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October 28, 2022

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Re: File Nos. 22-DDP-0048, 22-DDP-0072, 22-CUPPA-0086 and 22-CUP-0175

Members of the Louisville Metro Government Planning Commission and Mr. French;

Please be advised that this office represents Glenmary Homeowners Association, Inc. (“**Glenmary HOA**”) located at 10303 Colonel Hancock Drive, Louisville, Kentucky 40291. Glenmary HOA opposes both the detailed development plan in 22-DDP-0048 and/or 22-DDP-0072¹ and the pre-application/application for Conditional Use Permit in 22-CUPPA-0086 and 22-CUP-0175. The proposed Private Proprietary Club (“**the Club**”) is not compatible with the existing development of the area, prior use of the property, fails to promote the public health and safety of the surrounding property and violates the Declaration of Covenants, Conditions and Restrictions (“**Restrictions**”) applicable to the property.

BACKGROUND

The real property at issue in this case is located within Section 2 of Glenmary Subdivision, as identified in the plats filed by HFH in the office of the Jefferson County Clerk, Plat Book 37, Pages 99, 100 and 101. From April 15, 2005 through February 2021, the real

¹ The District Development Plans outlined in 22-DDP-0048, filed on April 6, 2022 in conjunction with the Conditional Use Permit Pre-Application [22-CUPPA-0086] and the current Plan [22-DDP-0072] appear to be identical in all respects and therefore will be referred to collectively as (“**the DDP**”).

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property at issue was owned by Par Golf, LLC ("**Par Golf**") and was, during part of that time, being used in conjunction with a membership golf club. In 2013, after the financial failure of the golf course, Par Golf filed applications for Minor Subdivision plat amendments, Docket Numbers 19173, 19174 and 19219, with the Louisville Metro Planning Commission ("**Planning Commission**") seeking to create three buildable lots on a portion of the real property at issue. On February 17, 2014, Glenmary HOA filed suit against Par Golf and the Planning Commission seeking a declaration of rights that the real property owned by Par Golf within Glenmary Subdivision was Recreation Area and that Par Golf's attempt to obtain approval for the further subdivision of some or all of the Recreation Areas for home construction constituted a violation and/or breach of contract as represented by the Restrictions and plats applicable to Glenmary Subdivision. (See Glenmary Homeowners Association, Inc. v. Par Golf, LLC, et al, Civil Action Number 14-CI-000844) ("**Declaratory Judgment Action**").

Following the Planning Commission's approval of Par Golf's applications for Minor Subdivision plat amendments, Docket Numbers 19173, 19174 and 19219, Glenmary HOA filed a Complaint/Notice of Appeal, Civil Action No. 14-CI-002143 against the Planning Commission and Par Golf which was later consolidated with the Declaratory Judgment Action. On March 1, 2018, Judge Barry Willett, Division One of the Jefferson Circuit Court, issued his Order holding, in part, that the Declarations applied to all of the Recreation Areas owned by Par Golf and that the failure of the Planning Commission to consider the Restrictions was arbitrary and capricious. (**Exhibit A, p. 28**). Judge Willett's Order reversed and set aside the Planning Commission's approval of Par Golf's applications for amended plats pursuant to Docket Numbers 19173, 19174 and 19219 and further required the Planning Commission to take all necessary and required actions to ensure that the amended plats were voided and held for naught. (**Exhibit A, p. 31**). Judge Willett's Order was affirmed by the Kentucky Court of Appeals on April 3, 2020 and the Kentucky Supreme Court denied Discretionary Review on June 9, 2021 making Judge Willett's Order final and non-appealable.

On May 21, 2021, the Applicants, AL CAT, LLC and Valley Station Towne Center, LLC (collectively, "**Applicants**"), purchased 45.92 acres of the Recreation Area property located in Glenmary Subdivision from Par Golf. (**Exhibit B**). The Applicants are both owned and/or controlled by Chris Thieneman. At the time of the purchase, the Order of Judge Willett and the Opinion of the Kentucky Court of Appeals affirming Judge Willett's Order were matters of public record and were known to Applicants and Mr. Thieneman. This is evidenced by the property description on the Deed to Applicants which includes the statement "The above described 45.92 acres includes certain real estate for which a subdivision approval under Planning Commission Docket No. 19173 is subject to a pending appeal in *Glenmary Homeowner's Association, Inc. v. Par Golf, LLC, et al*, Cases 14-CI-00844 and 14 CI-002143.". (**Exhibit B, p. 511**).

As part of the overall transaction to purchase the 45.92 acres, Mr. Thieneman also obtained an option to purchase the remaining Recreation Areas owned by Par Golf. Prior to the purchase, Mr. Thieneman sent emails/text messages to the members of the Glenmary HOA Board which he then posted on the Glenmary's Future Facebook page. (**Exhibit C**). The

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email/text posted includes Mr. Thieneman's statement that the Glenmary HOA should purchase the Recreation Areas from him or his controlled entities because it "is the logical answer to end the legal fees and lawsuits." (**Exhibit C**).

Following the purchase of the 45.92 acres, Mr. Thieneman continued in his attempts to force "negotiations" with the Glenmary HOA Board concerning the purchase of the Recreation Areas upon which he or his controlled entities held an option demanding a purchase price of \$1.6 million. Mr. Thieneman admitted via a Facebook post, that his motivation was to attempt to have the Property sold on behalf of the lender, Stock Yards who currently holds a mortgage on the Property and who Mr. Thieneman claims is his "number one bank" and that he and Stock Yards got together in 2020 and agreed that Mr. Thieneman should/could do whatever he could to get the Property/mortgage off Stock Yard's books. (collectively, **Exhibit D**). In fact, Mr. Thieneman stated in a separate post "One more just for you. Stockyards is my main bank. They want to get this off their books before the end of year. I said I will work my ass off to make that happen. I have tried hard to explain that the neighborhood should own it. If no it still has to be sold. Why some of you think it should be free use with no expense? I have no idea. But it's not about to work that way." (**Exhibit D**).

When Mr. Thieneman's attempts to force the Glenmary HOA Board to purchase certain portions of the recreation areas failed, he decided to pursue a different tactic. Mr. Thieneman aligned himself with the West Louisville Urban Coalition ("**WLUC**") and Mr. Neal Robertson and posted on Glenmary's Future page his intention to allow a "homeless retreat" to occur on a portion of the Property upon which he only held an option to purchase, on the weekend of October 1, 2021. (**Exhibit E**). The "retreat" ended with police being called and WLUC and Mr. Robertson, along with the individuals recruited to attend the "retreat", being asked to leave the Property due to their disturbance of the peace. Facebook posts from Mr. Thieneman all but admitted that his decision to hold the homeless "retreat" was an attempt to intimidate the residents of Glenmary and/or the Glenmary HOA by stating "I did what I could to help y'all decide who should own it. But you get what you deserve." (**Exhibit F**). Defendant Robertson posted on his Facebook page the statement that "the city is moving the homeless camps from downtown, so we will be recruiting them for Glenmary retreat Halloween weekend." Mr. Thieneman commented "trick or treat". (**Exhibit G**). Glenmary HOA filed suit against the Applicants, Mr. Thieneman, WLUC and Mr. Robertson, among others on October 21, 2021 styled, Glenmary Homeowners Association, Inc., v. Par Golf, et al, Civil Action No. 21-CI-005993. That litigation is still pending.

Against this background, Mr. Thieneman, through the Applicants, filed the proposed DDP and CUP to operate a the Club on a portion of the designated Recreation Areas located within Glenmary Subdivision. The DDP includes the renovation of the existing golf course clubhouse and the conversion of the existing tennis courts into pickle ball courts. New additions to this limited area will include a putting green, a practice green, a driving range, a new pool, volleyball courts, an amphitheater, and the conversion of the former golf cart barn into a wedding venue. With the exception of the putting/practice greens and driving range, none of these amenities were part of the original golf course operations.

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LEGAL ISSUES

LDC 4.2.1 describes the intent and applicability relating to all conditional uses, including but not limited to, the creation of a Private Proprietary Club such as the one being proposed by the Applicants.

Certain land uses due to their extent, nature of operation, limited application, or relationship to natural resources are considered as exceptional cases. The uses listed in this Part may be permitted in certain districts by Conditional Use Permit following a public hearing before the Board of Zoning Adjustment **provided such uses will not have an adverse effect on neighboring property**, are not in conflict with Goals, Objectives, and Policies of the Comprehensive Plan, **the proposed uses are essential to or will promote the public health, safety, and general welfare in one or more zones**, and are in compliance with the listed standards and requirements.
(emphasis added).

LDC 11.4.7, F, 2 provides that the review of a proposed DDP includes consideration of “[t]he compatibility of the overall site design [sic] (location of buildings, parking lots, screening, landscaping) and land use or uses with the existing and projected future development of the area;...”. LDC 4.2.44 provides that while a CUP can be obtained for a Private Proprietary Club in R-4/R-6 zoned property, such as the property at issue, such use must be compatible in size and scale with surrounding land uses “Private Proprietary Clubs may be located in the..... Districts where such use is compatible in size and scale with surrounding land uses and where the lot contains at least 2 acres upon the granting of a Conditional Use Permit.” Finally, the LDC defines Private Proprietary Clubs as “Buildings and related facilities established for the recreational or other common interests of the members or users, which buildings and facilities are operated as a business, commercial activity, or for profit, but not including buildings and facilities established for activities listed in these regulations as adult entertainment activities.” In addition to the applicable provisions of the LDC, the Planning Commission must also consider the Restrictions. (**Exhibit H**). Paragraph (6) of the applicable Restrictions states “[n]o noxious or offensive trade or activity shall be conducted on any lot, nor shall anything be done which may be or become an annoyance or nuisance to the neighborhood.” Jefferson County Metro’s Noise Ordinance—LMCO § 99.02(A)—declares that:

[i]t shall be unlawful for any person within Louisville Metro to make, continue, or cause to be made or continued, any unreasonably loud, harsh, or excessive noise which either annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of others, unless the making or continuing of the noise is necessary for the protection or preservation of the life, health, or safety of a person or persons.

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LMCO § 99.01 defines an “unreasonably loud, harsh or excessive noise” as “[a]ny manufactured noise plainly audible at a distance of 50 feet from its point of origin or emanation.”

KRS 411.550(1) provides that:

In determining whether a defendant’s use of property constitutes a private nuisance, the judge or jury, whichever is the trier of fact, shall consider all relevant facts and circumstances including the following:

- (a) The lawful nature of the defendant’s use of the property;
- (b) The manner in which the defendant has used the property;
- (c) The importance of the defendant’s use of the property to the community;
- (d) The influence of the defendant’s use of property to the growth and prosperity of the community;
- (e) The kind, volume, and duration of the annoyance or interference with the use and enjoyment of claimant’s property caused by the defendant’s use of property;
- (f) The respective situations of the defendant and claimant; and
- (g) The character of the area in which the defendant’s property is located, including but not limited to, all applicable statutes, laws, or regulations.

Under Kentucky law, noise complaints constitute nuisance claims. Dickens v. Oxy Vinyls, LP, 631 F. Supp. 2d 859, 865 (W.D. Ky. 2009) (citing J.R. Curry v. Farmers Livestock Mkt., 343 S.W.2d 134 (Ky. 1961)).

ANALYSIS

Applying the foregoing legal issues to the proposed DDP and CUP of the Applicants, it is clear that the request should be denied. At the outset, the scope of the Club raises serious concerns about the true nature of the operation. While the Applicants have claimed that “[t]he Club and its amenities will be offered only to members...”, it seems extremely unlikely that will be the case. (Applicants’ July 2, 2022 Letter of Explanation, p. 2). After all, the DDP proposes to construct on the property an outdoor amphitheater and a wedding venue, neither of which existing previously, along with operating a restaurant in the former clubhouse that will be run by an outside restaurateur. As noted in the Staff Findings dated October 31, 2022, the Applicants have failed to describe the maximum number of members, the membership fees, or the hours of operation of ANY of the proposed amenities. Finally, if there is an attempt to allow non-members to use some or all the proposed Club amenities, there is no practical way to monitor that usage after approval and construction.

Regardless of the apparent commercial venture aspects of the proposed Club, there are also significant issues about whether a grant of a CUP is appropriate under the LDC. As indicated above, the LDC review of a proposed CUP must take into consideration the effect of the use on the neighboring property. As the DDP clearly shows, the proposed Club will be in the

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middle of Glenmary Subdivision. Approximately fifty homes are adjacent to the Club. Depending on the number of members, the increase in traffic and potential for parking issues are obvious. While the Applicants July 1, 2022, Letter of Explanation states that they intend to utilize the existing parking area, Applicants failure to identify the maximum number of members creates the very real possibility that the membership will exceed the existing parking, resulting in “members” parking in the Subdivision. Along with the increased exposure to traffic and parking issues, Applicants have stated an intention to solicit “members” of the Club who are not residents of Glenmary Subdivision and perhaps are not even residents of Jefferson County. (July 1, 2022, Letter of Explanation). As a result, all the residents of Glenmary Subdivision will then be exposed to “members” that have no ties to the surrounding property or residents, will be attending events such as concerts or weddings where alcohol will be consumed thereby creating a significant potential for adverse effects on the surrounding property that will not promote the public health, safety and general welfare of the residents of Glenmary Subdivision.

Applicants’ intention to provide an amphitheater, pickle ball courts and a wedding venue will only result in noise levels that will disturb and annoy the surrounding property owners. Studies have shown that pickle ball play alone creates noise levels that exceed *eight times* the ambient noise levels to neighboring residential properties located within approximately 170 feet. (**Exhibit I**). The DDP shows that the proposed pickle ball courts will be located within *fifty (50) feet* of some of the surrounding residential property. As a result, the pickle ball courts alone will constitute a violation of Jefferson County’s noise ordinance and will, as a matter of law, constitute a nuisance to a significant number of members of the neighborhood owning residential property adjacent to the proposed Club.

Contrary to the conclusions of the Applicants, not all the intended amenities of the Club are consistent with the previous use of the property as a golf course. There were no pickle ball courts, no wedding venues, no amphitheater, and no volleyball courts previously. The sound levels from any of these activities would not be consistent with golf course use. While the lack of information from the Applicants makes it difficult to determine, given the significant investment by the Applicants the will be necessary to complete the Club if approved, there will certainly be an incentive for the Applicants to develop a maximum membership that would greatly exceed that of the prior golf course. Finally, the anticipated hours of operation would also not be consistent with the golf course. Given the nature of the proposed wedding event space, amphitheater and potentially the volleyball and pickle ball courts (depending on lighting), use of these areas would not be limited by daylight.

Finally, the DDP constitutes a violation of the Declarations applicable to the property. As previously indicated and as the Applicants acknowledged in their July 1, 2022 Letter of Explanation, the property at issue is subject to the Restrictions and the notes on the plats recorded in Plat Book 37, Pg. 99, 100, and 101. Paragraph (6) of the Restrictions provides “[n]o noxious or offensive trade or activity shall be conducted on any lot, nor shall anything be done which may be or become and annoyance or nuisance to the neighborhood.” (**Exhibit H, p. 879**). As outlined above, the proposed amenities, the potential number of “members”, the inevitable increase in traffic and parking concerns and the very realistic potential for “members” to create

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situations whereby the public health and safety of the surrounding properties become threatened, constitute an annoyance or nuisance, as a matter of law, and therefore a violation of the Restrictions.

CONCLUSION

Accordingly, for all of the foregoing reasons, Glenmary HOA requests that the Planning Commission deny the current application in 22-DDP-0048 and/or 22-DDP-0072 along with the Conditional Use Permit in 22-CUPPA-0086 and 22-CUP-0175.

Very truly yours,
Lynch, Cox, Gilman & Goodman, PSC.



Donald L. Cox

DLC

cc: Robert Thompson, President
Glenmary HOA