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# Zoning and Land Use Planning

PATRICIA E. SALKIN\*

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## Ensuring Continuing Community Amenities Through Golf Course Redevelopment

### I. Introduction

The rate of golf course construction grew dramatically in the 1990s, reaching a peak in 2000 with nearly four hundred course openings in the United States.<sup>1</sup> However, with the number of golfers peaking the

same year,<sup>2</sup> golf courses started at the same time to become less profitable. Combined with the attractiveness of large tracts of land to developers and increasing property values, golf course owners have found themselves under pressure to sell their land for more profitable uses.<sup>3</sup> Indeed, between 2000 and 2005, golf course closings rose from a rate of twenty-three per year to more than ninety.<sup>4</sup> In 2005, the American golf industry saw its first overall decline in the number of courses since 1945.<sup>5</sup>

The golf courses most often under strain are older courses, which are typically in need of costly repairs or renovations.<sup>6</sup> Additionally, it is often the case that the once rural areas in which these courses were built have become suburbanized and built up, thereby increasing the

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<sup>1</sup>Dennis Cauchon, *Back nine may soon become a Starbucks—or a subdivision*, USA TODAY, Sep. 1, 2006 (measuring closures in 18-hole equivalents).

<sup>2</sup>See National Golf Foundation, *Frequent Questions*, <http://www.ngf.org/cgi/whofaqqolfers.asp?> (last visited Jan. 27, 2007).

<sup>3</sup>See Cauchon, *supra* note 1.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* (counting temporary closures).

<sup>6</sup>Alan Blondin, *Overbuilt Myrtle Beach leads to course sales*, THE MYRTLE BEACH SUN NEWS (South Carolina), Feb. 4, 2005. The average life of a golf course is between twenty and thirty years, after which point courses begin to physically settle and require often extensive irrigation repairs, restructuring and drainage improvements. *Id.*

value and the demand for the property to be put to other uses.<sup>7</sup> Public golf courses also tend to be less economically viable than private or semi-private clubs, and shorter courses tend to be less popular than longer ones.<sup>8</sup> Courses located in over-saturated golfing resort areas have also been heavily affected by the slowdown in industry growth.<sup>9</sup>

While the closure of such outdated or otherwise unprofitable courses may be beneficial to the golf industry as whole,<sup>10</sup> the decision to close a golf course in order to redevelop the land often raises difficult land use planning and community development issues. Golf courses are viewed by many

community residents as providing important areas of open space and recreational opportunities, and neighboring land owners often rue the possibility that housing complexes or mixed-use developments will replace their once pastoral views and lower their property values.<sup>11</sup> Additionally, the developments that replace golf courses often place increased burdens on essential infrastructure and municipal services.<sup>12</sup> Counties and municipalities may favor the approval of these redevelopments because they will add to the tax base<sup>13</sup> and because of a desire to avoid litigation over property rights issues. From an industry perspective, in areas where golf

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<sup>7</sup>*Id.*

<sup>8</sup>Yeleny Suarez, *Keeping the Greens*, SOUTH FLORIDA CEO, Dec. 2006, at 53, 54.

<sup>9</sup>See Blondin, *supra* note 6.

<sup>10</sup>Redevelopment is often supported in resort areas with high concentrations of golf courses. In these settings converting golf courses to other uses may be seen as a method of diversifying tourist attractions and making remaining courses more viable by decreasing competition. For example, in Myrtle Beach, a South Carolina resort destination with more than 120 golf courses, the equivalent of 18.5 courses have closed since 2001. Of these properties, development plans have included several malls and shopping centers, resort hotels, and a marina, in addition to the mixed-use residential and retail communities that commonly replace golf courses. See Blondin, *supra* note 6.

<sup>11</sup>Homes located next to golf courses can be worth up to three times the amount of comparable properties not situated near golf courses. Roger M. Showley, *Fore better or worse; Could golf course land help ease housing, budget crises?*, THE SAN DIEGO UNION-TRIBUNE, Aug. 17, 2003, at I-1. See also Blondin, *supra* note 6.

<sup>12</sup>See Blondin, *supra* note 6.

<sup>13</sup>See Cauchon, *supra* note 1.

courses have been overbuilt, the redevelopment of certain courses may also be viewed as a natural consequence of healthy competition and beneficial to surviving courses.<sup>14</sup> At the same time, prepared municipalities may view golf course redevelopment as an opportunity to plan for and negotiate for new community benefits.

This column examines some of the issues faced by municipalities hoping to preserve their golf courses or to ensure their strategic redevelopment, consistent with local community development goals. The column focuses on how local governments can most effectively employ planning and zoning techniques to ensure that community amenities, including affordable housing and recreational areas, are an important component of golf course redevelopment projects.

## II. Conventional Zoning and Land Use Regulations

While many golf courses may be zoned to allow for a certain amount of residential or

commercial development, others are more restrictively zoned as agricultural, recreational, or open space.<sup>15</sup> While such restrictive zoning may curtail development efforts to a certain extent, eventually requests for rezoning are made after all of the surrounding properties have been developed and the golf courses are no longer as profitable as initially anticipated. Municipalities may choose to grant rezoning requests in order to allow for golf course redevelopment, but community interests in preserving open space and retaining recreational facilities often lead municipalities to reject applications for wholesale rezoning of these lands.

### A. The Comprehensive Plan

Most state statutes require that zoning regulations be developed and implemented in accordance with the comprehensive land use plan. The typical comprehensive plan is the articulation of a shared vision for the future growth and development of the municipality. It often contains a series of ele-

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<sup>14</sup>See Suarez, *supra* note 8, at 53.

<sup>15</sup>See Alan Blondin, *Courses fall prey to development: Closures rise despite housing glut, irritating many residents*, THE MYRTLE BEACH SUN NEWS (South Carolina), Sep. 30, 2006 (describing golf courses zoned as general residential and forest/agricultural) [hereinafter *Courses fall prey*].

ments which may or may not be required by statute. These elements may include: demographic trends; housing stock and future housing needs; an inventory of public infrastructure and anticipated future infrastructure needs; existing recreational facilities and anticipated needs; transportation infrastructure; economic development goals; open space; and lands dedicated for agricultural use. Municipalities who have developed and adopted comprehensive plans and then enact land use regulations to implement the plan elements usually find court support for their decisions when their actions are consistent with the plan.

For example, the city of Mendota Heights, a suburb of St. Paul, justified its refusal of plans to convert the Mendota Heights Golf Course into a residential development by reference to its comprehensive plan, which recommended that the golf course be retained as open space.<sup>16</sup> Regardless of the fact that the golf course was actu-

ally zoned for residential development, the Supreme Court of Minnesota found that the comprehensive plan was controlling, finding that the city did not act arbitrarily in denying the development permits. The court explained that “[a] municipality has legitimate interests in protecting open and recreational space, as well as reaffirming historical land use designations.”<sup>17</sup> However, the court also emphasized that its decision did not permanently prohibit the development of the parcel, as the owner was free to negotiate with the city.<sup>18</sup> Furthermore, the court specifically stated that its judgment would not prevent the golf course owner from initiating a regulatory takings challenge.<sup>19</sup>

The regulatory takings question was raised several months later in a similar case, involving the Carriage Hills Golf Course in Eagan, another Twin Cities suburb.<sup>20</sup> As in *Mendota Golf*, the court found that the “historic use of the property as a golf course, the recent update of the comprehensive plan, and

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<sup>16</sup>See *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006).

<sup>17</sup>*Id.* at 181.

<sup>18</sup>*Id.* at 182.

<sup>19</sup>*Id.*

<sup>20</sup>See *Wensmann Realty, Inc. v. City of Eagan*, 2006 WL 1390278 (Minn. Ct. App. 2006), review granted, (Aug. 15, 2006).

the public hearing comments indicating that citizens valued the open space and recreational opportunities provided by a golf course” constituted legitimate justifications for the denial of the application to amend the land use plan.<sup>21</sup> In response to the developer’s assertion that these justifications were vague, the court noted that the city had also relied on concerns that the proposed mixed-use residential development and the accompanying population growth would aggravate traffic congestion and overcrowd city schools.<sup>22</sup> Concerning the takings claim, the court applied the *Penn Central* test, taking into consideration the economic impact of the government action, the interference of that action with investment-backed expectations, and the character of the contested government action. The court found first that the city’s refusal to amend the comprehensive plan did not diminish the property’s value, as it merely maintained the “existing long-term use of the property[.]” Rather, it attributed impacts to the

property’s value on “[v]arious other factors . . . including national trends, overbuilding in the area, and the size of the golf course.”<sup>23</sup> Secondly, the court found that the denial of the application to amend the comprehensive plan did not interfere with investment-backed expectations, as the owner had bought the property with the intent of operating a golf course.<sup>24</sup> Finally, because the character of the regulation was to support “broad and substantial interests,” the court held that a regulatory taking had not occurred.<sup>25</sup> Like the preceding Minnesota case, the court here also stressed that its decision did not permanently bar development on the property.

New York’s highest court has also recognized the preservation of open space and recreational areas as legitimate planning interests supporting municipal land use decisions favoring the retention of golf courses. In *Bonnie Briar Syndicate v. Town of Mamoroneck*, a Westchester County golf course owner challenged as an unconstitutional taking the

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<sup>21</sup>*Id.* at 5.

<sup>22</sup>*Id.* at 6.

<sup>23</sup>*Id.* at 9.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 12.

down-zoning of its property from residential to recreational, just months after it had filed a plan to construct a residential subdivision on the property.<sup>26</sup> As it had been conceded that the zoning law did not deny the plaintiff of all viable uses of the property, the court found that “[b]ecause zoning plaintiff’s property for solely recreational use bears a reasonable relationship to the legitimate objectives stated within the law (to further open space, recreational opportunities, and flood control), the regulatory action here substantially advances those purposes.”<sup>27</sup> In making this determination, the court stressed that the zoning change had been the subject of several land use studies and had been recommended repeatedly.<sup>28</sup> Additionally, the court disagreed with the owner’s contention that the zoning law was invalid because less restrictive zoning

designations would further the same interests.<sup>29</sup>

Not all courts have been receptive to the restrictive zoning of golf courses, particularly where a proposed redevelopment appears to be consistent with the community plan. The Pennsylvania Supreme Court, for example, overruled a municipal refusal to rezone the Valley Forge Golf Club property in order to permit the construction of a mixed-use residential complex.<sup>30</sup> The Valley Forge case, however, differed significantly from the Minnesota and New York cases. Perhaps the most striking difference was that the golf course was located immediately adjacent to the Court and the Plaza at King of Prussia, the largest mall in the United States.<sup>31</sup> Because the golf course was surrounded by high-density development, making its agricultural zoning seem particularly aber-

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<sup>26</sup>*Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96 (N.Y. 1999).

<sup>27</sup>*Id.* at 108.

<sup>28</sup>*Id.* Restricting the uses of the golf course was first recommended in 1966. *Id.* at 102.

<sup>29</sup>*Id.* at 108.

<sup>30</sup>*See In re Appeal of Realen Valley Forge Greenes Associates*, 576 Pa. 115 (Pa. 2003).

<sup>31</sup>*Id.* The King of Prussia mall wins this title only for square footage; the Mall of America, incidentally located within driving range of the two Minnesota golf courses detailed above, has more stores. *See Largest Shopping Malls in the United States*, <http://www.easternct.edu/depts/amerst/MallsLarge.htm> (last visited Jan. 24, 2007).

rant, the zoning board's denial of the rezoning request did not emphasize its intentions to preserve open space and recreational opportunities for the community.<sup>32</sup> Using the standard that "a zoning ordinance must be presumed constitutionally valid unless a challenging party shows that it is unreasonable, arbitrary, or not substantially related to the police power interest that the ordinance purports to serve," the court held the retention of the agricultural designation was unreasonable and constituted reverse spot zoning.<sup>33</sup> As the court explained, "no characteristic of the Golf Club's property justifies the degree of its developmental restriction by zoning as compared to the district designation and use of all of the surrounding lands. . . . This is spot zoning."<sup>34</sup>

Although the *Valley Forge* court did recognize that the preservation of open space was

a factor taken into account by the zoning board,<sup>35</sup> it did not explain whether that particular justification was unreasonable or arbitrary. This aspect of the decision did not go unnoticed by the dissenting judge, however, who pointed out that the majority did not consider the fact that the property was maintained as a golf course—providing open space and recreational opportunities—in its determination that the property was not unique. Under the spot zoning analysis, such a finding of uniqueness would have justified the anomalous zoning of the property in relation to the surrounding parcels.<sup>36</sup> Additionally, the dissent pointed out that the majority also ignored the zoning board's reliance on other public interests including the "prevention of overcrowding of land and congestion in travel and transportation. . . ."<sup>37</sup>

Although the most telling difference between the Valley

<sup>32</sup>In re Appeal of Realen Valley Forge Greenes Associates, 576 Pa. at 129.

<sup>33</sup>*Id.* at 135-38.

<sup>34</sup>*Id.* at 135-36. The term "reverse spot zoning" describes those circumstances in which the inconsistent zoning designation is produced over time as neighboring properties are rezoned rather than by a direct action singling out the property for dissimilar treatment.

<sup>35</sup>*Id.* at 130.

<sup>36</sup>*Id.* at 141.

<sup>37</sup>*Id.* at 145. Following the judgment, the municipality filed a request to have the decision withdrawn due to an alleged conflict of interest between the judge who wrote the majority opinion and the plaintiff developer. Larry Ruli-



Forge case and the cases in which restrictive land use designations were upheld may be the fact that the Pennsylvania municipality did not expressly base its zoning decision on goals in the comprehensive plan such as the preservation of open space and the availability of recreational facilities, the cases suggest that courts confronted with such scenarios will be influenced by a number of considerations. In the cases in which restrictive land use regulations were sustained, the decisions to retain the properties as golf courses were based on extensive land use planning processes and were recommended in recent comprehensive plan updates or land use planning reports. Additionally, these courses were located in low-density residential areas, and the interests in preserving open space and recreational opportunities were based on actual public input. Other considerations, such as environmental impacts and the effects of development on infrastructures and community services were also taken into account when cited by planning boards as justifications for their decisions. Furthermore, the courts have emphasized that restrictive land use laws must retain a degree of flexibility in order to remain valid. These considerations have also been taken into account by cities and towns across the country that have chosen to reject applications to modify land use designations<sup>38</sup> or to rezone golf courses before they become the subjects of

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son, *Town clubs golf course development*, THE PHILADELPHIA BUSINESS JOURNAL, Jan. 9, 2004. However, negotiations between the township and the developer have seemed to remove the need for litigation. See Keith Phucas, *Par for the course*, THE PHILADELPHIA TIMES HERALD, Apr. 20, 2006. Accordingly, the "Village at Valley Forge" is likely to open in 2008, despite continued protests from the community concerning drainage and environmental problems. *Id.*; Anne Pickering, *Glenhardie residents fear water runoff from proposed development*, THE SUBURBAN AND WAYNE TIMES (Pennsylvania), Aug. 3, 2006, available at [http://www.zwire.com/site/news.cfm?newsid=17001897&BRD=1677&PAG=461&dept\\_id=82745&rfti=6](http://www.zwire.com/site/news.cfm?newsid=17001897&BRD=1677&PAG=461&dept_id=82745&rfti=6). According to the development plan, no significant areas of open space will be preserved. Divaris Real Estate, *The best location in the country!*, [http://www.mypinwheel.com/accounts/pw\\_05132001/links/ValleyForge-11x17.pdf](http://www.mypinwheel.com/accounts/pw_05132001/links/ValleyForge-11x17.pdf) (last visited Jan. 24, 2007).

<sup>38</sup>See, e.g., Laura McCandlish, *Westminster Housing Complex Rejected; While growth is effectively shut down due to water deficit, project met with protests*, THE BALTIMORE SUN, Dec. 12, 2006, at 3B (city rejecting development plan and rezoning request due to water, open space and traffic concerns); The City of Hanahan, Resident outcry dooms golf course rezoning: Eagle

proposed redevelopments in order to ensure their retention as open spaces.<sup>39</sup>

### B. Exactions and Impact Fees

Exactions and impact fees have long been used by municipalities to obtain community amenities from developers seeking rezoning or development permits. Exactions, which place certain conditions on the granting of such requests (such as the payment of money or the dedication of easements and/or land), have faced many constitutional challenges, but they remain permissible under the

Supreme Court's *Nollan* and *Dolan* cases so long as there is an "essential nexus"<sup>40</sup> between the exaction and the negative effects of the proposed development and the exaction is also "roughly proportional"<sup>41</sup> to those effects. Impact fees may be levied in lieu of exactions, in order to finance the mitigation of negative development effects. Although nationally there is some debate as to whether the nexus and proportionality tests apply to impact fees, the Supreme Court remanded an exactions case with directions to review it under *Dolan*, suggesting that impact fees are subject to similar con-

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Landing owner could file appeal, <http://www.cityofhanahan.info/news.asp?newsid=62> (city denying a rezoning request in response to public opinion expressing a desire to preserve green space) (last visited Jan. 24, 2007).

<sup>39</sup>See, e.g., Eric Kurhi, *San Ramon adopts plan on golf course land-use*, OAKLAND TRIBUNE (California), Oct. 14, 2006 (adopting general plan amendment to create a golf course designation in response to public opposition of earlier "commercial recreation" designation); Bruce C. Smith, *Carmel scores a hole-in-one: City purchases Brookshire Golf Club, preserving it for its intended use*, THE INDIANAPOLIS STAR, Jan. 6, 2007 (noting that city rezoned the golf course as a park in 2002 in order to preserve green space); Jenna Ross, *City's plan to preserve golf course stirs debate: The primary owner of an Eden Prairie golf course wants to sell, but the city and neighbors say he can't—a stance that could cost him millions*, MINNEAPOLIS STAR TRIBUNE, Dec. 13, 2006 (city council considering the creation of a specific golf course zoning designation); Editorial, *Out of Balance: Deer Track rezoning gave residents rights they don't really have*, MYRTLE BEACH SUN NEWS (South Carolina), Nov. 21, 2006 (reducing zoning density allowance in response to public opposition to high-density development); Kyle Stock, *Green Acres: As golf industry retrenches, more course owners seek to cash out*, The Post and Courier (Charleston, SC), Nov. 20, 2006, at E18 (describing proposal to rezone golf courses as conservation open space).

<sup>40</sup>*Nollan v. California Coastal Commission*, 483 U.S. 825, 836-37 (1987).

<sup>41</sup>*Dolan v. City of Tigard*, 512 U.S. 374, 384-86 (1994).

stitutional limits as are exactions.<sup>42</sup>

Although exactions and impact fees may be useful and efficient tools when the conditions that they seek to impose on developers are clearly and proportionately related to the negative effects of development, the overall effect of the *Nollan* and *Dolan* rulings has been to significantly limit bargaining between possible developers and municipalities over the benefits to be provided to local governments and communities in exchange for zoning changes, thereby limiting creative proposals as well.<sup>43</sup> As a result, developers and municipalities alike have increasingly been turning toward more flexible zoning techniques in order to ensure that projects

will be beneficial to all of the parties involved.<sup>44</sup>

### III. Flexible Land Use Planning Techniques

Strict adherence to restrictive zoning is not always used as a method to deny requests to redevelop golf courses for other uses or to condition redevelopment on exactions. Instead, many local governments are open to redevelopment, and a variety of flexible zoning and land use planning techniques are available to ensure that municipalities can direct redevelopment in a positive direction. Recent golf course conversions have provided a variety of community amenities, commonly including the retention of open space<sup>45</sup> and the provision of

<sup>42</sup>See Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 635-37 (May 2004); *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994).

<sup>43</sup>See Lee Anne Fennel, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 4-5, 27-28 (Oct. 2000).

<sup>44</sup>See generally *id.*

<sup>45</sup>See, e.g., Norinne De Gal, *Golf Course Dispute Shows Growing Pains of Valencia*, LOS ANGELES BUSINESS JOURNAL, July 17, 2000 (preserving half of the property as a "park-like setting"); Meg Landers, *Changing Course: Jantzer family proposes mix of commercial buildings and residences to replace their Medford golf course*, MAIL TRIBUNE (Medford, OR), Nov. 8, 2005 (preserving 26% of the property as open space); Courses fall prey, *supra* note 15 (describing Deer Track South proposal preserving nearly a third of the property as open space, including two lakes); Jennifer K. Morita, *Rocklin group fights condo plan; Advocates suggest ballot measure to protect open space*, THE SACRAMENTO BEE, Dec. 19, 2006, at B4 (focusing redevelopment on only two holes of the golf course).

infrastructure improvements.<sup>46</sup> Golf courses converted to residential uses have also included plans to provide for senior and affordable housing.<sup>47</sup> In other cases, golf course owners have dedicated land to public uses or put restrictive deeds over their properties to ensure that portions of golf course lands will not be further developed.<sup>48</sup>

### **A. Planned Unit Developments**

Planned Unit Development (PUD) ordinances provide a more flexible approach to land use planning than traditional zoning techniques designed to separate arguably incompatible land uses. The PUD approach allows developers to mix uses and to deviate from strict den-

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<sup>46</sup>See, e.g., Laura McCandlish, *Commission votes to reject senior housing plan*, THE BALTIMORE SUN, Nov. 19, 2006 (developer offering to institute water problem mitigations and conduct traffic study); *Courses fall prey*, *supra* note 15 (Deer Track South developer agreeing to fix drainage problems); Dennis Sullivan, *Panel backs homes for golf course site*, CHICAGO TRIBUNE, Oct. 19, 2006 (planning director asking for the construction of a connecting thoroughfare); Doug Smith, *A pair of new neighbors help push Charlotte's boom across the Catawba: From 9-irons to new homes*, THE CHARLOTTE OBSERVER (North Carolina), Dec. 20, 2006 (developer building connector road); Travis Tritten, *Residents fight plans to replace golf course: 651-home proposal adds to traffic fears*, MYRTLE BEACH SUN NEWS (South Carolina), Nov. 2, 2006 (developer building connector road); Tom Kertscher, *Golf course project proposed: Developer wants to combine condos, shops at Germantown course*, MILWAUKEE JOURNAL SENTINEL, Nov. 18, 2005 (requiring developer to protect wetlands and provide traffic study).

<sup>47</sup>See, e.g., Laura McCandlish, *supra* note 46 (320-unit senior housing); Charlie Russo, *Golf course plans to turn holes to homes: Over-55 project at Glen Ellen*, THE BOSTON GLOBE, July 9, 2006 (zoning law encouraging senior housing projects); Landers, *supra* note 45 (providing nearly 50% senior housing); John Laidler, *Golf Course on 'smart growth' path*, THE BOSTON GLOBE, Dec. 7, 2006 (setting aside 25% of the proposed rental units as affordable housing); Will Vash, *Landfill eyed for affordable housing project*, PALM BEACH POST (Florida), Jan. 13, 2006 (describing affordable housing project that would alter several holes of the city-owned golf course).

<sup>48</sup>See, e.g., Laidler, *supra* note 47 (town requesting dedication of 110 acres of land); Lisa Fleisher, *MB Group pushes last-minute park proposal*, MYRTLE BEACH SUN NEWS (South Carolina), July 25, 2006 (developer donating twelve acres of adjacent land for a YMCA); *Courses fall prey*, *supra* note 15 (developer promising to put deed restrictions on a neighboring golf course).

sity requirements while retaining the underlying zoning designations. In effect, the density limits and use restrictions for each of the lots are merged so that the developer can concentrate (or “cluster”) the development in a more compact area of the property. In addition to the flexibility offered to developers, the PUD planning process also provides community planners with a certain degree of flexibility in requiring developers to provide specific community amenities in accordance with the comprehensive plan. These amenities might include the preservation of open space, the creation of affordable housing within the PUD or the improvement of essential infrastructure.<sup>49</sup>

In addition to these benefits, using PUDs to redevelop golf courses also tends to curtail opposition to course closures based on fears of decreases in property values, loss of scenic views and open space, and likely traffic increases. Neighboring land owners are often even supportive of PUDs, which usually take these issues into account during the plan-

ning process. For example, a PUD plan to convert a golf course in Medford, Oregon has been well received by the local government and the community; it will preserve 26% of the golf course as open space, provide a significant number of senior housing units, and it includes improvements of nearby roads.<sup>50</sup> Another PUD that has been supported by planning officials and some community members involves the conversion of a Myrtle Beach golf course into a mixed-use community. In addition to providing parks, amenity centers, and road improvements, the developer agreed to place deed restrictions on a nearby golf course that it also owned to ensure that it would not be redeveloped.<sup>51</sup>

### **B. Cluster Developments/ Subdivisions**

Cluster developments are similar to PUDs in that they treat a large parcel of land as a single unit in regard to density limits, but they differ from PUDs in that they do not gen-

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<sup>49</sup>See Pace Law School Land Use Law Center, Michael Murphy and Joseph Stinson, *Planned Unit Development* (1996), <http://www.law.pace.edu/landuse/bpud.html> (last visited Jan. 24, 2007).

<sup>50</sup>See Landers, *supra* note 45.

<sup>51</sup>See Courses fall prey, *supra* note 15.

erally involve mixed-use projects. In a cluster development, a developer will be permitted to surpass the density limits included in the underlying zoning, so long as these high-density developments are “clustered” in one area, leaving significant areas of open space.<sup>52</sup> Sometimes cluster developments are further conditioned on the provision of certain types of uses permitted by the underlying zoning, such as affordable or senior housing. In Millis, Massachusetts, for example, a town ordinance allows cluster developments for senior housing projects. Plans to redevelop a golf course there are taking advantage of the special zoning; rather than building 150 single-family homes on the entire property, a developer has proposed to build more than twice as many senior housing units while preserving more than half of the golf course as open space.<sup>53</sup> States have taken different approaches to clustering. For example, in

New York, municipalities are authorized to require applicants for subdivision approval to submit both a conventional subdivision plat and/or a cluster subdivision plat, and local governments may not “reward” applicants with density bonuses for clustering.<sup>54</sup> In other states, however, such as New Jersey, density bonuses are permitted to entice developers to plan their projects to preserve common open space and/or recreational areas.

### C. Incentive Zoning

Municipal incentive zoning systems allow developers to obtain incentives, usually related to increasing density limits or allowing additional uses, in exchange for providing certain amenities identified in the local incentive zoning ordinance.<sup>55</sup> The benefits sought by municipalities often include open space preservation and the construction of affordable housing, but may in-

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<sup>52</sup>See Pace Law School Land Use Law Center, Michael Murphy and Joseph Stinson, *Cluster Development* (1996), <http://www.law.pace.edu/landuse/cluste.html> (last visited Jan. 24, 2007).

<sup>53</sup>See Russo, *supra* note 47.

<sup>54</sup>See N.Y. Gen. City Law §§ 32-34; N.Y. Village Law §§ 7-728 to 7-732; and N.Y. Town Law §§ 276-278.

<sup>55</sup>See Philip A. LaRocque, *Where Will Our Children and Parents Live? Sustainable Development: A Builder's Perspective on Preserving Open Space to Promote Communities*, 4 ALB. L. ENVTL. OUTLOOK 22 (Spring 1999); see generally Thomas J. Lueck, *The Bulk-for-Benefits Deal in Zoning*, THE NEW



clude the creation of parks and public spaces or the financing of infrastructure improvement.<sup>56</sup> While incentive zoning ordinances have many of the same goals as PUDs and cluster developments, the specific amenities and incentives tend to be more clearly defined in these ordinances. In a state such as New York, which does not authorize impact fees and does not allow density bonuses for cluster developments, incentive zoning laws can be an effective technique to secure needed or desired community amenities through a golf course redevelopment project.

#### **D. Transfer of Development Rights**

Transfer of Development Rights (TDR) is another flexible zoning technique often employed to preserve open space areas and/or limit development in certain areas. Using TDR, the landowner yields some or all rights to develop or use certain parcels in exchange for the right to develop or use another

parcel of land more intensively.<sup>57</sup> TDR programs designate the areas where land is to remain undeveloped as “sending districts” and areas where increased density will be permitted as “receiving districts.” Landowners may sell or transfer some or all of their development rights to willing landowners in receiving districts (or to a government land bank), arguably receiving the fair market value of the right to develop on the parcel. When the development right is successfully transferred, a permanent easement or restriction is placed on the property in the sending district prohibiting future development. While TDRs provide an approach to allow golf course owners to realize all or partial development potential without having to build-out the entire parcel, municipalities have found it a challenge at times to site receiving districts where the increased development density may occur. Yet, there are some noted examples of

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YORK TIMES, July 23, 1989 (describing New York City’s incentive zoning ordinance).

<sup>56</sup>For example, in New York, authorized community benefits or amenities is defined as “open space, housing for persons of low or moderate income, parks, elder care, day care or other specific physical, social or cultural amenities, or cash in lieu thereof, of benefit to the residents of the community authorized . . .” by the municipal legislative body. *See, e.g.*, N.Y. Village Law § 7-703.

<sup>57</sup>Stuart Meck, ed., *Growing Smart Legislative Guidebook*, American Planning Association at 9-37 (2002).

TDR success, including the program in Collier County, Florida.<sup>58</sup> The Georgia enabling statute specifically mentions golf courses as one type of property that would make a suitable sending district in a TDR program.<sup>59</sup> A May 2006 charrette in St. Lucie County, Florida produced a local TDR law that specifically identified golf courses limited to 18 holes or less within a planned town or village, as being among the types of designated land uses eligible to participate in the TDR program.<sup>60</sup>

### **E. Land Dedications, Deed Restrictions and Conservation Easements**

Developers hoping to convert golf course properties to more intense uses sometimes agree to dedicate portions of

their lands to municipalities to be used as open space. Deed restrictions and conservation easements provide alternative methods of ensuring the retention of open space, and are often more appealing to property owners than outright dedications.

Deed restrictions are often included in golf course community developments where homeowners purchase their properties directly from the golf course owner.<sup>61</sup> When constructing new courses, developers may create these deed restrictions as a means of fulfilling open space requirements or to encourage home sales, but restrictive deeds may also be placed on golf courses during redevelopment. If portions of a course proposed for redevelopment will be retained

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<sup>58</sup>*Id.* at 9-45 to 9-46. The Collier County TDR program was enacted primarily to preserve both coastal areas and the inland wetlands. Since the program's inception in 1974, 526 development rights, arising from 325 acres in the Zone, have been transferred. *Id.* Fla. Stat. § 70.001 (1997) specifically authorizes the use of TDRs as one possible mitigation measure to a claim that a particular regulation "inordinately burdens" the owner's reasonable use of the land.

<sup>59</sup>*See*, Official Code of Georgia § 36-66A-1 which provides in part, "(6) 'Sending property' means a lot or parcel with special characteristics, including farm land; woodland; desert land; mountain land; a flood plain; natural habitats; recreation areas or parkland, including golf course areas; or land that has unique aesthetic, architectural, or historic value that a municipality or county desires to protect from future development."

<sup>60</sup>*See*, [http://www.tcrpc.org/departments/st\\_lucie\\_charrette/tdr\\_may\\_30\\_2006.pdf](http://www.tcrpc.org/departments/st_lucie_charrette/tdr_may_30_2006.pdf).

<sup>61</sup>*See* Bonnie Pollock, *A closer look at golf course redevelopment*, North Myrtle Beach Online, <http://www.northmyrtlebeachonline.com/modules/AMS/article.php?storyid=746> (last visited Jan. 24, 2007).



as a golf course, then deed restrictions may be placed on the remaining holes. Even where an entire course is to be redeveloped, however, deed restrictions may still come into play. In one case, a developer that owned several area golf courses offered to include deed restrictions over a separate nearby course to the future owners of homes to be built on the golf course slated for redevelopment.<sup>62</sup> Deed restrictions are generally more appealing to developers than dedications because they expire within a fixed number of years.

Conservation easements, which essentially prohibit land from being more than minimally developed, provide an especially effective approach to preserving open space due to the fact that they are permanent and run with the land to future owners. Golf courses are suitable candidates for conservation easements, and these easements may be particularly

attractive to developers and golf course owners because of the significant tax benefits associated with them.<sup>63</sup> While it is possible that some municipalities may purchase conservation easements funded either through local purchase of development rights programs or through other existing open space funds, oftentimes the landowner voluntarily donates the conservation easement in exchange for a tax deduction.

#### **F. Development Agreements**

Approximately a dozen states provide statutory authorization for development agreements, which are contracts negotiated between developers and local governments in which a developer promises to provide certain amenities in exchange for assurances that the land use regulations applicable to the proposed development will remain fixed for a

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<sup>62</sup>See Courses fall prey, *supra* note 15.

<sup>63</sup>See Derek Rice, *Easement Could Spell Large Tax Savings*, GOLF COURSE NEWS (June 2002). As a measure of how enticing conservation easements may be to golf course owners, they have apparently been touted as 'get rich quick schemes': as one business consultant was reported to have advised his clients, "buy a golf course and prohibit building on the fairways." Joe Stephens and David B. Ottaway, *Developers Find Payoff in Preservation; Donors Reap Tax Incentive by Giving to Land Trusts, but Critics Fear Abuse of System*, THE WASHINGTON POST, Dec. 21, 2003, at A01.

period of time.<sup>64</sup> For municipalities, development agreements provide an attractive alternative to exactions, which limit the types of amenities that may be conditioned as part of a development. These agreements are also particularly appealing to developers, as they guarantee developers a certain degree of “vested rights.”<sup>65</sup> Under the development agreement model, local governments negotiate with developers on a case-to-case basis in order to determine the amenities most needed by the community, whether they be infrastructure improvements, the creation of affordable housing, or the preservation of open space. In this respect, development agreements are often more flexible than PUDs and incentive zoning systems. Accordingly, they may be efficient tools for negotiating the benefits to be provided by golf course redevelopments, especially where a variety of community and government needs are implicated.

#### IV. Conclusion

With more than sixteen thousand golf courses open in the United States, redevelopments are unlikely to deprive golfers of opportunities to hit the greens any time soon.<sup>66</sup> At the same time, however, the land use choices made in golf course conversion cases will affect many communities in the coming years, touching upon space considerations, property values, and other issues deeply important to many of these communities’ residents, including quality of life. Whether golf courses should be retained in order to preserve open space and recreational opportunities or whether courses should be converted to other economic uses may be difficult to determine, but it is an important question for local planners and community residents to answer. With the land use tools described in this column, municipalities have a variety of methods to ensure that golf course properties are wisely

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<sup>64</sup>David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE. W. RES. 663, 664 (Summer 2001). Development agreements have been statutorily authorized in several states, including Arizona, California, Colorado, Florida, Hawaii, Idaho, Louisiana, Nevada, New Jersey, Oregon, South Carolina, Virginia and Washington. *Id.* at n. 32.

<sup>65</sup>*Id.* at 669-70.

<sup>66</sup>Cauchon, *supra* note 1.

and strategically redeveloped to ensure compatibility with community plans and desires.