeals. Most Texas appellate courts have concluded that to establish that an IRNE exists, one must prove that there was a general scheme or plan of development. In *Evans*, the Supreme Court of Texas noted that with respect to the existence of an IRNE, "[t]he central issue is usually the existence of a general plan of development."[14] What facts

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[12] *Evans v. Pollock,* 796 S.W.2d 465,466 (Tex. 1990) (bold emphasis added).

[13] *See Clear Lake City Water Auth. v. Clear Lake Utilities Co.*, 549 S.W.2d 385, 388 (Tex. 1977) (stating that the "doctrine has application only to promises *respecting the use of land*") (emphasis in original).

[14] 796 S.W.2d at 466

are necessary to prove a general scheme or plan of development, however, is not so clear.

Significantly, the applicability of the IRNE doctrine to a golf course subdivision where no express restrictions are placed on the golf course requiring it to be used as a golf course (or where such restrictions were filed but have since expired) has never been addressed by the supreme court. But five courts of appeals have adopted the following rule, enunciated in *Lehmann v. Wallace*:[15]

> [A] general building plan of improvements or development" may be "established in various ways, such as by express covenant, by implication from a filed map, or by parol representations made in sales brochures, maps, advertising, and oral statements on which the purchaser relied in making his purchase." 510 S.W.2d 675, 680 (Tex. App.—San Antonio 1974, writ ref'd n.r.e.). A few courts of appeals have noted that whether a general scheme or plan of development exists is a question of fact.[16]

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[15] *See Bitgood*, 2021 Tex. App. LEXIS 4571, at *19 (citing to *Lehmann*); *Country Cmty.*, 438 S.W.3d at 668 (quoting *Lehmann*); *Baywood Estates Prop. Owners Ass'n v. Caolo*, 392 S.W.3d 776, 783 (Tex. App.—Tyler 2012, no pet.) (citing *Lehmann*); *Rakowski v. Comm. to Protect Clear Creek Vill. Homeowners' Rights*, 252 S.W.3d 673, 678 n.5 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (quoting *Lehmann*); *Selected Lands Corp. v. Speich*, 702 S.W.2d 197, 199-200 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (quoting *Lehmann*).

[16] *See Byrd*, 2016 Tex. App. LEXIS 7805, at *18 (stating "existence and scope of common plan or scheme of development and its scope is fact question"); *Caolo*, 392 S.W.3d at 783 (stating "[w]hether a general plan or scheme of development exists is a fact question to be determined from the circumstances"); *Ski Masters of Tex., LLC v. Heinemeyer*, 269 S.W.3d 662, 672 (Tex. App.—San Antonio 2008, no pet.) (stating "[w]hether a general plan or scheme of development exists is a fact question").

While some courts have found that an IRNE may be established by showing that there is a general plan or scheme of development applicable to land not expressly restricted, such a rule has yet to be adopted in the golf course subdivision context specifically.[17] In *River Plantation Cmty. Improvement Assn v. River Plantation Props. LLC*, No. 09-20-00036-CV, 2022 Tex. App. LEXIS 2808, (Tex. App.—Beaumont Apr. 28, 2022, no pet.) ("*RPCIA*"), a developer sought to convert an unprofitable golf course into additional single family residential housing. There was ample evidence establishing that an IRNE existed at the time of the original development and construction of the golf course. An express restriction requiring that the golf course be used as a golf course was filed ten years after the original development, but these had expired by the time the new developer purchased the golf course. The RCPIA argued that the IRNE had not been extinguished by the subsequent filing of an express restriction, and that the IRNE continued despite the express restriction's expiration.

The court of appeals issued an opinion implicitly rejecting RCPIA's argument. However, the opinion never mentioned *Lehmann*, the rule from *Lehmann*, or any of the other cases that cited to the *Lehmann* rule—including that court's own opinion in *Bitgood*, which issued about six months after the briefing was completed in this case. The RPCIA repeatedly cited to *Lehmann* throughout its two briefs, to no avail. In the RCPIA case and many others, application of the IRNE doctrine as expressed in *Lehmann* may be the only refuge of a golf course subdivision desirous of retaining its golf course in the absence of any current,

[17] *See River Plantation Cmty. Improvement Assn v. River Plantation Props. LLC*, No. 09-20-00036-CV, 2022 Tex. App. LEXIS 2808, at *1 (Tex. App.-Beaumont Apr. 28, 2022, no pet.).

express restriction limiting the property to use as a golf course.[18]

IRNE AND *LEHMANN* BEFORE THE SUPREME COURT OF TEXAS

Although the supreme court cited to *Lehmann* in *Evans v. Pollock*, it did so only for the proposition that the IRNE doctrine can be applied such that it is limited only to a "restricted area" as opposed to "all the tracts in the development."[19] Until the supreme court adopts and applies the rule in *Lehmann* as the proper means for establishing a general scheme or plan of development under *Evans*, its 100 years of IRNE jurisprudence will remain a confusing landscape for Texas courts, civil litigants, and property owners. The importance to the state's jurisprudence in adopting the *Lehmann* rule or a similar alternative is plainly demonstrated by the countless homeowners and other landowners who have been and will continue to be affected by the IRNE doctrine.

Lehmann's importance was further reinforced in 2007, when the Texas Legislature enacted section 212.0155

[18] Specifically, the court of appeals affirmed the trial court's summary judgment rulings that there was ***no evidence*** of an IRNE on the River Plantation subdivision golf course property, despite uncontroverted summary-judgment evidence showing that there were (1) numerous express references to the "golf course" in five sections' deed restrictions, (2) 255 subdivision lots labeled as "golf course lots," (3) clear depictions of the golf course fairways, tee boxes, and greens in two sections' plat maps, and (4) several parol representations in sales advertisements and oral statements indicating that the River Plantation golf course was in fact a golf course that was incorporated into, a part of, and meandering throughout the River Plantation subdivision and the adjacent residential lots.). Put simply, had the rule in *Lehmann* been adopted and applied to the undisputed summary-judgment record, it seems likely that the proper outcome was to reverse the Final Judgment and remand for a jury trial on the existence of an IRNE that restricts the golf course to golf-course-use only.

[19] 796 S.W.2d at 470-71.

of the Texas Local Government Code[20] to address when a golf-course-use-only "restriction" is based on "an implied covenant or easement benefitting adjacent residential properties" with respect to a "[s]ubdivision golf course," which is defined as "a golf course or a country club within a common scheme of development for a predominantly residential single-family development project."[21]

The Bill Analysis of HB 3232 (section 212.0155) framed the Legislature's policy rationale for enacting the new law—a rationale that fits the facts of this case precisely, in pertinent part, as follows:

> In the Houston area subdivision golf courses are a popular type of neighborhood. This type of development involves creating residential lots adjacent to a golf course that winds through the community. **When the golf course and the home sites are developed simultaneously under a single development plan, the home buyers are charged a premium price for the prestige of living in a golf course community; these buyers have a reasonable expectation that the land developed as a golf course will continue as a golf course.**
>
> In recent years some owners of subdivision golf courses have considered redeveloping their land by converting the golf course into tracts for apartments,

[20] Section 212.0155 was passed unanimously by the Texas Legislature, without a single no vote in either chamber. *See* Act of June 15, 2007, 80th Leg., R.S., ch. 1092, § 1.

[21] *See* Tex. Local Gov't Code §§ 212.0155(b)(5)(A) and 212.0155(k)(5)(A). *See also Clear Lake City Water Auth. v. Clear Lake Country Club, L.P.*, 340 S.W.3d 27, 32 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (stating "[d]uring the Texas Legislature's 2007 session, House Bill 3232 ("HB 3232"), was introduced to address the redevelopment of closed golf courses").

> office buildings or warehouses. **But this type of redevelopment**, and even the public announcement of considering such a redevelopment, **has a serious detrimental effect on the property values of the whole subdivision**. When the property values deteriorate the homeowners suffer economic loss.
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> **Older citizens who invested in a homestead environment where they could live out the rest of their lives depend on their home equity for part of their retirement savings**. Young families want to raise their children where they can run and play and explore in open spaces and partake in activities that keep their kids busy and off the streets. Municipalities count on their tax base (as represented by the high value of the existing homes) not to lose its' [sic] value. . . .[22]

Notably, section 212.0155 was passed with the support of Inwood Forest Community Improvement Association,[23] which, in *Inwood Forest Cmty. Improvement Ass'n v. Inwood Forest Partners, L.P.*, Cause No. 2007-16697, 2010 Tex. Dist. LEXIS 4787, at *3-4 (Apr. 1, 2010) (hereinafter "*IFCIA*"), obtained a Final Judgment signed by then-Judge and now-Justice Randy Wilson. In his opinion, Justice Wilson declared that the Inwood Forest Country Club golf course "was and is encumbered and bound by an implied reciprocal negative easement, running

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[22] House Comm. on Land & Resource Management, Bill Analysis, Tex. H.B. 3232, 80th Leg., R.S. (2007) (emphasis added).

[23] *See* House Comm. on Land & Resource Management, Tex. H.B. 3232, 80th Leg., R.S. (Apr. 11, 2007) (witness list) (Matthew A. Kornhauser testifying for H.B. 3232 on behalf Inwood Forest Community Improvement Association); *see also* Testimony of Matthew A. Kornhauser, *available at* https://tlchouse.granicus.com/MediaPlayer.php?view_id=24&clip_id=2464 (last visited Nov. 16, 2022) (start time at 1:52:09).

with the land, whereby the Golf Course Property was and is restricted to golf course use for the benefit of adjacent subdivided lot owners in the Inwood Forest Subdivision.[24]

The issue of the IRNE doctrine as applied to golf-course subdivisions will continue to appear before the Texas courts of Appeals in substantially the same form as it has in the cases discussed above. Other states' courts have applied the IRNE doctrine, or similar doctrines, in the subdivision golf course context; [25] in doing so, they have

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[24] Section 212.0155, however, does not apply to the River Plantation subdivision or golf course because it is in neither the corporate boundaries nor extraterritorial jurisdiction of an applicable municipality. *See* Tex. Local Gov't Code § 212.0155(a).

[25] *See Kings River Trail Ass'n v. Pinehurst Trail Holdings, LLC*, 447 S.W.3d 439, 443 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (jury finding "that there was no general plan or scheme of development whereby the Property was restricted to golf course use for the benefit of adjacent subdivided lot owners"); *see also Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 688 P.2d 682, 683, 689 (Ariz. Ct. App. 1984) (discussing "equitable servitudes" and concluding that "a covenant restricting the use of the property is implied from the facts and circumstances and is enforceable against the new owners because they are not bona fide purchasers without notice"); *Mt. High Homeowners Ass'n v. J. L. Ward Constr. Co.*, 209 P.3d 347, 355 (Or. Ct. App. 2008) (affirming the trial court's declaration of the "existence of the equitable servitude" because "it would be unjust for defendant to benefit from the successful marketing of Mountain High as a "golf course community" without the imposition of the servitude"); *Ponderosa Pines Golf Course, LLC v. Ponderosa Pines Prop. Owner's Ass'n*, No. 31,489, 2013 N.M. App. Unpub. LEXIS 177, at *1-3 (N.M. Ct. App. May 2, 2013) (affirming trial court's summary judgment that "an equitable servitude in favor of the individual property owners was created that required the golf course property to remain a golf course or open space in perpetuity."); *Riverview Cmty. Grp. v. Spencer & Livingston*, 337 P.3d 1076, 1078, 1080-81 (Wash. 2014) (reversing a summary judgment dismissing homeowners' claims seeking an "equitable servitude" by "implication" and stating that "we observed that words on the face of a plat, such as "golf course" on one of the recorded plats here, can establish an equitable covenant limiting the use of land"); *Heatherwood Holdings, LLC v. First Commer. Bank*, 61 So. 3d 1012, 1013, 1026 (Ala. 2010) (answering affirmatively to certified question of "[w]hether Alabama law recognizes or will imply a restrictive covenant as to a golf course

clarified issues subject to dispute that similarly situated parties in Texas as yet cannot avoid, and can only hope to resolve by resorting to litigation.

II. CASE STUDY: *SHALIMAR ASS'N V. D.O.C. ENTERS., LTD.*[26]

Until such time as the Supreme Court of Texas has adopted the IRNE doctrine in golf course subdivision context, several factually similar cases from outside the jurisdiction of Texas may be instructive to property owners associations in search of guidance on these issues.[27] The leading case in this area is arguably *Shalimar Ass'n v. D.O.C. Enters., Ltd.,* a 1984 decision from the Arizona Court of Appeals.[28]

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constructed as part of a residential development consistent with a case with similar facts, *Shalimar Ass'n v. D.O.C. Enters., Ltd.*, 142 Ariz. 36, 688 P.2d 682 (Ariz. Ct. App. 1984)"); *WS CE Resort Owner, LLC v. Holland*, 860 S.E.2d 637, 641 (Ga. Ct. App. July 2, 2021) (holding that the "trial court properly determined that an implied easement exists in the property" in a "dispute between the operator of a golf course and the owners of property in a residential community regarding whether the property owners acquired an implied easement for the golf course"); *accord Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 427 P.2d 249, 253 (N.M. 1967) (stating that "where land is sold with reference to a map or plat showing a park or like open area, the purchaser acquires a private right, generally referred to as an easement, that such area shall be used in the manner designated"); *but see Peck v. Lanier Golf Club, Inc.*, 726 S.E.2d 442, 444, 446 n.4 (Ga. Ct. App. Mar. 8, 2012) (affirming summary judgment dismissing declaratory judgment claim asserting that plaintiff "acquired an implied easement or implied restrictive covenant in Lanier's adjacent golf course property," including because "the undisputed evidence established that the golf course was not developed as a part of the subdivision").

[26] 142 Ariz. 36, 688 P.2d 682 (Ariz. Ct. App. 1984).

[27] *See* note 24, *supra.*

[28] *Shalimar Ass'n v. D.O.C. Enters., Ltd.*, 142 Ariz. 36, 688 P.2d 682 (Ariz. Ct. App. 1984). *See Heatherwood Holdings, LLC v. First Commer. Bank*, 61 So. 3d 1012, 1013, 1026 (Ala. 2010) (explicitly

A. Background

Shalimar Estates was a residential land development consisting of 134 acres located in Tempe, Arizona. The development consisted of a golf course and adjacent residential lots (the “Shalimar Property”). Upon acquiring the land, the developer designed a golf course which was intended as an integral part of the general plan for the development and improvement of all the Shalimar property. The plan, including the golf course, was devised for the purpose of inducing people to buy property in the Shalimar subdivisions and was intended to be for the benefit of those purchasers and their successors in interest. A map showing the proposed development was shown to potential lot buyers and was recorded in the office of the Maricopa County Recorder in August 1960. The developer also recorded certain restrictions for Shalimar Estates, which in pertinent part read as follows:

> “5. No structure shall be located nearer than thirty feet to any property line abutting on the *golf course property; . . ..*
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> * * * * * *
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> 9. No fence, wall or hedge over 2 1/2 feet high shall be constructed or maintained within the area lying between the front of any building and the front or street property line. No fence, wall or hedge over 6 feet high shall be constructed or maintained on any portion of a lot. Landscaping shall be planned in this area so as to avoid undue obstruction of the *view of*

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adopting the Arizona rule as stated in *Shalimar* for golf course subdivisions in Alabama).

> *the golf course* from the lots, and all property lines abutting on *the golf course* shall be fenced with 3 feet high grape stake fencing or equivalent.
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>
> 17. It is contemplated that a *golf course* may be constructed on that certain part designated as Tract "A" in SHALIMAR ESTATES, and the terms "golf course property" and "golf course" as used herein shall *mean the golf course which may be constructed* on those tracts as shown by the recorded plat of SHALIMAR ESTATES."[29]

Notably, no restrictions were recorded against the golf course property itself (sometimes referred to as "Tract A"). The golf course was constructed in 1960 and 1961 in accordance with the configuration and dimensions shown on the recorded plat.[30]

Other recorded documents included references to golf course restrictions. For example, the recorded plat for the Shalimar West subdivision shows an easement for a golf cart path, and the recorded plat for Shalimar Estates addition number four contains a grant of a private irrigation easement to Shalimar Golf Club for its "use and enjoyment and its attendant liabilities of upkeep, maintenance and care." In addition, brochures and sales materials which depict and describe the golf course were placed on file as a public record with the Arizona Department of Real Estate.

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[29] *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 38 (Ariz. Ct. App. 1984).

[30] *Id.* at 38.

Residential lot sales began in 1961. The brochures provided to lot purchasers showed a golf course surrounded by numbered home lots.[31]

A group of new developers became interested in purchasing the Shalimar golf course in 1978. Prior to purchasing the golf course, the new developers saw the recorded plats for Shalimar Estates and Shalimar West which showed Tract A, the golf course property, surrounded by residential lots. They also saw the restrictions, which contained numerous references to the golf course, and the plat for Shalimar West, which contains an easement for a golf cart path.[32]

The new developers learned that the golf course had long since ceased to be a profitable enterprise for its owners. [33] They learned from driving on the golf course that it was surrounded by homes with a view overlooking it. They knew that the configuration of the existing golf course was virtually identical to the configuration of Tract A on the recorded plat. [34]

B. Issue

In *Shalimar*, the Arizona Court of Appeals determined that the issue for its decision was whether, under the circumstanced described above, restrictions upon the use of land may arise other than by deed or written instrument so as to bind a purchaser with notice.[35]

C. Holding

[31] *Id.*
[32] *Id.* at 39.
[33] *Id.* at 40.
[34] *Id.* at 44.
[35] *Id.* at 41

The trial court found that at or prior to the time they acquired their interest in the subject property, the new developer had actual or constructive notice, and they had information on the basis of which they had a duty to inquire and thereby would have learned of the golf course restrictions.

On appeal, the new developers argued that their sole duty of inquiry was to check recorded documents and, because they did so and found no restrictions, they should not be bound by an implied restrictive covenant.[36]

The Arizona Court of Appeals disagreed, upholding the trial court's decision that the new developers were not bona fide purchasers for value because they were on constructive notice of the IRNE. distinguished *Shalimar* from the line of Arizona cases holding that that an IRNE in favor of one parcel of land and against another must be created by a written instrument and recorded if a purchaser for value is to be put on notice of the IRNE's existence. The purpose for the distinguished rule, i.e., preventing "crazy quilt" pattern development,[37] is not applicable where the argued-for restriction applies only

[36] Arizona, like Texas, is a recordation or "notice" jurisdiction.

[37] *Id.* at 41-42, (quoting *Riley v. Bear Creek Planning Committee*, 131 Cal. 381, 551 P.2d 1213 (1976) ("Where, however, mutually enforceable equitable servitudes are sought to be created outside the recording statutes, the vindication of the expectations of the original grantee, and for that matter succeeding grantees, is hostage not only to the good faith of the grantor, but, even assuming good faith, to the vagaries of proof by extrinsic evidence of actual notice on the part of grantees who thereafter take a part of the servient tenement either from the common grantor or as successors in interest to his grantees. The uncertainty thus introduced into subdivision development would in many cases circumvent any plan for the orderly and harmonious development of such properties and result in a 'crazy-quilt' pattern of uses frustrating the bargained-for expectations of lot owners in the tract."

against land retained by the developer such as a subdivision golf course.[38]

CONCLUSION

To Texas property owners associations with golf course subdivisions, the facts of *Shalimar* and the cases that have adopted a similar rule will be instantly recognizable.[39] Given the increasing level of re-development interest in golf course subdivisions in Texas, the question is sure to arise in the courts more and more frequently.

While the Supreme Court of Texas has yet to authoritatively adopt *Lehmann, Shalimar,* or similar guideposts by which a reviewing court may guide its inquiry in the golf course subdivision context, there is good reason to believe that day may soon be coming. The traditional notion that Arizona was and is a recordation state did not impede the high court of that state from adopting a common-sense rule for determining the existence or non-existence of an IRNE in the golf course subdivision context.

[38] *Id.* at 42.
[39] *See* note 24, *supra*.