

LYNCH, COX, GILMAN & GOODMAN P.S.C.

**500 WEST JEFFERSON STREET, SUITE 2100
LOUISVILLE, KENTUCKY 40202
(502) 589-4215
Fax (502) 589-4994
E-Mail doncox@lynchcox.com**

DONALD L. COX

February 4, 2014

INDIANA OFFICE:
521 E. 7TH STREET
JEFFERSONVILLE, INDIANA 47130
TELEPHONE
(812) 283-7838

Louisville Metro Government
Planning Commission Members
Mayor's Gallery Metro Hall
527 West Jefferson Street
Louisville, Kentucky 40202

Julia Williams, AICP, Planner
444 S. Fifth Street, Ste., 300
Louisville, Kentucky 40202

Matthew R. Doyle, Planner
444 S. Fifth Street, Ste., 300
Louisville, Kentucky 40202

Re: File Nos. 13SUBDIV1000; 19173; 19174 and 19219

Members of the Louisville Metro Government Planning Commission, Ms. Williams and Mr. Doyle;

This office represents the Glenmary Homeowners' Association located at 4906 Bardstown Road, Suite 101, Louisville Kentucky, 4029. The Glenmary Homeowners' Association has become aware of the applications for Amendment of Record Plats filed by Par Golf, LLC ("**Par Golf**") as reflected in the above-referenced Planning Commission file numbers and want to assert its objections to the proposed actions.

BACKGROUND

As reflected in the staff reports, Glenmary is an innovative subdivision whose general plan was approved pursuant to docket nos. 9-67-88 and 10-34-88, respectively. On July 12, 1989, the developer of Glenmary Subdivision, HFH, Inc. ("**HFH**") caused to be lodged the plats in relation to Section 1 of Glenmary Subdivision. These plats are located in the Office of the Jefferson County Clerk, Plat Book 37, Page 48, Page 49 and Page 50. (**Exhibits A, B and C, respectively**). On each of these plats, HFH dedicated specific recreation areas which were set aside for use as a golf course, the same golf course area which is now operated by Par Golf and

is part of the current applications. As each of these original plats indicate, "A – D denotes golf course." (See **Exhibits A – C**).

Also on July 12, 1989, HFH caused to be filed with the Office of the Jefferson County Clerk, a Declaration of Covenants, Conditions and Restrictions ("**Deed of Restrictions**") applicable to the Glenmary Subdivision as represented by Plat Book 37, Pages 48, 49 and 50. (**Exhibit D**). As subsequent sections of the Glenmary Subdivision were developed, virtually identical deeds of restrictions were filed, including the Supplementary Declaration of Covenants, Conditions and Restrictions applicable to Section 2 of the Glenmary Subdivision filed with the Office of the Jefferson County Clerk in Deed Book 5943, Page 269 and the Corrected Supplementary Declaration of Covenants, Conditions and Restrictions applicable to Section 2 of the Glenmary Subdivision filed with the Office of the Jefferson County Clerk in Deed Book 5943, Page 269. (**Exhibits E and F, respectively**). These Deeds of Restrictions provide, in relevant parts:

- "NOW THEREFORE, Developer hereby declares that all of the property described in this instrument, and all such additional property as may be hereinafter made subject to this Declaration, shall be held, sold and conveyed subject to the following easements, restrictions, covenants and conditions, which are for the purpose of protecting the value and desirability of the real property. The easements, restrictions, covenants and conditions shall run with the real property and be binding on all parties having any right, title or interest in it, their heirs, successors and assigns, and shall inure to the benefit of each owner." (**Exhibit D, DB. 5879, Pg. 120; Exhibit E, DB. 5943, Pg. 269; and Exhibit F, DB. 5946, Pg. 876**).
- **Existing Property.** The real property which is subject to this Declaration is located in Jefferson County, Kentucky and is more particularly described as follows:

BEING LOTS 15 through 245, inclusive, as shown on the plat of Glenmary Subdivision of record in Plat and Subdivision Book 37, Page 48, 49-50 in the Office of the Clerk of Jefferson County, Kentucky.

BEING in part of the same property acquired by Developer by Deed dated January 24, 1989, of record in Deed Book 5837, Page 661, in the Office of the Clerk of Jefferson County, Kentucky. (**Exhibit D, DB. 3879, Pg. 120; Exhibit E, DB. 5943, Pg. 269; and Exhibit F, DB. 5946, Pg. 876**).

- "Developer intends to make this section containing 231 lots [100 lots for Section 2] a part of a larger community being developed in accordance with current plans and known as Glenmary Subdivision." (**Id.**)
- "The common area initially covered by this Declaration shall inure to the benefit of the owners with any new lots within Glenmary which may become subjected to this Declaration or a similar set of deed restrictions and common area allocable to the owners of all such lots within Glenmary shall inure to the benefit of the owners of the lots

recorded earlier, each to enjoy the common area of the other and to have and to hold the same as if each new lot had been developed and subjected to this Declaration simultaneously.” (Exhibit D, DB 5879, Pg. 121; Exhibit E, DB. 5943, Pg. 270; and Exhibit F, DB. 5946, Pg. 877).

- Unless cancelled, altered or amended under the provisions of this paragraph, these covenants and restrictions are to run with the land and shall be binding on all parties claiming under them for a period of thirty (30) years from the date this document is recorded, after which time they shall be extended automatically for successive periods of ten (10) years. These restrictions may be canceled, altered or amended at any time by the affirmative action of 75% of those persons entitled to vote pursuant to the Articles of Incorporation of the Glenmary Homeowners’ Association, Inc. Failure of any owner to demand or insist upon observance of any of these restrictions or to proceed for a restraint of violations shall not be deemed a waiver of the violation, or the right to seek enforcement of these restrictions. (Exhibit D, DB 5879, Pg. 127, ¶ 20; Exhibit E, DB. 5943, Pg. 276; and Exhibit F, DB. 5946, Pg. 883).
- “Owners of lots, homes or any residence understand that Glenmary Golf and Recreation Club, Inc. will be an integral part of the subdivision community.” (Exhibit D, DB 5879, Pg. 128, ¶ 29; Exhibit E, DB. 5943, Pg. 277; and Exhibit F, DB. 5946, Pg. 884).

Virtually identical Deeds of Restrictions were filed in relation to sections 2 and 3 of Glenmary Subdivision and are located in Deed Book 5943, Page 269 and Deed Book 6206, Page 637, respectively. All of the property owners who purchased homes within Glenmary Subdivision, including but not limited to the sections to which the above-referenced file numbers relate, purchased their lots subject to and in reliance upon the provisions of the filed Deeds of Restrictions. The record in this case establishes that the Applicant, Par Golf, has acknowledged that the Deeds of Restrictions apply to the property subject to the above reference case files. On September 27, 2011, Par Golf caused to be filed an Affidavit in Aid of Title with an attached Deed of Subdivision and Restriction. These documents were filed in the Office of the Jefferson County Clerk in Deed Book 9777, Pages 130 through 137. (Exhibit G). These documents acknowledge that the property at issue before the Planning Commission is subject to the Deeds of Restrictions identified herein “Lot #1 is subject to the Supplementary Declaration of Covenants, Conditions and Restrictions recorded in Deed Book 5943, Page 269, as amended in Deed Book 5946, Page 876, as amended in Deed Book 6853, Page 53, as amended in Deed Book 7324, Page 568, all in the Office of the Clerk of Jefferson County, Kentucky”. (Exhibit G, Deed Book 9777, Pg. 130).

The record also reflects that the Applicant, Par Golf, acquired its title to the property from EJB Golf Properties, LLC (“EJB”) pursuant to Deed dated April 15, 2005 which is located in the Office of the Jefferson County Clerk, Deed Book 8609, Page 13. EJB Golf is a successor-in-interest to TGM, Golf Properties, Inc. which is a successor to the original developer, HFH, Inc. All of these deeds, including the conveyance between EJB Golf and Par Golf specifically provide that title is conveyed subject to “any restrictions, stipulations, easements and zoning regulations of record.”

The current proposal of Par Golf asks this Planning Commission, pursuant to Chapter 7.1.91 of the Land Development Code for Jefferson County (“LDC”) to convert a portion of the common areas designated as recreation areas in accordance with the approved subdivision plats into buildable property. Pursuant to Chapter 7.1.91 of the LDC, the Planning Commission allegedly has the power to amend any recorded plat at the request of any lot owner in the subdivision.

It is respectfully submitted that the applications of Par Golf for the amendments to the recorded plats in relation to sections 1, 2 and 3 of the Glenmary Subdivision are flawed as a matter of law.

First, there is a substantial question whether the LDC applies to the Glenmary Subdivision. Chapter 7.1.90 of the LDC provides “[t]he provisions of the Land Development Code shall apply to all major and minor subdivision applications filed on or after March 21, 2003 (LDC effective date). Subdivision plans (major and minor) filed with a complete application prior to March 1, 2003 shall be reviewed for compliance with the subdivision regulations in effect at the time of filing.” As previously indicated, the Glenmary Subdivision was approved in 1988. Therefore, the LDC should have no application to this subdivision and the applications of Par Golf should be considered under the applicable regulations. No evidence has been presented that the amendments to the plats proposed by the Applicant, Par Golf, comply with any earlier regulations.

Second, assuming that the Planning Commission goes forward, it is respectfully submitted that approving the proposed amendments of the subdivision plats as requested, is beyond the scope of authority provided to the Planning Commission. The title record in this case clearly establishes that **all** of the plats at issue in the present proceeding were subject to recorded deeds of restriction and that the recorded deeds of restriction incorporated by reference the dedications, easements, etc. identified on the plats. These deeds of restrictions specifically provided that the restrictions, including the plat provisions, run with the land and that the common areas, which included, but was certainly was not limited to, the recreation areas upon which the golf course is currently located inured to the benefit of all lot owners. All purchasers of lots within the Glenmary Subdivision as well as the Applicant, Par Golf, acquired their property in reliance upon and bound by the restrictions contained of record, which included the specific recognition that the recreation areas were to be set aside and inured to the benefit of each individual lot owner as well as the acknowledgement by all owners of lots, homes and residents, that the Glenmary Golf and Recreation Club would be an integral part of the subdivision community.

The Deeds of Restrictions in this case specifically provide that the restrictions cannot be amended absent a vote of 75% of those persons entitled to vote. If the applications of Par Golf are approved by the Planning Commission, it will act as an amendment to the Declarations of Restrictions that are applicable to each lot owner and are applicable to Par Golf without obtaining the requisite 75% approval of those entitled to vote.

Kentucky Courts recognize that “[t]he rules governing the construction of restrictive covenants generally are the same as those applicable to contracts.” Westwood and Westwood East Homeowners’ Association, Inc. v. Giles, 2003 WL 21245343, *1 (Ky. App. 2003). The Kentucky Court of Appeals which went on to recognize “[a] restrictive covenant should not be construed to defeat the plain and obvious purpose of the contractual instrument or obvious intention of the parties. ... The fundamental rule in construing restrictive covenants is that the intentions of the parties governs.” (**Id.**, *2). Here the clear stated intention of the contract contained within the Deeds of Restrictions applicable to Glenmary Subdivision specifically recognizes that the conditions and the recreation areas, which include the golf course, are to inure to the benefit of all the homeowners and be maintained as such and that such recreation areas are an integral part of the subdivision. The only contractual method for obtaining an amendment to the Deeds of Restrictions or the incorporated plats is to obtain the 75% approval of those entitled to vote. If the Planning Commission goes forward and grants the current applications of Par Golf, it will alter the terms of the contract between the Homeowners’ Association in direct violation of the express terms and intentions of the parties.

Section 19 of the Kentucky Bill of Rights states that no law “impairing the obligations of contracts shall be enacted.” “Any law which changes the intention and legal effect of the original parties giving to one greater to the other less interest or benefit in the contract impairs its obligations. The extent of the change is immaterial.” Kentucky Utilities v. Carlisle Ice Co., 131 S.W.2d 499, 504 (Ky. 1939). As indicated above, the Deeds of Restrictions constitute contractual obligations between all affected parties, including but not limited to all homeowners within Glenmary Subdivision as well as the Applicant, Par Golf. If the Planning Commission moves forward in amending the plats as requested by Par Golf pursuant to Chapter 7.1.91 of the LDC without complying with the contractual terms contained within the Deeds of Restrictions, such action would violate Section 19 of the Kentucky Bill of Rights to the extent that it would change the legal and binding effect of the Deeds of Restrictions.

CONCLUSION

Accordingly, the Glenmary Homeowners’ Association respectfully requests that the Planning Commission deny all of the applications to amend recorded plats filed on behalf of Par Golf. As an initial matter, to the extent that the Planning Commission is currently seeking to review Par Golf’s applications pursuant to the provisions of the LDC, it would appear that the LDC has no application to the Glenmary Subdivision which was approved prior to the effective date of the LDC. There is no indication in this record that there has been any attempt to consider this application in accordance with the rules and regulations in effect prior to the LDC.

Moreover, the result of granting the applications to amend the recorded plats would have the effect of altering the contractual agreements between the parties as represented by the filed Deeds of Restrictions and Plats. These Deeds of Restrictions and Plats are applicable to all parties, including Par Golf and specifically recognized that it was the intent of the Parties to set aside the recreational area that encompasses the current applications for the continuing benefit of the individual lot owners. The Deeds of Restrictions recognized that the golf course is intended to

LYNCH, COX, GILMAN & GOODMAN P.S.C.

February 4, 2014

Page 6

be an integral part of the subdivision community which will be irreparably altered if the applications of Par Golf are approved.

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



Donald L. Cox

DLC

cc: Board Members