



Making a Par on a Golf Turnover

by Kevin J. Moore

While millions of Americans find golf a truly relaxing sport to play and to watch, it turns out that golf course developers have more difficulty making par when it comes to turning the course over to the equity members of the golf club for whom it was built. All too often, it seems, a plethora of disputes arise that make the turnover process needlessly complicated and expensive, yet there are several important steps that all developers can take to limit their potential liability.

Putting a viable turnover plan in place ahead of time means that cost savings can be achieved and the potential for litigation can be minimized.

In most cases, equity golf clubs are nonprofit corporations. Every member of the club is a member of the nonprofit corporation and they

elect a board of trustees, which runs the club. In turn, the board elects the club officers from among its members.

Importantly, members have to pay the club a substantial membership deposit or bond when they join. Once a member resigns, the club does not have to refund this deposit until another person acquires the membership and pays the club a deposit equal to or greater than the resigned member's deposit.

The developer's goal in the turnover is to extricate itself, as quickly and cheaply as possible, from ownership and control of the club and to obtain a full release from any liabilities to the club and its membership. The developer achieves this goal through a turnover agreement among the developer, the equity club and some entity which binds the club

members. The membership must be bound by the agreement because, while the developer controlled club can release the club's rights against the developer, it cannot release the developer appointed board from liability to the club membership for breach of fiduciary duty. Moreover, a court could set aside a release from a developer controlled club to the developer.

Since it is impossible to get every member to sign the turnover agreement, the club governing documents should set forth a mechanism wherein the membership elects a transition committee from their number, which can bind them to the turnover agreement. Few governing documents create such an empowered transition committee. Therefore, prior to or during turnover, the developer

should amend the governing documents to provide for an empowered transition committee. The developer should then call a meeting of the members to approve the transition committee concept and to elect its members.

There are two primary models for developing a club. In both models, the developer initially owns all of the club property and facilities. In one model, the developer forms the club at the time it starts selling memberships, and people immediately become equity members of the club. The developer controls the club by appointing the club board. On the date the developer sells a certain number of memberships, the developer conveys all of the club property and facilities to the club, the developer appointed members of the board resign and a board elected by the members takes their place.

In the second model, the developer does not form the club immediately. Instead, it sells contracts, which correspond to equity memberships. On the date the developer sells a certain number of these contractual memberships, called the "conversion date," the developer forms the equity club and the members' contractual memberships "convert" to equity memberships in the newly formed club. The developer continues to control the club until it sells all of the equity memberships, at which time developer appointed members of the board resign and a board elected by the members takes their place.

The most common disputes between the developer and the club membership that arise during turnover pertain to: (1) the timing of turnover, (2) entitlement to membership deposits, (3) entitlement to inventory, cash on hand and accounts receivable, (4) responsibility for accounts payable,

(5) responsibility for refunding membership deposits and (6) construction defects in the club facilities. Disputes between the developer and the membership over items 2 through 5 usually arise from a disagreement over when turnover is to occur and over how the aforementioned items are to be handled. Turnover is usually triggered by the sale of a particular number of memberships.

Frequently the governing documents are unclear and poorly written. They have usually been amended several times; the club staff hasn't followed them and has made all sorts of sweetheart deals with individual members, which may not have been documented in the club records. If the developer has already reached turnover and is stuck with this nightmare scenario, the best thing to do is to agree, with the transition committee, in the turnover agreement, upon a method of counting sold and resold memberships and on the club's entitlement to and responsibility for membership deposits, cash on hand, inventory, taxes, accounts receivable and accounts payable.

It is far better if the developer addresses these issues before turnover in the club's governing documents. These documents should be clear, internally consistent and should spell out how turnover is to be handled. The developer should hire a well paid and intelligent membership director. This person should meet with and be trained by the developer's attorney and be free to call the attorney when questions arise. It is cheaper to spend \$10,000 in legal fees during the sales process to avoid spending a \$100,000 during the turnover.

Construction defect claims constitute the other major turnover

issue. If the construction defects really exist and are cheap and easy to fix, the developer should fix them and the turnover agreement should state that they are fixed. Likewise, if it is substantially cheaper to repair the defects then it is to pay the member controlled club to fix them, the same procedure should be followed. Otherwise, the best approach is to agree upon the dollar amount required to make the repairs and to pay it to the club at turnover in exchange for a full release.

If there is a substantial difference of opinion between the developer's inspector and the membership's inspector over the nature of the construction defects and the cost to repair them, the turnover agreement can incorporate a procedure for an independent third party inspector whose decision is final on these matters. When the developer repairs the defects to the inspector's satisfaction, the release in the turnover agreement automatically becomes effective.

By addressing these concerns ahead of time, developers will recognize that many legal and financial disagreements can be settled before a problem emerges, enabling them to remain financially intact, without litigation.

Kevin J. Moore is a partner in the real estate practice group of Sills Cummis Epstein & Gross P.C., where he practices golf club turnover and restructuring law, land use law and redevelopment law.