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Golf Course Redevelopment

POLICY ISSUES, PRACTICAL CHALLENGES, AND POTENTIAL LIABILITY

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Our presentation team



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As a Florida Bar Board Certified attorney in City, County and Local Government Law and Fellow of the American Institute of Certified Planners, Susan has an in-depth and specialized knowledge of the challenges faced by local government clients in the complex areas of land use, planning and zoning. She leads the Firm's Public Land Use and Zoning Practice, and also acts as lead municipal attorney for two small coastal communities in Miami-Dade and Broward Counties.



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Alicia started her career as in-house counsel for the State of Florida Department of Transportation, District Six, in Miami-Dade County, where she litigated several multi-million dollar eminent domain cases on range of property types and defended against inverse claims. Alicia now represents governments and property owners on a range of land use litigation issues, including eminent domain, inverse condemnation, and Bert Harris Act claims.

Why Golf? Community Benefits/Harms

Benefits

- Significant **acreage** of open space with recreational facilities
- **View premiums** for adjacent lots - higher value, higher taxes paid. Golf drove development pro formas – residential, hotel uses
- **Environmental benefits** – Natural landscape and habitat areas in the rough, stormwater drainage and storage

Harms

- Excessive **water consumption** to maintain greens
- Chemical **contamination** from fertilizers, pesticides, herbicides and fungicides - Fuel spills from maintenance yards and vehicles - arsenic
- **Unprofitable** courses can eat away at property values of HOAs and hotels saddled with their maintenance costs, affecting tax base
  - One study found a 9% premium for Alabama golf course community lots, and a 17% reduction in those lots' values following golf course closure. Value of nearby lots also decreases with closure. Stephanie R. Yates and Lary B. Cowart (2019) The Impact of Shuttered Golf Courses on Property Values. Journal of Sustainable Real Estate: 2019, Vol. 11, No. 1, pp. 2-15.

Industry Trends and Outlook in US

Rate of development of new courses – dramatically slowing

1986–2005: 4926 new courses in 20 years – a 44% increase (comprising 1/3 of the US inventory)

2006-2016: 492 new courses in 10 years

Number of independent courses - declining

2006: 15,990 courses

2016: 15,014 courses – a third of all golf courses were unprofitable; another third broke even

2018: 14,613 courses - 198.5 closed and 12.5 opened in one year (1.2% decline in supply)

2019: 14,300 courses, 76% open to the public

* 2006-2019: Cumulative contraction of 10% of golf courses

Participation rates – finally stabilizing

2006: 29.8 million golfers

2011: 25.7 million golfers

2016: 23.8 million golfers

2019: Stabilizing at 24.3 million golfers (More in driving ranges, simulators, etc.)

National Golf Foundation; We Are Golf data

Industry Trends and Outlook in US

Challenges pre-pandemic

- Rising maintenance costs and costs of irrigation.
- Fewer revenue streams. Decreasing profitability.
- Difficulty of running them efficiently. Fewer qualified people to manage.
- Competition from alternative golf options, such as driving ranges, Top Golf, virtual golf, etc.
- Oversaturation of golf courses in some areas (Florida)
- Player expense for course fees and equipment
- Required skill levels to play
- Decreased availability of leisure time - takes several hours to play 18 holes
- Elitist, exclusionary perception – though participation is diversifying in recent years

Industry Trends and Outlook in US

Pandemic Impact

- Closures hammered courses starting in March
- Reopenings in May/June, with increasing rounds played over time
- Courses have developed methods of socially distant play

Outlook

- Clearly a correction has been happening. Will it stabilize?
- Impact of pandemic hard to project
- Ultimately, likely to be driven by participation rates, as well as local market factors such as local oversaturation and demographics.

Redevelopment: Issues Related to Closures

- If the course has gone into **foreclosure or bankruptcy**, resolving those issues can take years
- **Failure to maintain** closed course
  - Lack of resources
  - Neglect, to create pressure for community to approve a change of use
- Result: **Attractive nuisance**. Overgrown vegetation with wildlife, vandalism, dumping, homeless camping out, kids partying
- Difficulty transitioning the use, given **expectations** of surrounding property owners - **Developing a consensus** among affected homeowners can be challenging
- In some cases, private **covenants**, development agreements and PUDs may stand in the way of redevelopment, despite the lack of financial viability

Redevelopment: Issues Related to Closures

- Does the **land use classification and zoning district** accurately reflect the existing uses? Is it a non-conformity? Will comprehensive plan amendments and rezonings be necessary for redevelopment?
- Density: If development rights were given up in an old golf course subdivision approval, is that **adequately documented**? Issues in proof.
- Loss of **open space and recreation facilities** for the surrounding community. In jurisdictions with large number of golf courses, this can be a significant impact on park and open space concurrency/APF.
- Loss of **stormwater** infrastructure: surrounding area may be designed to drain into golf course, and redevelopment must address
- Lack of supportive infrastructure – likely to need expanded **road** network, improvements in **underground utilities**
- Assessment and cleanup of **contaminated** golf courses can be time-consuming, complex and expensive

Typical options for redevelopment

- Reduce or reconfigure the layout so that some golf remains and some acreage can be devoted to development
- Remove golf completely, allowing development with some open space/recreation/drainage
- Remove golf completely, and maintain as open space, recreational facility, or stormwater storage

Proactive: Address in Comprehensive Plan

Address redevelopment in the comprehensive plan, and provide options and standards. Can include:

- Transfer of development rights
- Purchase of development rights
- Allow payment of fee in lieu of onsite open space or recreational space
- Allow offsite provision of open space or recreational space

Proactive: Address Issue in Zoning Code

Implement comprehensive plan provisions in zoning code:

- Standards for redevelopment of golf courses such as permitted uses, mandatory open space requirements, buffer requirements, and processes for density transfers
- Require intense outreach and process with the community - Engage residents early, and allow them to influence the process and the plans
- Impose a pre-application process for initial local government feedback on the proposed site plan
- Require to maintain to the same level as prior to closure, or in accordance with an approved closure plan

Proactive: Creative Uses

Consider creative uses complementary to golf or redevelopment:

- Dog parks
- Make fitness trails and protected bike lanes from golf paths
- Create gardens on tees and greens
- Agriculture/orchards
- Solar farm
- Conservation areas in rough
- Solar arrays/roofs on indoor amenities
- Wells/drainage from golf water features
- Wetland mitigation

Proactive: Process

- Thorough briefings of appointed and elected officials, with a focus on those most directly impacted - Try to get clear direction from decision makers upfront
- Anticipate high level of public involvement and interest
- Anticipate potential for challenges – provide sufficient permissible uses
- Involve stormwater management and pollution control, not just planning and zoning staff
- Note that golf course designs vary widely, and all are unique. Standards should anticipate that variety, or provide for variances.

Las Vegas Nevada

Golf Course and Open Space Repurposing Ordinance

- Public engagement requirements - transparency prior to application:
  - Extensive outreach, beyond sending a letter/email - may need personal meetings to get actual participation
  - Neighborhood meetings and design workshops
  - Applicant required to document process and results
- Advisory panel of objective subject matter experts, including HOA leaders that were not directly affected by the issue, ecologists, landscape architects, etc., reviews the plan
- Stakeholder meetings with
  - Affected owners - golf/open spaces
  - Affected HOAs

Las Vegas Nevada

Golf Course and Open Space Repurposing Ordinance

- Imposed Development Standards
  - Additional application materials and studies required - traffic, drainage, prior to plan approval
  - More restrictive standards if adjacent to existing development

Las Vegas Nevada

Golf Course and Open Space Repurposing Ordinance

So. . . what happened?

Wealthy neighbors opposed redevelopment, so the City denied it and years of litigation resulted, including inverse condemnation claims. Multiple lawsuits. City on the way to spending over $1 million defending as of January 2020.

City attempting to repeal most onerous portions of ordinance, while neighbors threaten to sue if they do. Course owner claims no development will ever be possible, and seeks compensation.

See https://www.ktnv.com/13-investigates/rules-relaxed-for-redeveloping-golf-courses-open-space-in-city-of-las-vegas

Collier County

2016 Comprehensive Study on Golf Course Conversion

http://www.colliercountyfl.gov/home/showdocument?id=69574

Broadened Available Uses for Golf Course Properties

- Add uses to golf course zoning district, placing neighbors on notice of potentially transitioning uses, and providing alternative uses to avoid liability.
  - Permitted uses: added multi use paths, passive recreation, disc golf.
  - Accessory uses: 2 units for employee housing, maintenance, pro shop, restaurant
  - Conditional uses: larger commercial establishments oriented to golf, cemeteries, equestrian facilities, trails, neighborhood fitness in community centers, parks and playgrounds, museums, botanical gardens
- Open space retention to satisfy existing development demand
- Greenways as buffers, which can include playgrounds as well as retain native vegetation/preserve requirements
- Stormwater management requirements to avoid flooding onto adjacent properties
- Environmental remediation, meeting state standards as well as testing for petroleum products/fuel spills/parking areas

Collier County: Section 5.05.15 Conversion of Golf Courses

Intent to Convert Application Process

- Stakeholder (1000' radius) outreach process – following pre-application
  - County attends and observes.
  - Minimum of two meetings required. Present information about the process and the plans for redevelopment as specified. Facilitated discussion.
  - Address efforts to address compatibility, and present alternatives statement
  - Web-based visual survey with invite
  - Prepare report to County
- Developer's statement describing alternative to conversion
  - At least 3 options, with one being preservation of golf course. Examine if POAs can purchase or take over management
  - Inquire whether County desires to purchase some or all of the land
  - Describe the development option at a concept plan level

Collier County: Section 5.05.15 Conversion of Golf Courses

Conversion Application and Standards

- Whatever land use and zoning approvals are needed
- Criteria for meeting conversion process requirements
- Concept plan subject to compatibility design review
- Keep open space that was required for previous development
- Perimeter greenway, at least 35% of the area of the redevelopment - can include playgrounds, preserves
- Soil testing, lighting standards, stormwater management to avoid flooding onto adjacent properties,
- Environmental remediation, meeting state standards as well as testing for petroleum products/fuel spills/parking areas

Collier County

Golden Gate Country Club

- Redevelopment proposal for 700 homes, leading to controversy
- Offer to sell to County for municipal 12-hole course was accepted
  - Two bids received. $29.1 million purchase, ClubCorp to manage.
  - Accompanied by driving range simulator or Top Golf
  - Local foundation support for workforce housing as a component
  - Investment of $10 million into improving the course
  - Operator takes on financial risk. Reduced greens fees for residents
  - 12-hole leaves room for workforce housing, veteran nursing home or other uses. Increased restaurant seating, extended operating hours. Big Shots Golf.

https://www.naplesnews.com/story/news/columnists/brent-batten/2020/06/27/brent-batten-challenging-times-demand-answers-where-does-golf-course-stand/3263732001/

Golf Course Redevelopment Litigation

Inverse Condemnation Cases & Statutory Private Property Rights (Bert Harris Act) Cases

Regulatory Takings 101

TWO TYPES OF CLAIMS

1) Facial:
   - The law on its "face" automatically effects a taking
   - Must be a "Total Taking" – i.e., the law deprive the landowner of *all* economically beneficial use
   - The Lingo: "Total Takings" are also known as "Per Se" takings

2) As-Applied:
   - The law when applied to a particular property effects a taking
   - Can be a "Total Taking" (as defined above)
   - Can be a "Partial Taking" – i.e. the law has only some economic impact on the property, resulting in a taking of some of the property
   - The Lingo: Partial Takings are also known as "De Facto" takings

Facial Taking - State v. Federal Law

Is There a Difference?

Florida Law: a "total taking" occurs when the owner is deprived of "substantially all economically beneficial or productive use. . .." *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994).

Federal Law: a "total taking" occurs when the owner is deprived of "all economically beneficial or productive use. . .." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

Although the terminology is different, the application seems to be the same. *See Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting) (noting that the majority accepted the trial court's finding that the property had been deprived of all productive uses even though residual economic uses - such 606as camping – still exist); *see Palazzolo v. Rhode Island*, 533 U.S., 631 (2001) ("Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest."); *Agripost, LLC v. Miami-Dade County, Fla.*, 525 F.3d 1049, 1055 (11th Cir. 2008) (noting that state and federal standards are essentially the same).

As-Applied Taking - State v. Federal Law

Is There a Difference?

- Total Takings: Different terminology same application.
- Partial Takings: None.
  - There used to be some confusion both under federal and state law as to whether the propriety of the government regulation was a factor in determining whether there was a taking.
  - Both Federal and Florida Courts have now conclusively determined that this is not a factor in takings analysis. It is only a factor in a substantive due process analysis. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *abrogated by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1380–81 (Fla. 1981); *Dept. of Agriculture and Consumer Svcs. v. Polk*, 568 So. 2d 35 (Fla. 1990)

*Substantive Due Process Analysis: Legislative actions only, rational basis test. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994)

As-Applied Takings - Procedure

Ripeness/Finality/Exhaustion Requirement

- Must obtain a final government decision on the application of the regulation before seeking compensation for a regulatory taking. *Williamson County Reg'l Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 187 (1985), *overruled on other grounds by Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019).
- "[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). This may include:
  - Variances or Waivers;
  - Applications for a less intense development; and
  - Appeal of the regulator's decision through the regulator's procedures.
- While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).
- Futility Exception. *See* § 14:210.Ripeness requirement—Futility exception, 7 Fed. Proc., L. Ed. § 14:210, for an overview of the futility exception.
- There is no bright-line rule.

As-Applied Takings – Procedure

Exhaustion/State Litigation Requirement

- Pre-6/21/2019: property owners had to seek compensation through state remedies before they could file a § 1983 action for the taking in federal court. *Williamson County Reg'l Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 187 (1985), *overruled by Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019).

- Post-6/21/2019: property owners may immediately bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2179 (2019)

As-Applied, Partial Takings - Basics

Penn Central Test Determines Whether a Taking Has Occurred

- Economic Impact of the Regulation
  - Functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)
  - Mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 645 (1993).
  - Court of Federal Claims has generally "relied on dimunitions well in excess of 85 percent before finding a regulatory taking." *Walcek v. United States*, 49 Fed. Cl. 248, 271 (2001), *aff'd,* 303 F.3d 1349 (Fed. Cir. 2002)
  - Different Ways to Prove Economic Impact
    - Before and After Approach
    - Cost Basis Approach

*Note: Most regulatory takings claims concerning golf courses will fall under this category.

As-Applied, Partial Takings - Basics

Penn Central Test Determines Whether a Taking Has Occurred

- Reasonable, Investment-Backed Expectations
  - Awareness of existing regulations is considered.
  - Whether the particular impacted property is highly regulated is considered.
- Character of the Governmental Action
  - Does the action equate to physical appropriation or permanent invasion? *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 643 (1993); **OR**
  - Does the interference arise public program that adjusts the benefits and burdens of economic life to promote the common good? *Concrete Pipe & Products of California*, 508 U.S. at 643.
  - Reciprocity of benefits/General application: where the burden of the regulation results in public benefits to the general community, but the burden of the regulation falls on one property owner alone, this factor weighs in favor of finding a taking. *Ocean Palm Golf Club*, 139 So. 3d 463 (Fla. 5th DCA 2014). If the burden is more generalized and the subject property owner also benefits, this factor weighs against finding a taking. *See id.*

*Note: Most regulatory takings claims concerning golf courses will fall under this category.

Let's Hit the Links



Hypothetical Golf Course Redevelopment

1. **Regulatory Body:** Green Town
2. **Existing Land Use:** Recreational, permits a number of recreational uses such as private parks, tennis courts, horse stables, and golf courses.
3. **Existing Zoning:** Golf Course (GC), permits golf courses and ancillary uses such as driving ranges, club houses, and pro shops.
4. **Acreage:** 120 acres.
5. **Purchased in 1990**, with existing land use and zoning by First Owner LLC, for development of an 18-hole golf course.
6. **Sold in 2018,** to Hopeful Second Owner LLC, who claims to have purchased the property to redevelop a portion of it with residences, and to maintain the remainder of it as a 9-hole golf course.
7. Hopeful Second Owner LLC, applies to the Green Town for a change in land use and zoning on 50 acres to permit 250 residential unit development.

Let's Hit the Links



Hypothetical Golf Course Redevelopment (Cont.)

8. Hopeful Second Owner LLC's permit application to develop a smaller 9-hole course with amenities is approved. Application for residential development is denied.
9. Hopeful second Owner LLC sues the Green Town claiming:
    a. COUNT I: Green Town deprived it of all economically viable uses of the portion of the property it intends to develop with a residential use;
    b. COUNT II: Green Town deprived it of all economically viable uses of the entire property; and
    c. COUNT III: Green Town's actions effect a taking of the property under the *Penn Central* analysis.

Before we get to the Counts…



Step 1 in Any Takings Claim – Identify the Property

Is it the entire golf course? Parcel as a Whole Rule.

Does the denial of a change in land use and zoning take property? This is not a settled question.

- *Palazzalo v. Rhode Island, 533 U.S. 606 (2001):* Notice of an existing regulation does not automatically bar a takings claim.
- *Palm Golf Club P'ship v. City of Flagler Beach*, 139 So.3d 463 (Fla. 5th DCA 2014):
  - Government's refusal to change zoning on a property even though the character of the surrounding land has changed dramatically can, in some instances, result in a taking.*
  - Change in market and demographic factors never do.

*Note: The *Palm Golf* case supports its conclusion by citing two cases that say to conduct a substantive due process analysis, which only requires a rational basis.

COUNT I: Green Town deprived Hopeful Second Owner of all economically viable uses of the portion of the property it intends to develop with a residential use.

This claim will likely fail. Why? Parcel as a Whole Rule.

- Federal Court:
  - Gives substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law;
  - Considers the physical characteristics of the land; and
  - Considers the prospective value of the regulated land.

    Murr v. Wisconsin, 137 S. Ct. 1933 (2017)
- Florida Court:
  - Unity of Use;
  - Unity of Ownership; and
  - Contiguity.

    Dep't of Transp., Div. of Admin. v. Jirik, 498 So. 2d 1253, 1255 (Fla. 1986)

COUNT II: Green Town deprived Hopeful Second Owner of all economically viable uses on the entire property.

This claim will likely fail. Why?

- This is the most difficult standard to prove.
- It was being used before as an 18-hole golf course.
- There are other potential viable uses if the property is rezoned (tennis court, horse stables, etc.).
- Business profits should not be the focus of this inquiry. The question is market value of the real estate.

COUNT III: Green Town's actions effect a taking of the property under the *Penn Central* Analysis.

Will this claim fail?

- Economic Impact
  - Before and After: compares the property value before the regulation was applied to the property value after the regulation was applied.
  - Cost Basis: "includes all costs which enter into the creation of the property and give it value, what has been paid for the property, and what has been engaged to be paid." 47A C.J.S. Internal Revenue § 116. More appropriate for properties that are not usually bought and sold in the market. *Id.*
- Character of the Government Action
  - Not equivalent to a physical trespass
  - Does the interference arise public program that adjusts the benefits and burdens of economic life to promote the common good?
  - Reciprocity of benefits/General application

COUNT III: Green Town's actions effect a taking of the property under the *Penn Central* Analysis.

- Reasonable, Investment-Backed Expectation
  - *Palazzalo v. Rhode Island*, 533 U.S. 606 (2001): notice of an existing regulation does not automatically bar a takings claim.

What if suit has been filed and you change course (pun intended)?

Still may result in a temporary regulatory taking. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 314-382 (2002); *see also Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 469-478 - (2009) (for an explanation of prospective temporary takings versus retrospective temporary takings).

ONE FINAL TWIST: THE BERT HARRIS ACT, §70.001, Fla. Stat.

Provides relief when a new law, rule, ordinance, or regulation, as applied, inordinately burdens an existing use or a vested right to a specific use of real property.

Use of the Property:

1. Existing Use: Actual, present use, or reasonably foreseeable future use.
2. Vested Right: Bad faith or equitable estoppel.

Inordinately Burdened:

1. Property Owner is unable to attain reasonable invest-backed expectations; or
2. Leaves unreasonable remaining use.
3. Cannot be a temporary impact.

ONE FINAL TWIST: THE BERT HARRIS ACT, §70.001, Fla. Stat. (Cont.)

- Waives Sovereign Immunity and is Subject to Strict Construction. §70.001 (13), Fla. Stat.
- Pre-Suit Notice of Claim Requirements.
- How would the Hypothetical Golf Course Litigation Fare Under the Harris Act?
  - New law, rule, regulation/Pre-1995 Legislation.
  - Temporary Impacts.
  - The standard of proof is easier for the Property Owner.

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Thank you.

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