

GOLF COURSE COMMUNITIES

What's an HOA to Do When the Golf Club is Failing?

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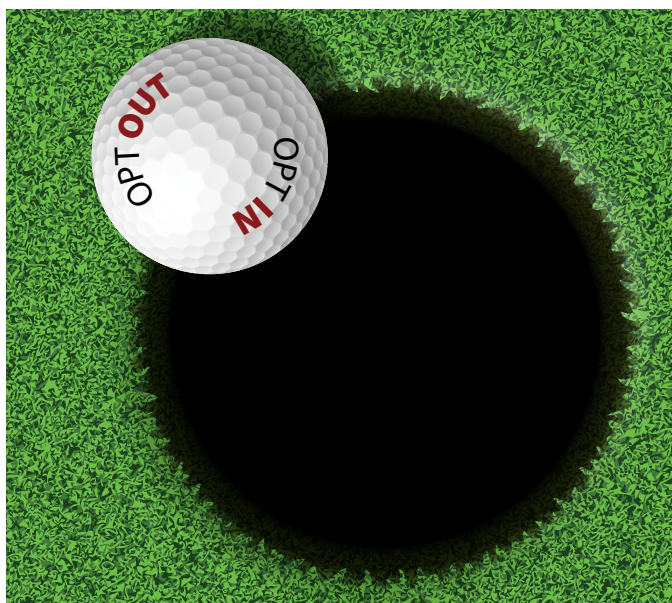
THE PROBLEM HAS BEEN A LONG TIME COMING. For many years, real estate developers would establish a residential community governed by a homeowners' association (HOA) and would establish a separate golf club to own, operate and maintain the golf and other recreational amenities within or adjacent to the residential community (club).

Many homeowners believed the primary purpose of the club was to establish a vehicle for the developer to deliver exceptional golf and recreational facilities to the purchasers of homes within the community. The various membership programs implemented, whether member-owned or developer owned, allowed the developer a method to not only recoup its initial capital investment in the recreational facilities but, in many cases, provide a revenue stream from dues as well. However, the overriding intent and purpose of the club was to enable the de-

In recent years, the trend has been moving away from the traditional two-tiered model where the HOA and club are legally distinct. Prospective purchasers historically were given the opportunity to voluntarily "opt-in" or "opt-out" of participation in the club. This voluntary model's failure to sustain the club for the long-term could possibly have been seen before it occurred, but in numerous cases was not. Many clubs have fallen victim to economic downturns and other forces that reduced the number of homeowners willing to support the club. As a result, large numbers of clubs and HOAs are facing the stark reality that the club simply cannot survive if only a few homeowners volunteer to participate in support of the recreational facilities.

Too few participants (i.e., members) requires the club to make the difficult choice between raising dues beyond the market, thereby further reducing the number of members; reducing the quality and services that the club can afford to provide; or selling, closing or otherwise off-loading the club to another party.

With these less than attractive options, a new model is gaining momentum. In place of the traditional two-tiered model is the new—and arguably fairer—single-tiered structure where the HOA owns the golf and recreational facilities and all homeowners are required to contribute something to sustain the facilities. New communities that have adopted this model are sometimes referred to as "bundled" or "golf benefited" communities. Alternatively, some communities retain the two-tiered structure but make participation in the club, at least at some level, mandatory. These communities' leaders recognize the critical and unavoidable conclusion that the golf and recreational facilities benefit *all* of the properties within the com-



veloper to maximize the value (i.e., sales price) of the lots and homes for sale. What the developer plainly understood was that the mere existence of the golf and recreational facilities surrounding the residential community raised the value of the surrounding residential property.



munity and not just those who choose to become members, and that in order to have sufficient funding for the operation and maintenance of the recreational facilities with marketable dues levels, a greater number of homeowners need to contribute to the club.

To adjust to market realities, some HOAs and clubs have joined forces and worked together to make support of the club a requirement of living in a golf course community. Some have attempted to retroactively convert the community to a mandatory membership program by holding a homeowners vote and amending the community documents to require some level of membership in the club. However, conversion to a mandatory membership program is wrought with potential pitfalls because lawsuits have been brought objecting to the conversion claiming that the “scheme of the community” will be altered.

In these cases, the homeowners argue that the HOA does not have the ability to require membership because the objecting homeowners never agreed to live in a mandatory membership community. These objectors suggest that their particular homes lose value and they are otherwise “damaged” as a result of the mandatory membership program. Some courts have agreed and found that amendments to the governing documents to create a mandatory membership program on existing homeowners were unenforceable. To adjust to this threat of litigation, some HOAs have made mandatory membership applicable to prospective homeowners only, and allow existing homeowners to remain outside the membership program if they choose. Though, one must wonder how a homeowner who chooses to buy property overlooking a golf course, or who enjoys the open space and view of a golf course within a community, could object to contributing to maintain such amenity with the argument that it does not provide a valuable benefit to all homeowners in the community.

In any event, many clubs and HOAs must consider whether to attempt to implement a fair allocation of costs to all homeowners by amending their documents or establishing other contractual means to obligate homeowners to contribute to the costs. Boards of both clubs and HOAs are coming to the conclusion that inherent in their roles as board members is the fiduciary duty to not just manage the status quo and “kick the can down the road,” but to proactively address the financial needs of the clubs with a strategic long-term plan.

In one recent case, The Club at Morningside in Rancho Mirage and the HOA determined it was necessary and appropriate to implement an assessment obligation for every homeowner to contribute \$250 per month to the club and amended their governing documents in accordance with the procedural requirements neces-

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sary to do so. To offset this expense to the members, the club offered a \$250 credit per month for each member of the club, to recognize the contribution the members made to the club by paying dues, and eliminating the net result of club members having to pay twice. A natural result was that membership spiked. However, 29 residents filed suit in November against the HOA. The court will render a decision by balancing the law as it applies to the particular facts of the case, or the parties will settle. However, the lesson to be learned is that boards of HOAs with associated clubs need to take a close look at the relationship between the homeowners and the club, evaluate the financial realities of the relationship and the applicable governing documents, and prudently and strategically determine how to proceed. CD

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