July 12, 2023

VIA ELECTRONIC MAIL

Doug Thomas, Chairman
Ormond Beach Planning Board
22 South Beach Street
Ormond Beach, Florida 32174

Re: ***Tomoka Reserve – PRD-2022-043***

Dear Chairman Thomas & Planning Board Members:

Our law firm represents Carolyn Davis and a consortium of homeowners within the Tomoka Oaks Country Club Estates subdivision in Ormond Beach, Florida ("Tomoka Oaks"). At its regular meeting on ***Thursday, July 13, 2023***, the Ormond Beach Planning Board ("Planning Board") is scheduled to consider the above-referenced project, which seeks to rezone and convert the existing Tomoka Oaks golf course into 276 single-family residential lots. For the reasons discussed herein, our clients oppose the proposed redevelopment of the golf course property and respectfully request that the Planning Board recommend ***denial*** of the proposed rezoning.

A. General Factual Overview

Briefly stated, in April 2021, Triumph Oaks of Ormond Beach, LLC ("Triumph Oaks"), purchased the Tomoka Oaks Golf & Country Club ("Golf Club") for approximately $2,600,000. Thereafter, Triumph Oaks filed an application with the City of Ormond Beach ("City") seeking to rezone the golf course property to Planned Residential Development (PRD) and redevelop the golf course with 276 single-family residential lots. Based upon such rezoning application and Triumph Oaks' proposed plans to permanently close the Golf Club and convert the golf course into 276 single-family lots, the issue has arisen as to whether the property is restricted to use as a golf course, either expressly or impliedly.

As discussed herein and based upon the historical and recorded documentation relating to Tomoka Oaks, our clients maintain that the Golf Club property is subject to either an express covenant or an implied covenant limiting the use of the property to a golf and country club, golf course, and related recreational uses. Accordingly, our clients assert that the proposal to convert

the Golf Club property into 276 single-family residential lots is not permissible and the requested rezoning should be ***denied***.

B. The Golf Club Restriction

In 1961, the City approved plats for both the Golf Club (f/k/a Sam Snead Golf & Country Club) and Tomoka Oaks Country Club Estates Unit 1.[1] The Plat for Unit 1 of the Tomoka Oaks Country Club Estates subdivision contained 105 residential lots, including approximately 55 residential lots bordering the golf course.[2]

In conjunction with the development of Unit 1 of Tomoka Oaks, the developer recorded "Restrictions Tomoka Oaks Country Club Estates, Unit #1, Ormond Beach, Florida" ("Unit 1 Covenants").[3] Notably, Paragraph 10 of the Unit 1 Covenants states:

> The Grantee [*i.e.*, lot owner] shall automatically become a member of the Tomoka Oaks Homeowners Association, a non-profit corporation comprised of all lot owners in Tomoka Oaks Country Club Estates . . . .

Paragraph 11 of the Unit 1 Covenants expressly prohibited the developer from releasing in whole or in part any restriction or reservation set forth in Paragraph 10.

Thereafter, on or about January 1, 1963, Tomoka Oaks, Inc., entered a 99-year "Lease" with Tomoka Oaks Golf and Country Club, Inc., for the golf course property.[4] Paragraph 3 of the Lease, entitled "Use," provided in pertinent part:

> ***The demised premises shall be used perpetually for a country club and related uses***. . . . ***This provision shall survive the lease*** and be included in any deed but the deed restriction may be waived by a resolution of two-thirds (2/3) of the Board of Directors of the Lessee with the concurrence of two-thirds (2/3) of the members of said Lessee and the concurrence of two-thirds (2/3) of the members of Tomoka Oaks Homeowners Association. . . .[5]

On or about October 30, 1963, Tomoka Oaks Golf and Country Club, Inc., executed a "Surrender of Lease."[6] As noted above, however, the limitation that the subject property be "used perpetually for a country club and related uses" survived the Lease per the express terms of Paragraph 3 therein.

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1 *See* Book 25, Page 61, Official Records of Volusia County, Florida; *Id*. at Book 25, Page 58.
2 *See id*. at Book 25, Pages 58 and 59.
3 *See id*. at Book 431, Page 32.
4 *See id*. at Book 516, Page 360.
5 *See id*. at Page 362 (emphasis supplied).
6 *See id*. at Book 585, Page 155.

Following the Surrender of Lease, Tomoka Oaks, Inc., conveyed the golf course property to Ralph B. Frederick, Trustee, via Warranty Deed dated December 12, 1963 ("1963 Warranty Deed").[7] Notably, the 1963 Warranty Deed for the golf course property provided in pertinent part:

> ***The above described property shall be used perpetually for purposes of a golf and country club, golf course, and related uses***, and in the event that party of the second part, or its successors in interest, ***fail to utilize said property exclusively as a golf and country club, golf course, and related uses***, and the property not be sold to Tomoka Oaks, Inc., Tomoka Oaks Golf and Country Club, Inc. or Tomoka Oaks Homeowners Association as specified in the preceding paragraph, ***then the above described property shall automatically revert*** to and become the property of party of the first part . . . .
>
> ***The aforesaid reverter clause specified in the last preceding paragraph may be released or modified*** by resolution concurred in by two-thirds of the entire board of directors of Tomoka Oaks, Inc. at any time after ten years after the date of recording of this Deed; provided that if Tomoka Oaks, Inc. shall have disposed of four-fifths (4/5) of the lots in Tomoka Oaks Country Club Estates, then the foregoing right to release or modify the reverter shall be vested automatically and exclusively in the Tomoka Oaks Homeowners Association, Inc., to be exercised by resolution of two-thirds (2/3) of the Board of Directors of the Tomoka Oaks Homeowners Association, Inc.[8]

Consistent with the terms of the surrendered Lease, the 1963 Warranty Deed expressly provided that the subject property "shall be used perpetually for purposes of a golf and country club, golf course, and related uses." Moreover, while the 1963 Warranty Deed included language and a process for the release or modification of the "reverter clause," there is no language in the 1963 Warranty Deed authorizing the release or modification of the actual restrictive covenant limiting the use of the property to a "golf and country club, golf course, and related uses."

On or about February 18, 1969, Tomoka Oaks, Inc., purported to pass a "Resolution" to effectuate the sale of the golf course property to Ormond Ocean Homes, Inc.[9] Therein, Tomoka Oaks, Inc., purported to "release . . . its right of first refusal" and "further releases the reverter clause contained in [the 1963 Warranty Deed], such release of reverter to become effective December 13, 1973, the release date specified in such reverter clause."[10] Relying upon such Resolution, Tomoka Oaks, Inc., executed a "Release" on or about June 16, 1971, purporting to

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[7] *See id*. at Book 585, Page 157. At the time of such conveyance, Ralph B. Frederick was also apparently the President of Tomoka Oaks, Inc.

[8] *See id*. at Page 159 (emphasis supplied).

[9] *See id*. at Book 1238, Page 246.

[10] *See id*. at Page 248.

release its "right of first refusal" and the "reverter clause contained in [the 1963 Warranty Deed], such release of reverter to become effective December 13, 1973, the release date specified in such reverter clause."[11]

Based upon the foregoing Resolution and Release, Triumph Oaks and/or its representatives have suggested to the City that the use restriction imposed upon the golf course property is no longer valid or in effect. Our clients maintain that this view is legally flawed and without merit.

As reflected above, the 1963 Lease for the golf course property expressly provided that "[t]he demised premises shall be used perpetually for a country club and related uses" and that such "provision shall survive the lease." Additionally, and consistent with the 1963 Lease, the 1963 Warranty Deed expressly provided that the property "shall be used perpetually for purposes of a golf and country club, golf course, and related uses." While the 1963 Lease mentions a process by which such use restriction could potentially be waived, the historical documentation presented to our office does not establish that such process was ever followed – *i.e.*, concurrence of two-thirds of the Lessee and its members and two-thirds of the members of the Tomoka Oaks Homeowners Association.[12]

Further, while the 1963 Warranty Deed included language and a process for the release or modification of the "reverter clause," there is no language in the Warranty Deed authorizing the release or modification of the actual restrictive covenant limiting the use of the property to a "golf and country club, golf course, and related uses." Rather, the 1963 Warranty Deed unambiguously states that the subject property "shall be used perpetually for purposes of a golf and country club, golf course, and related uses."

Lastly, reliance upon the 1969 Resolution and the 1971 Release to claim that the use restriction was somehow waived or released is misplaced. Even assuming the 1969 Resolution and the 1971 Release are valid – which is questionable – neither document purports to release, waive, or otherwise modify the use restriction.[13]

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[11] *See id*. at Book 1307, Page 89.

[12] The historical documentation provided to our office, including newspaper articles, reflect the existence of a "Tomoka Oaks Homeowners Association" during the subject timeframe.

[13] The 1969 Resolution and the 1971 Release are of questionable validity given that they purport to "prospectively" release the "right of reverter." By its own terms, the 1963 Warranty Deed provided that Tomoka Oaks, Inc., could release or modify the reverter clause only by resolution "at any time ***after*** ten years ***after*** the date of recording of this Deed" and only if Tomoka Oaks, Inc., had not yet disposed of four-fifths (4/5) of the lots in Tomoka Oaks at such time. *See* Book 585, Pages 158-59, Official Records of Volusia County (emphasis supplied). Contrary to the plain language of the 1963 Warranty Deed, Tomoka Oaks, Inc., purported to pass a resolution more than four (4) years ***before*** the ten (10) year anniversary of the recording of the 1963 Warranty Deed seeking to release the right of reverter. Further, the fact that the 1969 Resolution and the 1971 Release purported to "delay" the effectiveness of such release until December 13, 1973 (*i.e.*, ten (10) years after the 1963 Warranty Deed was recorded) is irrelevant. Not only does it ignore the fact that the 1963 Warranty Deed required the resolution itself to occur ten (10) years ***after*** the

As discussed above, the 1969 Resolution and the 1971 Release purport to release the "right of first refusal" and the "reverter clause." Nothing in the express language of the 1969 Resolution or the 1971 Release, however, purports to waive, release, or otherwise modify the use restriction providing that the property "shall be used perpetually for purposes of a golf and country club, golf course, and related uses." Accordingly, based upon the foregoing and the plain and unambiguous language in the 1963 Lease and the 1963 Warranty Deed, our clients maintain that such use restriction is valid and effective and was never lawfully released, waived, or otherwise terminated. On this basis alone, the proposed conversion of the golf course into 276 single-family residential lots would be prohibited and the Planning Board should recommend ***denial*** of the proposed rezoning.

C. Implied Restriction Limiting The Tomoka Oaks Property To Use As A Golf Club

In addition to the above, it is well established that a "restrictive covenant" may "arise by implication from the conduct of parties or from the language used in deeds, plats, maps, or general building development plans."[14] In this regard, courts have recognized:

> If there is a common plan of development that places restrictions on property use, then such restrictions may be enforced in equity. "A court's primary interest in equity is to give effect to the actual intent of the grantor . . . by looking not only to language in deeds, but variously to matters extrinsic to related written documents, including conduct, conversation, and correspondence."[15]

Consistent with the above, Florida courts have held that use restrictions may also be implied based upon notations denoted on plats or maps:

> Whenever the owner of a tract of land subdivides the same into lots and blocks, lays off streets and other public ways and designates portions of said lands to be parks[,] playgrounds[,] or similar facilities or uses similar words calculated to encourage prospective purchasers to buy said lots, and actually sells lots with reference to the plat, he becomes bound to his grantees by the plat and the representations thereon. As the maker of the plat and the one who selects the words used thereon it will be construed against him.

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recording of the Deed, but it ignores the fact that Tomoka Oaks, Inc., did not have any authority to adopt any such resolution if four-fifths (4/5) of the lots in Tomoka Oaks had been disposed of by such time.

[14] *See Skyline Woods Homeowners Ass'n. v. Broekmeier*, 805, 758 N.W.2d 376, 387 (Neb. 2008).

[15] *See id*. (citation omitted); *see also Strader v. Oakley*, 410 So. 2d 954, 955-56 (Fla. 1st DCA 1982) (recognizing implied restriction that limited construction to only single-family residences).

> Common honesty requires that he perform that which at the time of conveyance he represented he would perform.[16]

Turning to the instant case, several courts have examined implied restrictions and the requirement to maintain or operate property as a golf course when developed in conjunction with a surrounding residential subdivision. For example, in *Shalimar Association v. D.O.C. Enterprises*, 688 P.2d 682 (Az. Ct. App. 1984), the court held that there was an implied restrictive covenant to maintain property as a golf course even though there were no express covenants burdening the golf course property on behalf of the adjoining homeowners. The court concluded that the common plan of development, which included a golf course, combined with the representations made to the purchasers about the maintenance of the golf course and the adjoining homeowners' express covenants, created an implied restrictive covenant that the land be used only as a golf course.

Similarly, in *Ute Park Summer Homes Association v. Maxwell Land Grant Co.*, 427 P.2d 249 (N.M. 1967), the New Mexico Supreme Court found that an implied restriction existed requiring the subject property to be used as a golf course. In so doing, the court focused on the representations made to prospective purchasers and the materials used in the sales of the lots which pictured an area marked "golf course." The court reiterated that, when a map or plat showing a park or other open area is used to sell property, "the purchaser acquires a private right, generally referred to as an easement, that such area shall be used in the manner designated," and such private right "is not dependent on a proper making and recording of a plat for purposes of dedication."[17]

Numerous other courts have concluded that the facts surrounding the initial development of properties as golf course communities and the marketing of lots in such communities to prospective purchasers created an "implied restrictive covenant" limiting the use of the subject properties to a golf course. In reaching this conclusion, the courts have examined such things as: (1) the plats, maps, and drawings of the community; (2) advertisements, brochures, and marketing materials; (3) common schemes or plans of development; (4) recorded covenants; (5) general informational documents regarding the community; and (6) lot premiums and purchasers' reliance upon the existence of the golf course in acquiring their lots.[18]

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[16] *McCorquodale v. Keyton*, 63 So. 2d 906, 910 (Fla. 1953); *see also Boothby v. Gulf Props. of Ala.*, 40 So. 2d 117 (Fla. 1948). A common plan or scheme of development is a well-recognized principle in Florida law. *See Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 307 (Fla. 1966).

[17] *Ute Park Summer Homes Association v. Maxwell Land Grant Co.*, 427 P.2d 249, 253 (N.M. 1967).

[18] *See Knight v. City of Albuquerque*, 794 P. 2d 739 (N.M. Ct. App. 2014) (holding property denoted on subdivision plats as a golf course must remain either a golf course or open space, stating "a developer will not be allowed to induce purchasers to buy property by purporting to include open space such as parks or golf course in a subdivision plat, only to subsequently change the uses of those open space areas"); *In re Heatherwood Holdings, LLC v. HGC, Inc.*, 746 F.3d 1206 (11th Cir. 2014) (holding evidence of common scheme of development that included golf course property as an integral part and as an inducement to purchasers of residential lots

Here, the historical documentation relating to Tomoka Oaks and the Golf Club establishes the following: (1) a common developer (Tomoka Oaks, Inc.) with a plan of development for a residential community surrounding an 18-hole championship golf course; (2) an approved unified master plan for Tomoka Oaks, which included the golf course and the residential lots; (3) references to "golf course" on the recorded plats for various portions of Tomoka Oaks; (4) recorded restrictions, as previously discussed, providing that the golf course property shall be used "for purposes of a golf and country club, golf course, and related uses"; (5) recorded residential covenants that reference the golf course and authorize reduced setbacks to take advantage of the adjoining golf course; (6) marketing and sales materials for the residential lots depicting the common development plan, including the golf course; (7) evidence of lot premiums being charged for residential lots with golf course frontage; and (8) evidence that successors developers had actual, as well as constructive, notice of the approved master plan and common plan of development. Additionally, it is indisputable that residents within Tomoka Oaks purchased their properties in reliance upon or because of the Golf Club.

Accordingly, even assuming the express covenant restricting use of the subject property to a golf and country club is no longer valid as Triumph Oaks has erroneously suggested, the above-summarized facts and cited case law would establish that, at a minimum, the use of the Golf Club property is limited to a golf course or similar open space purposes by virtue of an implied restrictive covenant. Simply put, whether by an implied grant, implied restriction, or estoppel, such restriction would prevent the subdivision and development of the Golf Club property with 276 single-family residential lots as currently proposed. Thus, on this additional basis, the Planning Board should recommend ***denial*** of the proposed rezoning.

D. Conclusion

In sum, as discussed herein, nothing in the express language of the 1969 Resolution or the 1971 Release purports to waive, release, or otherwise modify the use restriction imposed via the 1963 Lease and the 1963 Warranty Deed that the property "shall be used perpetually for purposes of a golf and country club, golf course, and related uses." Thus, based upon the foregoing and the plain and unambiguous language in the 1963 Lease and the 1963 Warranty Deed that the use

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therein created an implied restriction limiting the use of such property to a golf course); *Ponderosa Pines Golf Course, LLC v. Ponderosa Pines Prop. Owner's Ass'n*, 2013 WL 4515569 (N.M. Ct. App. 2013) (holding "equitable servitude in favor of the individual subdivision property owners precluded Plaintiff from changing the use of the golf course"); *Skyline Woods Homeowners Ass'n.*, 758 N.W.2d at 390 ("We conclude that homeowners who bought their property relying on the proximity and existence of the golf course should be protected by implied restrictive covenants that the property be maintained as a golf course. We therefore agree with the district court that an implied restrictive covenant requiring that it be used only as a golf course burdens and runs with the golf course property."); *see also Victorville W. Ltd. P'ship v. Inverrary Ass'n*, 226 So. 3d 888 (Fla. 4th DCA 2017) (refusing to cancel golf course covenant even though course had become unprofitable, concluding that "the golf course preserves the character of the community and provides residents with a pleasant view" and, thus, "must be enforced because it remains a 'substantial value to' the surrounding residences").

restriction was to be "perpetual," our clients maintain that such use restriction is still valid and in effect. Accordingly, on this basis alone, our clients respectfully submit that the Planning Board should recommend ***denial*** of the proposed rezoning, which seeks to improperly convert the Golf Club property into 276 single-family residential lots, or otherwise table the matter until such time as a judicial determination is made regarding the continued validity of the express restrictive covenant.

Further, even assuming the express restrictive covenant is no longer valid and in effect, as Triumph Oaks has erroneously suggested, our clients maintain that the Golf Club property is nevertheless subject to an implied restrictive covenant, thereby limiting the use of such property to a golf and country club, golf course, and related recreational uses. On this additional basis, our clients respectfully submit that the Planning Board should recommend ***denial*** of the proposed rezoning or otherwise table the matter until such time as a judicial determination is made regarding such implied restriction.

Our clients appreciate the Planning Board's attention to this matter of great community importance to the residents of Tomoka Oaks and respectfully request that the Planning Board recommend ***denial*** of the proposed rezoning. Please do not hesitate to contact me if you have any questions or need additional information,

Sincerely,

S. Brent Spain

S. Brent Spain

cc: Honorable Bill Partington, Mayor (via e-mail)
Randy Hayes, Esquire (via e-mail)
Joyce Shanahan, City Manager (via e-mail)
Steven Spraker, Planning Director (via e-mail)