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BEYOND THE GREEN: THE LEGAL LAND USE CONTROLS INVOLVED WITH GOLF COURSE CLOSURES

I. THE DRIVING RANGE OF ISSUES: AN INTRODUCTION ON FUTURE LAND USE PLANNING FOR DEAD GOLF COURSES

Behind the façade of manicured lawns and open vistas lies a grim truth about the state of golf – its demise in popularity.¹ More accurately, the sport is falling victim to a mismatch in supply and demand between venues for play and willing players.² According to the National Golf Foundation, golf course closures have outnumbered openings since 2006.³ In the late 1980s, golf surged in popularity for a solid twenty years, a period of time that saw over four thousand new courses around the country.⁴ Yet, the 2000s brought a downfall in regular players, equipment sales, ratings, and annual number of rounds played.⁵ Prominent golf industry executives trust that the sport’s passionate adherents will keep the game strong in the future, though they note challenges to overcome, particularly, rising costs, time commitments, financial and environmental sustainability, and accessibility to all.⁶

1. See Nolan Gray, *Dead Golf Courses Are the New NIMBY Battlefield*, BLOOMBERG CITYLAB (June 8, 2018, 8:21 AM), <https://www.bloomberg.com/news/articles/2018-06-08/dead-golf-courses-are-the-new-nimby-battlefield> [<https://perma.cc/MXL2-3TXU>] (“Golf is dying, many experts say.”).

2. See Jason Scott Deegan, *A depressing Deegan’s Dozen: Obituaries of the best golf courses to close in 2018*, GOLF ADVISOR (Dec. 28, 2018), <https://www.golfadvisor.com/articles/a-depressing-deegans-dozen-obituaries-of-the-best-golf-courses-to-close-in-2018> [<https://perma.cc/H7XA-6JM2>] (highlighting trend in late 2010s of golf course closures).

3. See NGF’s *2019 Golf Industry Report Overview*, NAT’L GOLF FOUND. (Apr. 2019), <https://www.thengfq.com/2019/04/ngf-releases-2019-golf-industry-report/> [<https://perma.cc/HKQ8-7SN5>] (noting closure of about two hundred golf courses year prior).

4. See Phoebe Petrovic, *There Aren’t Enough Golfers To Keep All Of The U.S. Courses In Business*, NAT’L PUB. RADIO (June 5, 2019), <https://www.npr.org/2019/06/05/730057491/there-arent-enough-golfers-to-keep-all-of-the-u-s-courses-in-business> [<https://perma.cc/EW5S-9VB6>] (stating National Golf Foundation’s encouragement “to build a course a day for 10 years”).

5. See Gray, *supra* note 1 (attributing downfall to “one-two punch of recession and bad press” surrounding Tiger Woods in 2009).

6. See Erik Matuszewski, *The State Of Golf For 2019 — An Industry Roundtable*, FORBES (May 1, 2019), <https://www.forbes.com/sites/erikmatuszewski/2019/05/01/the-state-of-the-golf-industry-for-2019/#676b93fa5208> [<https://perma.cc/BX4C-PTYF>] (identifying change in perception from game for only high-society players to game for all).

However, this trend of closures may not quite mean the worst for invested property owners.⁷ Last year provided a rather strange situation for the game, in which its popularity surged due to COVID-19-related mandates of social distancing and working from home, which left people around the country with open schedules and a craving for outdoor socializing.⁸ Yet, uncertainty lingers as to whether the coronavirus-influenced revival of the sport will prove long-lasting.⁹ Prior to the pandemic, the golf industry attempted to market itself to a new generation of golfers by transforming the traditional culture of the sport into a wholly different experience, for example, through the Topgolf entertainment franchise.¹⁰ However, these attempts do not point to an assured sustainable future for the sport itself, as players continue to struggle with the affordability and time commitment that golf demands.¹¹ If these obstacles remain still after the COVID-19 pandemic, golf course owners may consider the option of ceasing operations and selling the property to escape financial downfall, especially if the course is in decent shape.¹² In other instances where the course is in worse condition, the decision to repurpose the course may not necessarily belong to the golf property owner.¹³

7. See NGF's 2019 Golf Industry Report Overview, *supra* note 3 (stating "soaring real estate values" and remaining facilities' "stronger financial health").

8. See Dylan Dethier, *How is the coronavirus changing golf's future?*, GOLF.COM (May 27, 2020), <https://golf.com/news/golf-future-coronavirus-changing/> [<https://perma.cc/NE65-P86>] (noting quick succession of golf course re-openings following initial pandemic-related closures).

9. See *id.* (posing questions of lost revenue from closures, travel restrictions, tight municipal budgets, and de-urbanization).

10. See generally *Frequently Asked Questions*, TOPGOLF, <https://topgolf.com/us/faq/> [<https://perma.cc/GN8S-KZZL>] (last visited Jan. 6, 2021) (describing entertainment features of Topgolf experience); see *Millennial Golfers: 16 Ways to Target Young People and Get Them Playing Your Golf Course*, LIGHTSPEED (June 26, 2019), <https://www.lightspeedhq.com/blog/12-things-millennial-golfers-want/> [<https://perma.cc/PP2E-UK8Z>] (suggesting marketing strategies to increase popularity of golf in millennial generation).

11. See Karl Taro Greenfeld, *The Death of Golf*, MEN'S J. (June 2015), <https://www.mensjournal.com/features/the-death-of-golf-20150625/> [<https://perma.cc/M3CP-5R9P>] (noting attempts to rescue golf "by making the game faster, cheaper, and easier to play have all taken on an air of desperation").

12. See Larry Hirsh, *Considerations when Selling a Golf Property*, GOLF PROP. ANALYSTS (May 24, 2017), <https://golfprop.com/uncategorized/considerations-when-selling-a-golf-property/> [<https://perma.cc/C2UG-VVKN>] (identifying necessary remedial steps and due diligence before selling golf property, considering "the plethora of golf properties on the market").

13. See, e.g., *Eminent Domain Might be the 19th Hole for the Willow Ridge Country Club*, SANCHEZ & POLOVETSKY, PLLC (Nov. 30, 2020), <https://www.spnylaw.com/legal-blog/eminant-domain-might-be-the-19th-hole-for-the-willow-ridge-country-club> [<https://perma.cc/Y23A-LP2E>] (reporting town's intention to invoke eminent domain on golf course, competing with private developers also approaching

As the golf industry continues navigating its uncertain future, local governments and private owners must face the inevitable death of some golf courses.¹⁴ Golf operations will likely cease through government or developer buy-outs, or perhaps through owner sell-outs.¹⁵ In other situations, the golf course has already been left behind with its upkeep responsibilities neglected.¹⁶ Regardless of how it occurs, more communities are left with closures, condemnations, and abandonments.¹⁷

As applied to these forms of golf course fatalities, this Comment will explore the interplay of three fundamental concepts of property law – takings, zoning, and covenants – and how they impose or mitigate obstacles in repurposing golf courses.¹⁸ The purpose of this Comment is *not* to debate whether government should interfere with private property rights of golf course owners, nor does this Comment serve to advocate for specific post-closure uses of golf course property.¹⁹ Instead, this Comment will inform of the government’s available legal tools when a golf course quits operations, and aim to determine how such tools may strike a balance in providing overall net benefit to the surrounding community while achieving equitable results for the populations particularly impacted.²⁰ Nonetheless, the policy and ethical questions involved

owner); see also Mark Lungariello & Mike Dougherty, *Harrison eyes eminent domain for Willow Ridge Country Club*, LOHUD.COM (Nov. 14, 2020), <https://www.lohud.com/story/news/local/westchester/harrison/2020/10/30/harrison-new-york-ny-willow-ridge-country-club/6083191002/> [https://perma.cc/LY59-RS2Q] (describing financial instability of course and noting past government takeover attempt). For further discussion of eminent domain and takings jurisprudence, see *infra* notes 51-102 and accompanying text.

14. See generally *Gold and COVID-19: Latest news on course operations*, GOLF ADVISOR (Oct. 21, 2020), <https://www.golfadvisor.com/covid-19/> [https://perma.cc/8X84-PEB3] (updating COVID-19-related closures).

15. For further discussion on an example of problems associated with golf course ownership transfer, see *infra* notes 199-211 and accompanying text.

16. For further discussion of an abandoned golf course in Arizona tangled in ongoing litigation, see *infra* notes 199-211 and accompanying text.

17. For further discussion on a distinction between types of golf course closures, see *infra* notes 33-38 and accompanying text.

18. For further discussion of three land use controls’ effectiveness in golf courses, see *infra* notes 212–294 and accompanying text.

19. See, e.g., Celeste M. Hammond, *Repurposing Golf Courses and Other Amenities That Burden the Land: Covenants Running Forever - A Transactional Perspective*, 512 UIC JOHN MARSHALL L. REV. 603, 605 (2019) (“This article focuses on the changes in using land restricted to golf courses that now need repurposed uses”); see also Lauren Sewell, *Golf Course Land Positive Effects on the Environment*, 9 SEATTLE J. ENVTL. L. 329, 331-32 (2019) (advocating for wildlife protection and water conservation).

20. See, e.g., Eddie A. Perez, *The Importance of Eminent Domain in Community Development Projects*, 29 W. NEW ENG. L. REV. 109, 112, 120 (2006) (arguing eminent

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may incidentally overlap with inquiries of the appropriate level of government interference with private property rights or of the best repurposed golf course land use.²¹ Further, this Comment focuses on government action as a necessary solution, implying generally that local governments are more likely to achieve this balance through informed zoning and takings decisions rather than private individuals performing covenants.²²

Section II of this Comment provides the broad legal framework behind the three relevant property law concepts, with its highest focus towards government takings.²³ This overview looks at how state courts have applied these principles of law to golf course controversies, either where courses have been closed by government action or where government acts in response to closures.²⁴ Further, Section II will summarize the ethical theories involved when interests and benefits conflict between private landowners and the general public, for which golf serves as an arena of discord.²⁵ Section

domain as way for government officials to maintain accountability to constituents by requiring property transfers to represent “ideas, passions, and sentiments of the general population” while recognizing private individuals “making the ultimate sacrifice for the greater good”); *see also* Urban Institute Policy Debates, *Land Use Regulation: What’s It Worth Anyway?*, URB. INST., <https://www.urban.org/debates/land-use-regulation-whats-it-worth-anyway> [<https://perma.cc/MZJ7-8T95>] (last visited Mar. 1, 2021) (weighing zoning’s undesired effects in restricting individuals and businesses and in exacerbating social inequality, with benefits in flexibility and adaptability that allow “people to shape the communities in which they live, work, and play”). For further discussion on the balance of public policy and ethical solutions, *see supra* notes 212-294 and accompanying text.

21. *See, e.g.*, Jedediah B. Forkner, *Is the Illinois Equity in Eminent Domain Act Truly Equitable?*, 83 CHI. KENT L. REV. 995, 1014 (2008) (describing failure of states to adequately define “blight” warranting government interference through eminent domain, with many definitions “based on vague concepts such as dilapidation, obsolescence, and lack of community planning”); Adele Peters, *Need land for parks and housing? There are plenty of useless golf courses to repurpose*, FAST COMPANY (Mar. 6, 2019), <https://www.fastcompany.com/90315242/need-land-for-parks-and-housing-there-are-plenty-of-useless-golf-courses-to-repurpose> (identifying competing interests in parks, conservation, residential development, affordable housing, versus stereotypically wealthy golf course neighbors who oppose development in their backyards).

22. *See* American Planning Association Chapter Delegate Assembly, *APA Policy Guide on Takings*, AM. PLANNING ASS’N (Apr. 11, 1995), <https://www.planning.org/policy/guides/adopted/takings.htm> [<https://perma.cc/QYB2-CAJR>] (describing taking and zonings as form of “police power” where government may “intervene in private activity to protect the public health, safety and welfare”).

23. For further discussion of United States Supreme Court case law on takings, zonings, and covenants, *see infra* notes 51-137 and accompanying text.

24. For further discussion on state court treatment of issues, *see infra* notes 51-137 and accompanying text.

25. For further discussion on an overview of philosophical and political issues posed by golf course ownership and operations, *see infra* notes 138-167 and accompanying text.

III introduces current golf course controversies that Section IV will analyze using the principles of law and ethics to ultimately recommend a strategy of government involvement in repurposing dead courses.²⁶

By synthesizing three common land use controls with basic ethical and community considerations, this Comment will attempt to answer a million-dollar putt of a question: which means works the best?²⁷ In other words, which legal tools are most instrumental in achieving the best outcome for the community when a golf course dies?²⁸ There is no hole-in-one answer, as much depends on the factual scenarios of each course closure plus the underlying social, political, and ethical tensions between the concerned populations.²⁹ Each tool serves different purposes generally, though combinations of other public policy practices can enhance their effectiveness.³⁰ In consideration of those varying factors that ultimately point towards the end goal of community improvement, this Comment advocates for courts to maintain their deference towards the government action.³¹ As follows, government should invoke eminent domain foremost where possible to acquire the dead courses, and secondarily repurpose the land through rezoning and upholding covenants to the extent practicable.³²

II. TEEING UP THE BALL: A BACKGROUND ON GOLF COURSE CLASSIFICATION, PROPERTY LAW, AND PHILOSOPHY OF LAND USE

At the outset, it is vital to understand the distinction between closed, condemned, and abandoned golf courses to properly visual-

26. For further discussion of current case studies in Ohio, South Carolina, and Arizona, see *infra* notes 173-211 and accompanying text. For further discussion of suggestions of best public policy for land use control uses on dead courses, see *infra* notes 212-294 and accompanying text.

27. For further discussion on a summary of rationale behind conclusion, see *infra* notes 295-303 and accompanying text.

28. For further discussion on the distinctions among eminent domain, rezoning, and covenant issues simplified, see *infra* notes 295-300 and accompanying text.

29. For further discussion of community tensions, see *infra* notes 161-167 and accompanying text.

30. For further discussion of benefits and drawbacks of each tool, see *infra* notes 173-294 and accompanying text.

31. See, e.g., *Boulders at Strafford, LLC v. Town of Strafford*, 153 N.H. 633, 639 (2006) (presuming reasonableness of zoning ordinances and requiring only rational basis for legislation). *But see* *Schumacher v. Town of E. Hampton, N.Y. Zoning Bd. of Appeals*, 849 N.Y.S.2d 72, 74 (2007) (finding zoning board “improperly succumbed to community pressure”).

32. For further discussion of ideal strategy of government involvement in repurposing dead courses, see *infra* notes 273-281 and accompanying text.

ize the land use controls involved.³³ Closed courses would include those that shut down permanently due to decreased revenue or decline in demand.³⁴ Abandoned courses are similar in that golf activities have ceased at the site likely due to similar causes, but there may be an added element of lack of maintenance for an extended period of time.³⁵ Condemned courses, on the other hand, receive their designation specifically from government condemnation proceedings, which opens the golf course to acquisition by eminent domain.³⁶ Abandoned and closed golf courses lend to better case studies for land use restrictions like zoning and restrictive covenants, whereas condemned golf courses lend directly to analyses of government takings.³⁷ For the sake of consistency however, this Comment will hereinafter refer to all three categories collectively as ‘dead courses.’³⁸

In order to identify the legal tools available when faced with a dead golf course, the owner’s identity is a first-matter inquiry.³⁹ Depending on the golf course’s ownership, different legal obligations flow, and this Comment touches upon three types of ownership schemes.⁴⁰ First, as their name suggests, municipal golf courses exist under local governmental ownership, maintenance, and opera-

33. See Katherine M. Conners, *Case Note: Property—Cities Gone Wild: The Expanding Definition of a Taking under Urban Renewal Projects—Johnson v. City of Minneapolis*, 32 WM. MITCHELL L. REV. 1465, 1480 (2006) (noting property may be condemned, but plan for which property was condemned may also be abandoned, thereby leaving condemned property “completely undisturbed”).

34. See Victoria Sanchez, *Why have so many DC-area golf courses closed since 2005?*, WJLA (June 17, 2019), <https://wjla.com/sports/why-have-so-many-dc-area-golf-courses-closed-since-2005> (attributing expenses in upkeep and green fees for decision to end course’s lease).

35. See, e.g., Paul Maryniak, *State high court ends Lakes legal battle*, AHWATUKEE FOOTHILLS NEWS (Apr. 8, 2020), https://www.ahwatukee.com/news/article_4fdf5272-790b-11ea-99ca-a365849fc431.html [<https://perma.cc/S6UT-L9UH>] (highlighting end of seven-year legal battle involving defunct Ahwatukee Lakes Golf Course).

36. See generally FED. R. CIV. P. 71.1 (providing rules governing condemnation).

37. For further discussion of golf course case law, see *infra* notes 51-137 (discussing past use of inverse condemnations, takings, zoning, and land restrictions).

38. See Kelly Pedro, *Builders Hit Hole-in-One: Dead Golf Courses Become Sites for New Housing*, REALTOR.COM (Sept. 27, 2018), <https://www.realtor.com/news/trends/developers-hit-a-hole-in-one-as-golf-interest-dwindles/> [<https://perma.cc/V2AZ-XYNR>] (equating “dead” golf courses with closed courses).

39. See, e.g., 26 PA. CONS. STAT. § 103 (defining “condemnee” as “owner of a property interest taken, injured or destroyed” through eminent domain).

40. See, e.g., *City of Atlanta v. Mapel*, 121 Ga. App. 567, 571 (1970) (finding governmental immunity for tort liability on municipal golf course). *But see Amaral v. Cuppels*, 64 Mass. App. Ct. 85, 93 (2005) (finding private golf course owner liable for trespass for stray balls).

tion, such as through a town or city.⁴¹ Prerequisite to this ownership model, a state's legislature must first confer upon the municipality the authority to undertake such responsibilities.⁴² Accordingly, ownership and operation is a legislative function upon which the municipality's citizens may hold sway by the political process.⁴³ Municipal golf courses may overlap with the second type, public golf courses, though public courses are distinguishable in that private individuals may operate them for both public use and commercial benefit.⁴⁴ Thus, municipal golf courses can be considered a subset of public golf courses, though not all public golf courses are necessarily municipally-owned.⁴⁵

Further distinct from public golf courses is the third type examined in this Comment, private golf courses.⁴⁶ These courses are marked by private membership to country clubs, which is different from privately owned courses that members of the general public may enjoy upon payment of a fee.⁴⁷ Because of their associations with country clubs, private courses exist within a web of amenities provided to their members, which may include clubhouses, dining areas, pools, offices, bars, tennis courts, and other benefits.⁴⁸ These distinctions of ownership, while subtle, are important to keep in mind to accurately gauge who comprises the 'community' surrounding the golf course – which thus frames the ethical questions of whose interest should receive higher legal protection.⁴⁹ Furthermore, the distinction between non-government-owned courses

41. See 18A McQUILLIN MUN. CORP. § 53:142 (3d ed.) (characterizing municipal golf courses as "proprietary" function rather than "governmental" function).

42. See *West v. Town of Lake Placid*, 97 Fla. 127, 143 (1929) (describing ownership and operation as "permissible municipal function").

43. See *Duran v. Cassidy*, 28 Cal. App. 3d 574, 581-82 (1972) (holding city council's "declaration of public purpose" to build and operate golf course was "essentially legislative" and subject to voter approval, thus not merely administrative decision in furtherance of legislative policy).

44. See, e.g., *Golf Concepts v. City of Rochester Hills*, 217 Mich. App. 21, 23, 26, 32 (1996) (finding private, for-profit corporation operating course on leased city-owned property was "public park" but refusing property tax exemption).

45. See *Gennrich v. Zurich American Ins. Co.*, 329 Wis. 2d 91, 104 (Wis. Ct. App. 2010) (discussing employer's duties for non-municipal public for-profit golf course).

46. See *State, Dep't. of Revenue v. Teague*, 441 So. 2d 914, 915 (Ala. 1983) (noting distinction between privately owned public golf courses and purely private golf courses).

47. See *id.* (upholding gross receipts tax on both courses).

48. See *Algonquin Golf Club v. State Tax Comm'n*, 220 S.W.3d 415, 417 (Mo. Ct. App. 2007) (noting clubs' solely social and recreational purposes and their not-for-profit, "break-even" revenue schemes).

49. For further discussion of how 'community' may differ depending on the tool at issue, see *infra* notes 138-152 and accompanying text.

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from government-owned ones implies that government's role will vary in the appropriate amount of involvement in the golf course afterlife.⁵⁰

A. Par Three: A Trio of Land Use Tools

1. *Takings*

A “taking” refers to the Fifth Amendment’s allowance of the government to seize private property “for public use” as long as the government pays “just compensation” in return.⁵¹ For more typical issues of government overregulating private property, United States Supreme Court jurisprudence provides a standard path for determining whether a government taking occurs; first, if the government authorizes a “permanent physical occupation” against an individual’s property rights, this is referred to as a *Loretto* taking.⁵² This is characterized as a ‘*per se*’ taking where government action enables a physical invasion upon an owner’s property, for example by allowing the fixation of utility wires on a parcel of private real estate.⁵³ This is a “very narrow” standard for a claimant to meet, as courts interpret *Loretto* takings to require an element of permanence behind the occupation.⁵⁴ Absent this permanent impact, government may alternatively effectuate a *Lucas* taking if its regulation of property deprives the owner of all economically viable uses, meaning the government renders the owner’s property essentially valueless.⁵⁵ An example of such would be government’s prohibition on private development because of the existence of wetlands

50. See James R. Todd, *Trouble in Paradise: Redevelopment of Golf Courses in a Changing Market*, NAT’L L. REV. (May 27, 2019), <https://www.natlawreview.com/article/trouble-paradise-redevelopment-golf-courses-changing-market> [<https://perma.cc/K56D-YDEA>] (stating challenge of redeveloping homeowner association golf courses due to restrictive covenants).

51. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

52. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (finding installation facilities on landlord’s property was taking requiring just compensation).

53. See Wendie L. Kellington, *New Takes on Old Takes: A Takings Law Update*, ALI-ABA 17TH ANNUAL LAND USE INST., http://landuselaw.wustl.edu/takings_update.htm [<https://perma.cc/6S5V-32Y2>] (last visited Dec. 18, 2020) (citing *GTE Northwest, Inc. v. Pub. Util. Comm’n*, 321 Or. 458 (1995)) (finding *Loretto* takings where government “allow[s] other companies to ‘collocate’ wires”).

54. *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 251-253 (1987) (quoting *Loretto*, 458 U.S. at 441) (finding no *Loretto* taking in Pole Attachments Act’s invitation to lease utility pole spaces).

55. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019-20 (1992) (finding total taking in government’s prohibition of owner building houses on beachfront property).

on the property.⁵⁶ *Lucas* takings are often called ‘categorical’ regulatory takings, in which courts typically require the government regulation at issue to effectuate a “complete elimination” or “total loss” of economic value.⁵⁷

Since *Loretto* and *Lucas* takings tend to be quite rare, the more common takings analysis stems from the Supreme Court case *Penn Central Transportation Co. v. New York City*.⁵⁸ Here, the inquiry of whether a ‘regulatory taking’ has resulted from government regulation depends on an *ad hoc* balancing of several factors, *i.e.*, the regulation’s economic impact on the property, the extent and interference with reasonable investment-backed expectations, and the characterization of the government action at issue.⁵⁹ For economic impact, a *Penn Central* taking likely requires more than diminution or change in market value, as courts would find retention of significant value of the parcel weighs against the finding of a taking.⁶⁰ The “investment-backed expectations” factor may require evidence that the property owner made expenditures or changed

56. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (noting trial court’s finding of Corps of Engineers’ denial of permit left remaining property value “de minimus”).

57. Carol Necole Brown, *The Categorical Lucas Rule and the Nuisance and Background Principles Exception*, 30 *TOURO L. REV.* 349, 354 (2014) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 330 (2002)) (describing *Lucas* as “categorical rule turn[ing] on denial of all *value* or denial of all *use*” (emphasis in original)).

58. 438 U.S. 104, 124, 138 (1978) (finding no taking for government’s development restrictions imposed upon landmark sites). According to a 2017 review of takings claims, claimants asserting a *Lucas* taking enjoyed a success rate of only 1.6 percent. See Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 *IOWA L. REV.* 1847, 1849-50 (2017) (finding only twenty-seven out of 1,700 state and federal cases in twenty-five years where *Lucas* taking claim prevailed).

59. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting Court’s inability to develop “set formula” instead of weighing factors). These are commonly called the ‘*Penn Central*’ factors, to which another synthesizing factor courts may weigh is consideration of the “parcel as a whole.” Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 *PENN. ST. L. REV.* 601, 612 (2014) (noting “parcel as a whole” factor’s importance in temporary takings claims). At its time, the *Penn Central* decision was seen as a landmark decision for architectural preservation and heritage. See Warren Weaver Jr., *Ban on Grand Central Office Tower Is Upheld by Supreme Court 6 to 3*, *N.Y. TIMES* (June 27, 1978), <https://www.nytimes.com/1978/06/27/archives/new-jersey-pages-ban-on-grand-central-office-tower-is-upheld-by.html> [<https://perma.cc/3SB5-VJF9>] (predicting decision “to unleash a wave of new landmark designations by municipalities that have been hesitant to try to preserve commercial properties because of possible legal challenges”).

60. See *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 318 (2013) (finding “any change in market value of the Golf Course Property is merely an incident of ownership that is not compensable under the Fifth Amendment”).

development plans based on the government action.⁶¹ Lastly, when a court looks at the characterization of the government action, it understands that government regulation “involves the adjustment of rights for the public good,” though there is no precise formula to determine whether such “economic injuries caused by public action [should] be compensated by the government rather than remain disproportionately concentrated on a few persons.”⁶² Still, because members of the public both endure burdens and enjoy benefits from governmental restriction, “[n]ot all damages suffered by a private property owner at the hands of [a] governmental agency are compensable.”⁶³ Altogether, a takings inquiry, whether through *Loretto*, *Lucas*, or *Penn Central*, determines whether a regulatory action is “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain,” which accordingly is a question of the severity of government’s burden upon its citizens’ property rights.⁶⁴

A golf course owner would likely challenge a government taking through an ‘inverse condemnation’ claim to recover the value of the property seized.⁶⁵ The landowner must initiate this claim in response to an alleged taking, hence the ‘inverse’ to condemnation proceedings where government initiates the action to acquire the property through eminent domain.⁶⁶ In either claim – legitimizing or challenging a condemnation proceeding – the party against the government must have a valid, enforceable property interest as a prerequisite basis for compensation.⁶⁷ In the case of golf courses, that real property interest terminates when the lease expires with-

61. *See id.* at 320 (noting no evidence of developer’s expenditures following town’s zoning decision).

62. *Id.* at 315-16 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005)) (considering this determination question of “justice and fairness”).

63. *Id.* at 316 (quoting *Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 170 (2011)) (framing burdens as expense of “living and doing business in a civilized community” (quoting *Kirby Forest Indust. v. United States*, 467 U.S. 1, 14 (1984))).

64. *Lingle*, 544 U.S. at 539-40 (observing *Penn Central*’s large focus is “magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests”).

65. *See Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2168 (2019) (noting direct contrast to condemnation claim where government initiates action to acquire, and noting claims arise in state court pursuant to state statute).

66. *See San Diego Metro. Transit Dev. Bd. v. Handlery Hotel, Inc.*, 73 Cal. App. 4th 517, 529 (1999) (citing direct authorization of both proceedings by California Constitution).

67. *See id.* at 529, 532 (requiring “vested, legally enforceable property interest . . . for compensation in an inverse condemnation proceeding for loss of future business”).

out renewal.⁶⁸ In instances where a golf course exists under an existing lease but the course sits idly, closed, or abandoned, then a takings proceeding appears most appropriate.⁶⁹ Provided the owner of the dead course is unable to find another private owner to repurpose the land, this scenario may allow the government's proactivity in recognizing and fulfilling the better future use of the property.⁷⁰

As a form of government takings, the United States legal system has long recognized eminent domain as the common law right of government to take private property for its own public uses.⁷¹ The justification for this power expanded significantly sixteen years ago in *Kelo v. City of New London, Connecticut*, where the Supreme Court affirmed broad qualifications for "public use" and found economic development a sufficient public purpose for the taking of property.⁷² *Kelo* employed this expanded rule to validate a non-profit development agency's condemnation of private real estate in an urban neighborhood, which was purported for redevelopment to implement the agency's urban revitalization plan that the city adopted.⁷³ With condemnation of property as a weapon and a

68. *See id.* at 533 ("Here, the real property interest is inextricably intertwined with the business of operating the golf course. Without the former, the latter does not exist.").

69. *Cf.* Josh Sens, *7 surprising things that happen when course maintenance stops*, GOLF (Apr. 10, 2020), <https://golf.com/news/7-surprising-things-when-golf-courses-stop-maintenance/> [<https://perma.cc/33FU-TS63>] (providing basic steps of golf course maintenance like mowing, weeding, watering, and cleaning contamination).

70. *See, e.g.*, Amy Biolchini, *Highlands Golf Club sold to Blandford Nature Center*, MLIVE GRAND RAPIDS (Jan. 19, 2019), https://www.mlive.com/news/grand-rapids/2017/02/highlands_golf_club_sold_to_bl.html [<https://perma.cc/FAW2-U456>] (reporting owner's transfer of golf course to nonprofit land conservancy).

71. *See* *Kohl v. United States*, 91 U.S. 367, 373-74, 376 (1875) (describing right as belonging to United States with no requirement of consent from states).

72. *See* *Kelo v. City of New London, Conn.*, 545 U.S. 469, 472, 480, 484 (2005) (upholding taking of private property as part of city's economic development plan).

73. *See id.* at 472-75 (stating revitalization plan designed to create jobs, increase tax revenue, and help "build momentum for revitalization of downtown New London"). The *Kelo* decision generated intense backlash, with polls showing over eighty percent of the public disapproving. *See* Ilya Somin, *Opinion: The political and judicial reaction to Kelo*, WASH. POST (June 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/> [<https://perma.cc/RQJ7-5QMH>] (stating "opposition cut across conventional partisan, ideological, racial, and gender division . . . on which Rush Limbaugh, Ralph Nader, libertarians, and the NAACP were all on the same side"). *Kelo* is also described as one of the worst Supreme Court decisions. *See* Damon Root, *John Paul Stevens Is Still Trying To Defend the Kelo Debacle*, REASON (May 16, 2019), <https://reason.com/2019/05/16/john-paul-stevens-is-still-trying-to-defend-the-kelo-debacle/> (arguing "destructive ruling paved the way for

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broad reading of ‘public uses’ as ammunition, local governments could thereafter use eminent domain with ease to transform the use of golf course land.⁷⁴ However, note the distinction between eminent domain as a means to convert golf courses into other uses, versus a means to turn land *into* golf courses; this Comment focuses on the former.⁷⁵ Still, repurposing land to create a golf course could satisfy the courts’ broad definition of public purpose anyway, as golf courses fit within permissible parks and recreation uses.⁷⁶

In determining whether government’s use of eminent domain effectively benefits the community, an appropriate consideration is the government’s underlying agenda or intent in acquiring the golf course property.⁷⁷ This focus on government intention relates back to the “public use” requirement for takings, which courts may define literally as public employment of the property right, or more broadly or comprehensively as any “[p]ublic advantage, convenience, or benefit . . . contribut[ing] to the general welfare and the prosperity of the whole community”⁷⁸ Parks and recreational purposes serve a public use quite explicitly.⁷⁹ Road expansion may also suffice.⁸⁰ However, when government takes property for non-

atrocious real world consequences . . . [and] mangled the Takings Clause); *see also* Casey C. Sullivan, *13 Worst Supreme Court Decisions of All Time*, FINDLAW (Oct. 14, 2015), https://blogs.findlaw.com/supreme_court/2015/10/13-worst-supreme-court-decisions-of-all-time.html [<https://perma.cc/T8DF-NM6J>] (listing *Kelo* and *Lucas* decisions).

74. *But see* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2119 (2009) (noting quick and often ineffective state responses to limit *Kelo*’s power).

75. *See, e.g.*, In re Condemnation of Certain Properties and Property Interests for Use as Public Golf Course, 822 A.2d 846, 856 (Pa. Commw. Ct. 2003) (finding use as golf course sufficient public use for condemnees’ property).

76. *See* Dornan v. Phila. Hous. Auth., 331 Pa. 209, 221-22 (1938) (“The taking of land for a public golf course or playground would be for a public use . . . [and it] is not essential that the entire community or even any considerable portion of it should directly enjoy or participate . . . in order to make its use a public one.”); *see also* Hanna v. Sunrise Recreation, Inc., 94 So. 2d 597, 601 (Fla. 1957) (describing park purposes).

77. *See, e.g.*, City of Austin v. Whittington, 384 S.W.3d 766, 781-82 (Tex. 2012) (holding no bad faith in government’s taking for parking garage).

78. State Highway Comm’n v. Thornton, 271 N.C. 227, 242 (1967) (finding construction of public road as sufficient public use).

79. *See, e.g.*, Matter of Cty. of Suffolk, 333 N.Y.S.2d 686, 688 (1972) (allowing county to use parks and recreation purposes to condemn private venture that included golf course); *see also* William Bros. Lumber Co. v. Gwinnett Cnty., 258 Ga. 243, 243 (1988) (citing state statutory authority that qualifies parks and recreation as public purposes for county’s condemnation proceedings).

80. *See, e.g.*, Div. of Admin., State of Fla. Dept. of Transp. v. Frenchman, Inc., 476 So. 2d 224, 226 (Fla. Dist. Ct. App. 1985) (determining severance damages for taking golf course property to widen state highway).

public uses, additional justifications or conditions may be required, like the pursuit of an urban development plan as in *Kelo*.⁸¹

One observation about takings litigation is that private landowners tend to rely on theories from the other property law principles discussed herein to demonstrate whether a compensable taking has occurred.⁸² Particularly often, these challengers allege that government zoning decisions overregulate their private property to the extent of a *de facto* taking, triggering the *Penn Central* analysis.⁸³ An example of this interplay between regulatory takings and zoning appears in *Ocean Palm Golf Club Partnership v. City of Flagler Beach*, where a Florida appellate court found the city's refusal to change its comprehensive plan did not amount to a taking under the conventional framework.⁸⁴ Plaintiff Ocean Palm Golf petitioned for its closed golf course to be rezoned from a recreational zone to a low-density zone so the owners could then develop the parcel.⁸⁵ While the court recognized that a government's inaction in response may constitute a taking under certain circumstances, Ocean Palm Golf's situation was distinguishable as an attempt to force the city to "act as a guarantor for the landowner's investment after it becomes unprofitable due to, not the zoning regulations, but outside market forces."⁸⁶ Because plaintiff's parcels as a whole retained economic beneficial use, the court found no regulatory

81. *See, e.g.,* *McCord v. Hous. Auth. of City of Atlanta*, 246 Ga. 547, 551 (1980) (finding Georgia law allowed takings for non-public use if private landowner's remedy was option to retain land and develop it in accordance with urban redevelopment plan).

82. *See, e.g.,* *Forest View Co. v. Town of Monument*, 646 P.3d 774, 779-80 (Colo. 2020) (refusing to compensate private claimants under eminent domain or regulatory taking theories where government violated restrictive covenant); *see also* *Witzel v. Vill. of Brainard*, 208 Neb. 231, 232-34 (1981) (allowing village's eminent domain proceeding despite plaintiffs' claim that public use behind taking violated zoning ordinance).

83. *See* *Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 471 (Fla. Dist. Ct. App. 2014) (attributing claims to "inverse condemnation" causes of action, where taking occurred without formal exercise of eminent domain power).

84. *See id.* at 472, 474 (finding sustained economic use of property, thereby finding no takings under *Lucas* and *Penn Central* inquiries).

85. *See id.* at 470-71 (noting trial court's holding that property could still be used as golf course).

86. *Id.* at 472-73 (noting longstanding character of land in this case further distinguishes it from cases where government refusal to rezone constituted taking). In refusing to award compensation to Ocean Palm Golf, the court noted "[it] is not the purpose of eminent domain law" for government to bear the cost of the landowner's "failed economic expectations." *Id.* at 473 (attributing loss of profits to over-construction of courses, aging population of players, and increased operating costs).

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taking under the *Penn Central* factors, despite the zoning bearing a disproportionate impact on plaintiff.⁸⁷

A second observation with takings litigation is that the extent of relief awarded to a successful plaintiff will depend on the magnitude of the taking, meaning whether the condemnation of the golf course is an all-or-nothing operation or is a partial taking may affect the compensation.⁸⁸ Typically, partial takings are legal, where government may seize only a portion of an entire parcel of land to fulfill its project, such as taking a strip of private farmland to build a road.⁸⁹ In a golf course partial taking example, the Alabama Supreme Court affirmed the payment of compensation to a landowner who suffered loss of four acres from his forty-four-acre golf course to the federal government in expansion of a U.S. highway bypass.⁹⁰ A different Idaho case dealt with condemnation by the state against a city to take fourteen acres of a larger 255-acre tract that the city planned to use for adding holes to an existing golf course.⁹¹

However, with partial takings, conflict arises primarily in the proper assessment of damages, specifically whether government must pay additional severance damages when the remainder of the non-taken land suffers a diminution of value.⁹² Severance damages

87. *See id.* at 473-74 (attributing disproportionate impact to second *Penn Central* factor of considering character of government action in favor of golf club plaintiff, but finding impact outweighed by plaintiff's sustainable investment-backed expectations and economic value). The decision was appealed to the Florida Supreme Court, but ultimately denied review. *See Ocean Palm Golf Club Partnership v. City of Flagler Beach*, 160 So. 3d 897, 897 (Fla. 2015) (declining to accept jurisdiction under Florida Constitution); *see also* Patricia Salkin, *FL Appeals Court Holds City's Refusal to Change its Comprehensive Plan was not a Taking*, LAW OF THE LAND BLOG (Aug. 2014), <https://lawoftheland.wordpress.com/2014/08/21/fl-appeals-court-holds-citys-refusal-to-change-its-comprehensive-plan-was-not-a-taking/> [<https://perma.cc/E5UN-UNGE>] (summarizing case and reporting appeal to Florida Supreme Court).

88. *See, e.g., Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d at 473 (considering whether partial taking of golf course occurred).

89. *See Abraham Bell & Gideon Parchomovsky, Partial Takings*, 117 COLUM. L. REV. 2043, 2045, 2049 (2017) (claiming partial takings more common than total takings in some jurisdictions).

90. *See State v. Meadowbrook, Inc.*, 286 Ala. 359, 360 (1970) (considering admissibility of evidence and abuse of discretion in awarding damage amount).

91. *See State ex rel. Symms v. City of Mountain Home*, 94 Idaho 528, 530 (1972) (noting state's purpose for eminent domain for proposed highway construction).

92. *See id.* at 532 (providing Idaho statute on severance damages and affirming jury's proper award of such damages); *see also United States v. 9.20 Acres of Land, More or Less, Situate in Polk Cty., State of Iowa*, 638 F.2d 1123, 1127 (8th Cir. 1981) (calculating just compensation separately based off fair and reasonable market value immediately before and immediately after taking).

awards depend on whether the taken acreage was part of a larger parcel of land as opposed to two separate parcels, and the question is practical for a jury to decide.⁹³ Accordingly, the extent to which a government taking affects the value of the remaining land, *i.e.*, if government takes a substantially valuable asset from the remainder of a golf course, the loss of the value relative to the remaining use of the land is a worthy consideration.⁹⁴ Hence, how plaintiffs may frame their takings claims against government will involve strategic decisions on how to describe the parcel at issue and its relationship to the remaining or surrounding land.⁹⁵

Lastly, the role of timeliness (or lack thereof) in takings proceedings is certainly worth observing.⁹⁶ Government can dismiss its condemnation suit at any time prior to the actual acquisition of property.⁹⁷ The actual acquisition gives government the legal rights to use the property, but not until the seized owner receives payment.⁹⁸ In the time between filing and acquisition, ordinary delays are excusable, absent bad faith or deliberate obstruction of the proceedings.⁹⁹ However, substantial delay may relieve the impacted landowner by imposing liability upon government for substantial rise in value.¹⁰⁰ Therefore, litigants should be mindful of the extent of delay imposed by the government and whether they can establish prejudice as a result of the delay.¹⁰¹ This consideration

93. *See* 9.20 Acres of Land, 638 F.2d at 1127 (noting considerations of whether two pieces of land are effectively single parcel include “the use and appearance of the land, its legal divisions, and the intent of its owner”).

94. *See* United States v. 51.8 Acres of Land, More or Less, Town of Hempstead, Nassau Cty., New York, 147 F. Supp. 356, 360-61 (E.D.N.Y. 1956) (awarding severance damages to golf course owner when government condemned three holes – “valuable asset”).

95. *See* Bell & Parchomovsky, *supra* note 89, at 2062 (noting unique economic issues in partial takings claims).

96. *See, e.g.*, Abbas v. United States, 124 Fed. Cl. 46, 53 (2015) (barring takings claim for failing to meet six-year statute of limitations required by United States Court of Federal Claims).

97. *See* Forest Preserve Dist. of DuPage Cty. v. First Nat’l Bank of Franklin Park, 930 N.E.2d 477, 498 (Ill. App. Ct. 2010) (rejecting plaintiff’s claim that date of taking is date of condemnation filing).

98. *See id.* (valuing just compensation at date of taking).

99. *See id.* at 504 (providing general safeguard from liability under Illinois law for ordinary delay, but not for intentional or willful conduct “calculated to obstruct or hinder the court’s administration of justice,” among other grounds for sanctions).

100. *See id.* at 499 (citing Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 18-19 (1984)) (finding eight years substantial delay in taking property that included golf course acreage).

101. *See* Pennichuck Corp. v. City of Nashua, 152 N.H. 729, 740-41 (2005) (requiring alleged prejudice “more than mere hypothetical and unlikely financial harm” and finding lack of evidence that city’s delay in filing condemnation peti-

likely goes towards a separate inquiry whether the government acted in good or bad faith in regards to a legitimate interest, though that bad faith inquiry may ultimately loop back to the third *Penn Central* factor concerning the characterization of the government action.¹⁰²

2. Zoning

After takings, the next most important consideration in addressing dead golf courses is the zoning schemes in which the courses rest.¹⁰³ In essence, zoning is the practice of dividing land into districts dedicated to separate uses, like single-family residential, commercial, industrial, and so forth.¹⁰⁴ Zoning ordinances are frequently intended to conform to a comprehensive zoning plan, and such ordinances are constitutional so long as they substantially relate to “the public health, safety, morals, or general welfare.”¹⁰⁵ Contrarily, zoning determinations that do not benefit the public in effect may be struck down as an arbitrary or irrational exercise of the government’s police power.¹⁰⁶

Zoning classifications and designs may vary based on how states divide their local governments, but the designations follow similar structures across the country.¹⁰⁷ In a New Hampshire town example, golf courses are listed under commercial recreational facilities, which are allowed in designated commercial/industrial districts.¹⁰⁸

tion prejudiced utility company). *But see* *Captline v. Cty. of Allegheny*, 693 A.2d 619, 621 (Pa. Commw. Ct. 1997) (finding landowner’s ten-year delay and lack of due diligence in pursuing *de facto* taking claim prejudiced government, citing rebuttable presumption of two-year delay as prejudicial).

102. *See* John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171, 198 (2005) (citing *Tahoe-Sierra* for additional consideration of whether government action taken in bad faith).

103. For further discussion of the importance and relevance of zoning, see *infra* notes 104-120, 184-198, 247-277 and accompanying text.

104. *See, e.g.*, *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 380 (1926) (describing zoning ordinance that classifies land into use, height, and area districts).

105. *Id.* at 395 (holding constitutionality of comprehensive zoning plans, or ‘Euclidean’ zoning).

106. *See, e.g.*, *Nectow v. City of Cambridge*, 277 U.S. 183, 187-89 (1928) (finding due process violation in ordinance that injured individual plaintiff and was not indispensable to general plan).

107. *See* 12 C.F.R. § 390.304 (including subdivisions and departments created and expressly authorized by state statutes, excluding inner subordinate or non-autonomous divisions, agencies, or boards).

108. *See* TOWN OF ENFIELD, ZONING AND FLOODPLAIN DEVELOPMENT ORDINANCE at 19, 76 (Mar. 10, 2020), https://www.enfield.nh.us/sites/g/files/vyhlf3106/f/uploads/current_zoning_ordinance_2020_updated_march_10_2020_final_0.pdf [<https://perma.cc/8Q6H-WM78>] (“In the C/I District, land may be used and

Golf courses may also fall within recreational facilities, and the town's Zoning Board of Adjustment may grant an exception to the zoned use and allow operation within residential and community business districts.¹⁰⁹ In another example, but from a county-wide ordinance in Colorado, golf courses are listed under parks and open space, and allowed in rural, urban residential, some nonresidential, and some mixed use districts.¹¹⁰ A Michigan township's zoning ordinance lists golf courses as outdoor recreation requiring a special land use permit, with additional regulations on golf courses in particular.¹¹¹ Similarly, an Alabama city ordinance permits golf courses in agricultural districts, permits special exceptions in residential districts, and classifies golf courses as outdoor recreation facilities but not as open space.¹¹²

When a local private plaintiff challenges a zoning or planning decision, these claims may inherently involve the same legal theories as takings analyses.¹¹³ For example, in *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, the challenger alleged the city's decision to rezone golf course property for conservation and recreation purposes instead of allowing residential development constituted a taking under both *Lucas* and *Penn Central*.¹¹⁴ The South Carolina

buildings may be erected or altered for the following purposes only and subject to the following regulations and limitations . . . C. Commercial recreational uses.”).

109. See *id.* at 30-32, 82 (permitting special exceptions for non-commercial golf courses in residential, rural residential, and rural residential-agricultural districts and permitting special exceptions for commercial and non-commercial golf courses in community business districts).

110. See MESA COUNTY, 2020 LAND DEVELOPMENT CODE §§ 6-2, 12-19 (Sept. 29, 2020), <https://www.mesacounty.us/globalassets/planning/codes-plans-policies—standards/land-development-code/full-code/mesa-county-2020-land-development-code—amended-september-29-2020.pdf> [<https://perma.cc/2KV6-DJES>] (including table for permitted and conditional uses).

111. See GRAND HAVEN CHARTER TOWNSHIP, ZONING ORDINANCE 2020 §§ 12.04-05, 12.38 (Mar. 22, 2020), http://www.ghc.org/wp-content/uploads/delightful-downloads/2020/04/GHT-Zoning-Ordinance_04202020-compressed.pdf [<https://perma.cc/D2X7-8PDK>] (imposing lot size, fence height, property line distance requirements on golf courses).

112. See CITY OF MADISON, ALABAMA, ZONING ORDINANCE §§ 4-0-2, 4-11-1, 4-12-6, 5-22-2 (July 22, 2020), <https://www.madisonal.gov/DocumentCenter/View/11365/Zoning-Ordinance-July-2020?bidId=> [<https://perma.cc/DLX6-BWLS>] (excluding golf courses from open space specifically for Traditional Neighborhood Development Districts).

113. For further discussion on golf course takings cases arising from zoning disputes, see *supra* notes 83-87 and accompanying text.

114. See *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 313-14 (2013) (alleging rezoning was *per se* taking because it “eliminated all economically beneficial use of the claimed developable land” and rezoning was regulatory taking “functionally equivalent to the classic taking in which government directly appropriated private property or ousts the owner from his domain”).

Supreme Court disagreed, noting the golf course “remains a valuable property, not only as a golf course, but also for other, related uses permitted by the [ordinance].”¹¹⁵ Similarly in *Wensmann Realty, Inc. v. City of Eagan*, but in the context of a larger planning scheme, the Minnesota Supreme Court found the city’s refusal to amend its comprehensive plan – thereby disallowing residential development on a golf course – passed rational basis review as the court upheld the city’s concerns in preservation of recreational space and historical land use.¹¹⁶ The property owner further alleged the denial to amend the plan was a regulatory taking despite passing rational basis review, though the court refused an ultimate determination on the question due to factual disputes.¹¹⁷

Thus, an emerging pattern appears that government will prevail in both takings and zoning disputes where it may advance justifiable public purposes for eminent domain use or legitimate reasons for its zoning decisions.¹¹⁸ Government enjoys a healthy amount of deference towards zoning decisions because these practices are manifestations of the government’s police power and because they are legislative matters, which are presumptively valid.¹¹⁹ Provided the government does not infringe upon its constituents’ constitutional rights, perhaps by discriminating against race or class through zoning, then its zoning classification decisions will likely stand against scrutiny.¹²⁰

115. *Id.* at 321 (finding government’s adjustment of “benefits and burdens of economic life to promote the common good” legitimate). Before the decision reached the South Carolina Supreme Court, speculation arose that the *Dunes West Golf Club* decision would be the first of many lawsuits concerning failing golf courses in the state. See Prentiss Findlay, *Dunes West fighting to build 32 homes*, POST & COURIER (Nov. 2, 2016), https://www.postandcourier.com/news/dunes-west-fighting-to-build-32-homes/article_ad84539b-61bc-57a2-9b4a-110665926537.html [<https://perma.cc/6FUK-BT94>] (interviewing South Carolina Golf Course Owners Association president, predicting “[i]t was just a matter of time before someone challenged [the new municipal zoning]” and acknowledging urgency in state supreme court hearing case).

116. See *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 627, 631 (Minn. 2007) (giving great deference to city’s judgment).

117. See *id.* at 631, 642 (balancing *Penn Central* factors). The following year in a referendum, Eagan residents voted against the city purchasing the land. See Vadim Lavrusik, *Carriage Hills Golf Course timeline*, STARTRIBUNE (Feb. 17, 2009), <https://www.startribune.com/carriage-hills-golf-course-timeline/39577002/> [<https://perma.cc/6PNZ-JYQF>] (reporting 53-47 vote with 35,560 votes cast).

118. For further discussion of courts authorizing government takings power, see *supra* notes 51-102 and accompanying text.

119. See *Harbit v. City of Charleston*, 382 S.C. 383, 390 (2009) (noting property owner’s burden to overcome presumptive validity of zoning decisions).

120. See *id.* at 391 (noting courts’ caution to find zoning ordinances unconstitutional “as it is not the court’s function to pass upon the wisdom or expediency of municipal ordinances or regulations”).

3. *Covenants*

Covenants, restrictions, and conditions, hereinafter referred to broadly as ‘covenants,’ are the third type of relevant land use control, and these formulate as contractual rights or obligations imposed upon owners of real property.¹²¹ These rights and restrictions “run with the land,” meaning future possessors of the property are bound by the terms of the declaration.¹²² However, for the covenant to run with the land, it must be the intention of the original grantor, declarant, or parties for the covenant to do so for the burden or benefit of the successors in interest.¹²³ Depending on state law, courts may find other characteristics essential to the enforceability of the covenant, too.¹²⁴ Examples of such characteristics might include the covenant’s relationship to the use or enjoyment of the land (“touch and concern” the land) or that a successional relationship exists between affected parties (‘privity’).¹²⁵ This legal tool varies in nature from zoning and takings because covenants exist as agreements between private parties, whose legal dispute may call upon government actors to decide whether such agreements should ultimately be enforced under state law.¹²⁶

Golf course litigation arising out of state courts often debates the existence and enforceability of an implied restrictive covenant,

121. See *Hawk v. PC Vill. Ass’n, Inc.*, 233 Ariz. 94, 98 (2013) (considering covenants contracts under Arizona statute, confirmed through deed language).

122. See *Cloud v. Ass’n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992) (noting real property covenants “burden or benefit successors in interest”).

123. See *id.* (providing text of declaration stating “[t]he following . . . covenants . . . shall be deemed to run with the land, shall be a benefit and a burden to Declarant, its successors and assigns . . .”).

124. See, e.g., *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1030-33 (11th Cir. 2014) (comparing interpretations of covenant state law in Louisiana, Mississippi, and Florida).

125. See *Cloud*, 857 P.2d at 440 (requiring covenant to “closely relate to the land, its use, or its enjoyment” to fulfill “touch and concern” requirement); see also *Misita v. Conn.*, 138 So. 3d 138, 142 n.6 (Miss. 2014) (quoting *Clement v. R.L. Burns Corp.*, 373 So. 2d 790, 794 (Miss. 1979)) (finding privity in someone who “stands in the shoes or sits in the seat of the owner from whom he derives his title” and enhancement of value, conferred benefit, or imposed burden on land sufficient to “touch and concern” land).

126. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (finding racially restrictive covenant violation of Fourteenth Amendment Equal Protection Clause). While covenants more typically involve issues in state law granting their enforceability, *Shelley* was notable in that the Supreme Court struck the covenant down as an improper extension of the state’s use of its police power that violated federal protections. See *id.* at 21-22 (“[I]t would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.”).

which “raises and fastens upon” title of a lot and prevents use of that lot “in a manner detrimental to the enjoyment and value of neighboring lots sold with express restrictions in their conveyance.”¹²⁷ Restrictive covenants prohibit certain uses or acts, whereas affirmative covenants require certain uses or acts.¹²⁸ Further, express restrictions in covenants are bound to state law principles of contract interpretation.¹²⁹ Whether the restrictive covenant is *implied*, however, requires courts to look into the intent of the common grantor in effectuating the restriction as part of a common plan.¹³⁰ Accordingly, enforcement of the restriction involves a weighing of equity and consideration of whether the land purchaser had knowledge of the restriction.¹³¹ A finding of an implied restriction as such may contravene express written restrictions found in property deeds, so courts may hesitate in definitively finding and enforcing such implied covenants.¹³²

The above state law interpretation of an implied restrictive covenant comes from a Nebraska Supreme Court case, where the court found an implied restrictive covenant required the property at issue to be maintained as a golf course because of surrounding homeowners’ reliance on such maintenance.¹³³ Similarly, in a different case from Arizona, the court found enough evidence of notice and intent for an implied covenant requiring continued use of property as a golf course, notwithstanding the lack of the same burden on

127. *Skyline Woods Homeowners Ass’n, Inc. v. Broekemeier*, 276 Neb. 792, 805 (2008) (reviewing whether defendants “had constructive notice of such covenant”).

128. *See In re Midsouth Golf, LLC*, 549 B.R. 156, 164-65 (Bankr. E.D.N.C. 2016) (differentiating personal covenants from covenants running with land).

129. *See Hollingsworth v. Chateau Bu-De, LLC*, 987 F. Supp. 2d 629, 635 (D. Md. 2013) (noting problem of ambiguities in express covenants).

130. *See Skyline Woods Homeowners Ass’n, Inc.*, 276 Neb. at 805 (determining grantor’s intent not only through deed language, but also through “related written documents, including conduct, conversation, and correspondence”).

131. *See id.* (requiring actual or constructive knowledge).

132. *See id.* at 806 (“[B]ecause implied restrictive covenants mandate relaxation of the writing requirement, courts are generally reluctant and cautious to conclude implied restrictive covenants exist.”).

133. *See id.* at 810 (concluding “homeowners who bought their property relying on the proximity and existence of the golf course should be protected”). As practical recommendations following the *Skyline Woods* case stated, “[a]ttorneys should *always* draft their covenants, restrictions, and easements explicitly” Daniel J. Hassing, *FORE! A Heads-Up to Nebraska Real Estate Attorneys After the Skyline Woods Golf Course Case*, 1 NEB. L. REV. BULL. 37, 43 (2009), <http://lawreview.unl.edu/?p=582> [<https://perma.cc/3NCV-X685>] (emphasis in original) (warning of litigation costs now that Nebraska courts may find restriction by implication).

other neighbors.¹³⁴ In a more recent Eleventh Circuit case that aligned itself with the Arizona case, the court affirmed the Alabama Supreme Court's decision that an implied restrictive covenant existed demanding a golf course property to be used as such in what the court called "an abstract question of law."¹³⁵ Here, the Eleventh Circuit gave weight to different methods from state case law that may indicate whether the original grantor intended a common scheme of development, plus neighboring homeowners' expectation that the golf course property in question would indeed remain a golf course.¹³⁶ These cases demonstrate that a covenant's overall effect on a dead course will depend on a considerations of the land grantor's intention, surrounding property owners' own expectations and conditions, and equity for the covenant's challenger – altogether in an imperfect, unclear calculus.¹³⁷

B. Fairway Factors: The Role of Community and Ethics

The legality of these land use controls does not automatically qualify such practices as 'moral' or 'ethical.'¹³⁸ In areas of law and morality where no public consensus exists, private interests may

134. See *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 43, 46 (1984) (upholding restriction imposed by original developer until year 2025). Later disputes have arisen between the homeowners association and the country club itself over legal title to land along the perimeter of the golf course, which could be subject to future development. See *About Us*, Shalimar Association, <https://shalimarassociation.org/about-us/> [<https://perma.cc/9KWR-8MK7>] (last visited Mar. 5, 2021) (identifying homeowners association as legal owner of disputed strip parcel).

135. *In re Heatherwood Holdings, LLC*, 746 F.3d 1206, 1214 (11th Cir. 2014) (noting sufficiently similar facts to *Shalimar* and questioning economic feasibility, estoppel, and notice as related to covenant's existence).

136. See *id.* at 1215, 1218 (considering written restrictions in deeds, plats showing restrictions, actual conditions, and acceptance of conditions by lot owners). Three years after the Eleventh Circuit's decision, the Heatherwood Hills Country Club reopened the golf course to the public. See Rick Karle, *Heatherwood Hills Country Club reopens after 8 years*, WBRC (Aug. 12, 2017), <https://www.wbrc.com/story/35688632/heatherwood-hills-country-club-reopens-after-8-years/> (reporting "resurrection" of golf club against odds of other failing courses); see also Guy Cipriano, *The hills are alive again*, GOLF COURSE INDUS. MAG. (May 8, 2018), <https://www.golfcourseindustry.com/article/heatherwood-hills-golf-alabama/> [<https://perma.cc/63KT-YLMZ>] (detailing bankruptcy and ensuing reopening process).

137. See *In re Erie Golf Course*, 605 Pa. 484, 492-493 (2010) (applying public trust doctrine to golf course sale).

138. See L. Scott Smith, *Law, Morality, and Judicial Decision-Making*, 65 TEX. B.J. 400, 403 (2002) (questioning how law "ought" to be, regarding moral imperatives).

prevail over the public good.¹³⁹ To determine which legal tool fits best for different scenarios of dead courses, this Comment gives consideration to two basic theories of ethics, utilitarianism and deontology, to guide responsible public policy.¹⁴⁰

Because these ethical theories will be applied to assess the benefits to the community, a conscious understanding of the idea of ‘community’ is a preliminary matter.¹⁴¹ According to one definition, community refers entirely to “a feeling and a set of relationships among people,” whose members share history, trust, safety, belonging, and care for each other in an individual or collective context.¹⁴² Since community is dependent upon people’s outputs for each other, locations such as golf clubs and organizations are not communities themselves; rather, they serve as venues for communities to form and meet members’ needs.¹⁴³

However, community cannot be reduced merely to a relationship oriented towards fulfilling common needs.¹⁴⁴ One study identified common “core elements” of communities according to philosophy, psychology, and sociology, including themes of “physical proximity, shared, group, bounded, interaction, belonging, and support.”¹⁴⁵ Other considerations of a community may include its sustenance, its symbol, freedom of territory, process of actions, diversity, and tangibility, though these may be less applicable to communities at issue around dead golf courses.¹⁴⁶ Accordingly, this Comment uses ‘community’ to refer to people with common inter-

139. *See id.* at 408 (noting individual judge’s conception of morality inevitably guides resolution, and “moral theory can be ignored only at the peril of the law and those who administer it”).

140. For further discussion of utilitarianism and deontological ethics, see *infra* notes 153-160 and accompanying text.

141. *See* David M. Chavis & Kien Lee, *What Is Community Anyway?*, STAN. SOCIAL INNOVATION REV. (May 12, 2015), https://ssir.org/articles/entry/what_is_community_anyway [<https://perma.cc/9DB2-2N7X>] (noting term’s meaning “requires more thoughtfulness and deliberation” by policymakers).

142. *See id.* (stating purpose of communities to meet “common needs”).

143. *See id.* (observing great variance in formation and organization of communities – *i.e.*, through shared culture or experiences, through formal or informal institutions).

144. *See* Virginie Cobigo, Lynn Martin & Rawad Mcheimech, *Understanding Community*, 5 CANADIAN J. DISABILITY STUDIES 181, 188 (Dec. 2016), retrieved from <https://cjds.uwaterloo.ca/index.php/cjds/article/view/318/540> [<https://perma.cc/Q752-N6JJ>] (surveying sixty-six definitions of “community” for common themes).

145. *See id.* at 190, 192 (suggesting derivative definition for community as “group of people that interact and support each other, and are bounded by shared experiences or characteristics, a sense of belonging, and often by their physical proximity”).

146. *See id.* at 188-89 (defining or giving examples of such themes).

ests or goals concerning dead courses, with additional emphasis on physical and geographical proximity to the golf course parcel at issue – and as follows, golf courses may involve multiple communities whose visions conflict with each other.¹⁴⁷

The definition of ‘community’ becomes more skewed when it is attached to ‘development’ – the idea of which inherently invites competing interests over land use.¹⁴⁸ Actual community development action may flow from those with exclusive ownership of the property at issue; however, a potentially separate ‘sense of ownership’ may exist within a different community that might influence public involvement and support in the development.¹⁴⁹ Sense of ownership manifests in perceived control of the process, the outcome, and the distribution, which entails questions of whose voices are heard, who has influence over decisions, and who will be impacted in the end.¹⁵⁰ When interests clash, the result is a decline in trust from community members towards the developer or decisionmaker.¹⁵¹ Though not a determinative factor in this Comment’s analysis, decisionmakers should not undermine trust, as it may reconcile parties’ disparities and ultimately guide effective public policy.¹⁵²

After defining the invested communities, the next step is to figure how to advance their interests righteously and effectively, for which basic considerations of ethics can help.¹⁵³ Here, ethics refers to the traditional philosophical understanding, and not the idea of

147. *See id.* at 190 (depicting how definitions of community may vary by discipline of respondent).

148. *See* Paul Lachapelle, *A Sense of Ownership in Community Development: Understanding the Potential for Participation in Community Planning Efforts*, 39 J. CMTY. DEV. SOC’Y 52, 53 (2008), retrieved from <http://www.msucommunitydevelopment.org/paul/content/Lachapelle%202008%20Ownership%20JCDS.pdf> [<https://perma.cc/VE8E-Y9LS>] (identifying sense of ownership in process, outcome, and distribution as essential in community ownership).

149. *See id.* at 53 (implying political undertones to sense of ownership).

150. *See id.* at 53-55 (considering how sense of ownership develops through temporal and spatial community activities).

151. *See id.* at 56 (noting role of risk and authority in quality of trust).

152. *See* Christopher A. Cooper, H. Gibbs Knotts, & Kathleen M. Brennan, *The Importance of Trust in Government for Public Administration: The Case of Zoning*, 68 PUBLIC ADMIN. REV. 459, 464 (2008), retrieved from <https://www.jstor.org/stable/25145624> [<https://perma.cc/5ZJG-C7RE>] (finding trust in government important as it “has the potential to relieve the tensions between political accountability and managerial flexibility”).

153. *See* Thomas R. Bender, *Irons v. Ethics Commission: Missing Pieces*, 58 R.I. BAR J. 7, 7 (June 2010) (asserting “laws are enacted because they serve and benefit the public’s interests, not the private interests of individual legislators to the detriment of the public interest”).

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'legal ethics.'¹⁵⁴ The ethical theory that appears most uniformly applicable to disputes in dead golf course usage would be utilitarianism, which mandates the result that brings "the greatest amount of good for the greatest number."¹⁵⁵ In other words, a decision on land use may be "objectively right" if it "will produce the greatest amount of happiness on the whole; that is, taking into account all whose happiness is affected by the conduct."¹⁵⁶ Utilitarian ethics could help guide government officials in deciding which zone classification will bring the best objective benefit to the community, or in deciding whether an alternative use of the golf course is necessary for the general public that would justify the use of eminent domain.¹⁵⁷ A second theory of ethics that could guide golf course decisions going forward is deontology, which asserts that certain moral duties guide the actions and choices of individuals.¹⁵⁸ This duty would mandate respect and dignity towards humanity as a whole.¹⁵⁹ Thus, while utilitarianism might help guide broader pol-

154. See generally *Model Rules of Professional Conduct*, AM. BAR ASS'N (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [<https://perma.cc/74X4-BGLG>] (providing what jurisprudence typically calls 'legal ethics'). Still, legal ethics may also provide relevant backdrops to bear in mind – for example, zoning board members should not decide land use disputes as motivated by their own personal profit. See Patricia E. Salkin, *1998 Survey of Ethics in Land-Use Planning*, 26 FORDHAM URB. L.J. 1393, 1394 (May 1999) (applying rules against conflicts of interest). Moreover, board members and applicants for zoning changes should be wary of *ex parte* communications that carry risk of disclosure of confidential information. See Patricia E. Salkin, *Legal Ethics and Land-Use Planning*, 30 URB. L. 383, 385 (1998) (concerning especially those who are not parties to dispute at hand).

155. Julia Driver, *The History of Utilitarianism*, STAN. ENCY. PHIL. (Sept. 22, 2014), <https://plato.stanford.edu/entries/utilitarianism-history/> [<https://perma.cc/XU5L-D6LY>] (attributing this to Classical Utilitarians of Jeremy Bentham and John Stuart Mill).

156. Robert McGee, *Property Rights vs. Utilitarianism: Two Views of Ethics*, 27 REASON PAPERS 87, 92 (2004), retrieved from https://reasonpapers.com/pdf/27/rp_27_4.pdf [<https://perma.cc/KLN6-F9YK>] (quoting English utilitarian Henry Sidgwick).

157. See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1867 (2007) (noting property rights may be justified by utilitarianism easily by looking at increase of welfare). *But see id.* at 1876 ("The immorality of the original act of deprivation trumps all considerations of utility that can be arrayed on the other side. Popular morality seems to concur.").

158. See Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCY. PHIL. (Oct. 17, 2016), <https://plato.stanford.edu/entries/ethics-deontological/#DeoThe> [<https://perma.cc/LCW4-4JKE>] (noting direct opposition to consequentialism, which asserts actions are morally assessed solely by results they bring).

159. See David Misselbrook, *Duty, Kant and Deontology*, 63 BRITISH J. GEN. PRACT. 211, 211 (Apr. 2013), retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3609464/> [<https://perma.cc/2KZF-UU29>] (noting philosopher Immanuel Kant's idea of absolute duties).

icy practices like comprehensive planning, perhaps deontology is better at helping government resolve its conflicts with discrete populations or special interests in golf course disputes – although these two theories of ethics are not necessarily at odds with each other.¹⁶⁰

Lastly, ethical considerations permeate through arguments about golf's proper place in today's society, in which some critics debate whether the sport should continue to exist at all.¹⁶¹ For example, golf has had a not-so-distant history of segregation, and surveys of professionals have revealed a lukewarm attitude towards increasing diversity.¹⁶² Alongside these observations of racial and sexual inequality within the sport, critics are also quick to note the political and classist undertones of golf culture itself.¹⁶³ Interest-

160. See Timothy M. Sandefur & Steven Greenhut, *Eminent Domain*, INDEP. INST. (Jan. 31, 2006), <https://www.independent.org/events/transcript.asp?id=114> [<https://perma.cc/TA5V-NEDF>] (identifying deontology, which “says that an official has unbreakable obligation,” as one justification operating alongside obligation to “promote good consequences for the greatest number” (internal quotation marks omitted)).

161. See, e.g., Margot Harris, *This woman is going viral for her hilarious anti-golf TikToks, but she's not in it just for the laughs*, INSIDER (May 29, 2020), <https://www.insider.com/anti-golf-tiktok-viral-abbie-richards-2020-5> [<https://perma.cc/U3Y3-LVQF>] (noting social, economic, environmental, and political implications of golf); Jordan Pearson, *Reclaim the Golf Courses*, VICE (Mar. 1, 2018), <https://www.vice.com/en/article/7x7qqe/reclaim-the-golf-courses> [<https://perma.cc/E8QE-86C>] (advocating for total ban on golf, urging reclamation of golf course property as accessible public spaces “without destroying anything else in the process, except a hobby for people who scrape profits from the work that the rest of us do”).

162. See Randy Cohen, *Is Golf Unethical?*, N.Y. TIMES (Aug. 18, 2009), <https://ethicist.blogs.nytimes.com/2009/08/18/is-golf-unethical/> [<https://perma.cc/748B-QYD4>] (describing golf culture “redolent of a gated community” and criticizing male golf stars’ complacency in sexually segregated clubs); see also Maurice Allen, *Being black in a white sport*, GOLF DIGEST (June 2, 2020), <https://www.golfdigest.com/story/being-black-in-a-white-sport> [<https://perma.cc/HVZ2-Q8NL>] (detailing African-American professional’s experience with racial inequality in golf, recalling “[o]ften I’m the only black man in a competition . . . I’ve had competitors and their families straight up rain n-words and racial slurs on me without remorse”).

163. See, e.g., Nick Paumgarten, *Inside the Cultish Dreamworld of Augusta National*, NEW YORKER (June 14, 2019), <https://www.newyorker.com/magazine/2019/06/24/inside-the-cultish-dreamworld-of-augusta-national> [<https://perma.cc/QF4K-KGT9>] (characterizing Augusta National as “oligarchs’ playground . . . for the rich and powerful” with plenty of white male C.E.O. members); see also Beatrice Harvey, *Power, Pollution, and Golf*, PRINDLE POST (Apr. 18, 2019), <https://www.prindlepost.org/2019/04/power-pollution-and-golf/> [<https://perma.cc/H3GK-L8Y3>] (observing tendency for golfers to be wealthy “and that the golf course is a place where hierarchy and prestige are not only respected but built into the very foundation of the culture”). Harvey further equates golf culture to capitalist power with former President Donald Trump as prime example, citing “elitist attitudes and expectations” that continue to shadow over the sport. *Id.* (describing

ingly, players try to leave politics aside when on the green, but partisan bias may still appear in golfers' views on proper etiquette, norms of playing, and perhaps most importantly, whether the status quo of private club exclusivity is acceptable.¹⁶⁴ Finally, critics cite the detriment to the environment that golf brings, notably through water depletion and pollution.¹⁶⁵ Proponents respond by claiming that courses offer a secondary use as wildlife refuge areas, though no clear consensus remains on this rebuttal.¹⁶⁶ These are just examples of how golf is no stranger to ethical dilemmas, and therefore dead course decisionmakers may need to look past the immediate property owners' interests to the concerns or experiences of outlying impacted community members who may also have stake in the land use.¹⁶⁷

golf courses as "private spaces of leisure for powerful men, a place for unethical behavior sheltered from the public eye and more traditional structures of power").

164. See Larry Bohannon, *Is it possible to take politics out of golf these days?*, DESERT SUN (Feb. 27, 2017), <https://www.desertsun.com/story/sports/golf/2017/02/27/possible-take-politics-out-golf-these-days/98479546/> [<https://perma.cc/8YJR-KLDW>] (idealizing golf as "arena where partisanship could be suspended for 18 holes," noting both former Presidents Barack Obama and Donald Trump's "unquestioned great love for the game"); see also Sam Weinman, *How Republicans and Democrats differ . . . on the golf course*, GOLF DIGEST (Nov. 6, 2018), <https://www.golfdigest.com/story/how-republicans-and-democrats-differ-on-the-golf-course> [<https://perma.cc/ZH6X-838H>] (describing golf as "politically agnostic," but comparing survey results showing conservative golfers' tendency to follow rules more closely and to allow private club to "do whatever it wants"). This view on private clubs' rights is roughly analogous to political arguments on "state's rights" that should be free from outside agency interference. See *id.* (contrasting liberal golfers' desire to uproot status quo of private club exclusivity).

165. See Sewell, *supra* note 19, at 342-43 (noting usage of 312,000 gallons of water daily for watering golf courses and alerting risk of chemical runoff into local water); see also Harvey, *supra* note 163 (providing harmful environmental effects of golf balls, sheer size of acreage, and pesticide use).

166. See Sewell, *supra* note 19, at 334-36 (describing benefit of open acreage to bird and bat conservation). But see Harvey, *supra* note 163 (conceding "no clear consensus" on biological conservation and ecosystem management, and disruption of wildlife is inevitable upon building of course). This lack of consensus is partially due to the difficulty in measuring quantifiable, objective impacts on golf courses, compared to the qualitative, intangible benefits that guide the arguments on both sides. See Miquel Salgot & Josefina C. Tapias, *Golf courses: Environmental impacts*, 6 TOURISM & HOSP. RESEARCH 218, 219 (May 2006), <https://www.jstor.org/stable/23745310?seq=1> (adding that "environment" itself is also complex, subjective definition).

167. See *Golf and your community*, R&A, <https://www.randa.org/Sustainability/Communities/Golf-and-your-community> [<https://perma.cc/7TBK-CCP6>] (last visited Mar. 5, 2021) (describing how golf course managers can improve community relations in face of local antagonism).

III. HAZARDS & HANDICAPS: THREE CASE STUDIES

Three distinct scenarios from three different states offer a glimpse into how the land use controls arise in intra-community conflicts.¹⁶⁸ In Ohio, an eminent domain dispute is en route to the state supreme court, involving the state historical society's attempt to reclaim Native American burial grounds from a private golf course to open for full public access.¹⁶⁹ In South Carolina, a wave of golf course closures has led to vicious debates between residents, developers, and local government over the necessity of rezoning to accommodate redevelopment.¹⁷⁰ Lastly, an Arizona community has faced frustration over failed performance of a covenant requiring continued use of an unkempt property as a golf course.¹⁷¹ As follows in Section IV, these case studies demonstrate whether these land use controls can achieve fruitful use of the golf course property in an ethical way.¹⁷²

A. Buckeye Birdie: Ohio as an Eminent Domain Pioneer

Eminent domain allows government the unique power to intervene and take control over a property dispute where interests clash.¹⁷³ The standout case from Ohio that demonstrates this inter-

168. See SEAN NOLON, ONA FERGUSON & PAT FIELD, *LAND IN CONFLICT: MANAGING AND RESOLVING LAND USE DISPUTES* xiii (2013), retrieved from <https://www.lincolnst.edu/sites/default/files/pubfiles/land-in-conflict-chp.pdf> [<https://perma.cc/Y7JM-KXGY>] (arguing such disputes indicative of “reality that communities have many choices about how to handle controversial land use decisions . . . [y]et these legal requirements serve only as procedural minimums and do not preclude the addition of more collaborative forms of decision making”).

169. For further discussion on the dispute between the Ohio History Connection and Moundbuilders Country Club over the access to the Octagon Earthworks on the golf course, see *infra* notes 173-183 and accompanying text. See also *Membership*, Moundbuilders Country Club, <https://www.moundbuilderscc.com/Default.aspx?p=dynamicModule&pageid=367883&ssid=280002&vnf=1> [<https://perma.cc/EG6X-Z4V3>] (last visited Mar. 5, 2021) (listing private membership options).

170. For further discussion of the parties and factors involved in the tentative zoning and planning decisions, see *infra* notes 184-198 and the accompanying text.

171. For further discussion of judicial enforcement of the covenant on the Ahwatukee Lakes Golf Course property, see *infra* notes 199-211 and the accompanying text.

172. For further discussion on ideal government strategy to balance efficient land repurposing with sensitivity to community concerns, see *infra* notes 212-294 and the accompanying text.

173. See Ohio History Connection, *About Us*, OHIO HISTORY CTR. (2021), <https://www.ohiohistory.org/about-us> [<https://perma.cc/H79T-ZSJJ>] (last visited Jan. 5, 2021) (noting status as 501(c)(3) nonprofit organization). Rather than the typical eminent domain proceeding commenced by governmental subdivision like a municipality, the state's nonprofit historical society initiated the lease termination in the *Moundbuilders* dispute. See Jeremy Pelzer, *Ohio Supreme Court to decide whether state historical society can take over golf course built on ancient earthworks*, CLEVE-

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vention is a dispute involving a sacred Native American architectural site beneath Moundbuilders Country Club in Newark.¹⁷⁴ Known as the Octagon Earthworks, the site is part of perhaps “the largest, best-preserved and most precise geometric earthworks in the world,” but the golf club extended its existing lease over the site until 2078.¹⁷⁵ In May 2019, the Licking County Common Pleas Court authorized the Ohio History Connection’s (“OHC”) use of eminent domain over the site, upholding OHC’s “public duty to operate, protect and maintain the Octagon Earthworks and promote the state memorial for public use.”¹⁷⁶ The following January 2020, a state appellate court affirmed, demanding that the golf club, “in the interest of optimal usage and preservation, now needs to give way to full public access” to the Octagon Earthworks.¹⁷⁷ Then in July, the Ohio Supreme Court announced it would take the case on further appeal.¹⁷⁸

The Ohio Constitution provides that “[p]rivate property shall [n]ever be held inviolate, but subservient to the public welfare.”¹⁷⁹ Ohio case law interprets this as only allowing the exercise of emi-

LAND.COM (July 8, 2020), <https://www.cleveland.com/open/2020/07/ohio-supreme-court-to-decide-whether-state-historical-society-can-take-over-golf-course-built-on-ancient-earthworks.html> [<https://perma.cc/32UB-3SDS>] (reporting on state historical society’s eminent domain right).

174. See Chris Gaitten, *The Battle Over the Octagon Earthworks*, COLUMBUS MONTHLY (Oct. 8, 2019), <https://www.columbusmonthly.com/news/20191008/battle-over-octagon-earthworks> [<https://perma.cc/UAU7-N7R7>] (accounting history of site and golf course).

175. See *id.* (noting extension was quiet maneuver in 1997).

176. See Kent Mallett, *Story of the year No. 7: Judge rules OHC can reclaim Octagon Mounds; decision appealed*, NEWARK ADVOCATE (Dec. 27, 2019), <https://www.newarkadvocate.com/story/news/2019/12/27/judge-rules-ohc-can-reclaim-octagon-mounds-moundbuilders-appeals/2710132001/> [<https://perma.cc/B8RZ-5PR7>] (summarizing timeline of dispute up to appellate oral argument in November 2019).

177. State ex rel. Ohio History Connection v. Moundbuilders Country Club Co., 143 N.E.3d 614, 622 (Ohio Ct. App. 2020) (finding necessity for OHC’s taking of property for public purpose); see also Kent Mallett, *Moundbuilders loses appeal in effort to keep golf course at Newark earthworks*, NEWARK ADVOCATE (Jan. 30, 2020, 2:29 PM), <https://www.newarkadvocate.com/story/news/2020/01/30/moundbuilders-loses-appeal-effort-keep-golf-course-property/4619998002/> [<https://perma.cc/83AX-MRT5>] (summarizing golf club’s losing argument and reporting on OHC’s positive response to ruling).

178. See Kent Mallett, *Ohio Supreme Court to hear Moundbuilders’ appeal of rulings on lease of Hopewell site*, NEWARK ADVOCATE (Jul. 7, 2020, 6:30 PM) <https://www.newarkadvocate.com/story/news/2020/07/07/ohio-supreme-court-hear-moundbuilders-appeal-golf-course-lease/5389923002/> [<https://perma.cc/P5GV-72JU>] (predicting three to six months before court hears arguments and nine months to year until final decision).

179. OH. CONST. art. I, § 19 (requiring just compensation for immediate seizure).

ment domain powers “for the common good.”¹⁸⁰ Yet, the necessity of the exercise for public good appears rather broad, as Ohio courts understand the public use requirement as “reasonably convenient or useful to the public”¹⁸¹ In the most recent *Moundbuilders* case from January 2020, the Ohio Court of Appeals found public access to the Native American remnants sufficient to allow eminent domain, and likened the site to a “public park” with presumed public use.¹⁸² Upcoming in April 2021, defendant-appellant Moundbuilders Country Club will argue in front of the Ohio Supreme Court that OHC failed to meet its burden in proving “good faith” in its appraisal offer, and that the district court failed to weigh competing public interests in finding that the taking was “necessary” for the public good.¹⁸³

B. Concerned Carolinians: South Carolina’s Zoning Disputes

Zoning provides an element of flexibility to both government and private citizens, as there is less of an imperative for government to aim towards specific projects or populations and there is more room for community sway.¹⁸⁴ However, as golf courses meet their demise in even the promised land of South Carolina, disputes in zoning decisions plague the people, as this flexibility in options results in discord.¹⁸⁵ Across the state, golf courses continue to lose

180. *State ex rel. Ohio History Connection*, 143 N.E.3d at 621 (providing eminent domain power inherent in state).

181. *Id.* (quoting *Sunoco Pipeline L.P. v. Teter*, 63 N.E.3d 160, 176 (Ohio Ct. App. 2016)) (noting appellee Ohio History Connection’s argument that acquisition of golf course lease was “necessary”).

182. *See id.* at 622 (finding Moundbuilders did not meet burden of showing lack of necessity).

183. *See* Merit Brief of Defendant-Appellant at 2-4, *State ex rel. Ohio History Connection, et al. v. The Moundbuilders Country Club Co.*, No. 2020-0191 (Ohio Sept. 28, 2020) (arguing misapplication of good faith requirement “places in jeopardy the rights of every property holder in Ohio who owns real estate that is desired by the government” and district court’s elimination of necessity element applied to public use goes against established eminent domain precedence); *see also* Ohio History Connection, *Octagon Earthworks Update*, 1.17.21, OHIO HISTORY CTR. (2021), [https://www.ohiohistory.org/about-us/newsroom/august-2018-\(1\)/octagon-earthworks](https://www.ohiohistory.org/about-us/newsroom/august-2018-(1)/octagon-earthworks) [<https://perma.cc/QPC2-V9SB>] (last visited Mar. 1, 2021) (notifying of oral argument in front of Ohio Supreme Court on April 13, 2021).

184. *See Guide to Land Use Planning for South Carolina*, S.C. ASS’N OF CTYS. at 7 (2017), <https://www.sccounties.org/sites/default/files/uploads/publications/guide-to-land-use-planning.pdf> [<https://perma.cc/7JXF-2NT8>] (noting South Carolina counties’ flexibility in deciding “extent of planning, zoning, and land development regulation necessary to meet local needs”).

185. *See South Carolina, TOP 100 GOLF COURSES*, <https://www.top100golfcourses.com/golf-courses/north-america/usa/south-carolina> [<https://perma.cc/W9AT-847Z>] (last visited Oct. 25, 2020) (acknowledging state’s tourism board “flaunts South Carolina as the No. 1 golfing state in America”).

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profits, shift ownership, and harbor tensions between developers and residents.¹⁸⁶ At the Island West community in Beaufort County, residents “vehemently” opposed a developer’s initiative to rezone the golf course so as to allow a hotel, commercial buildings, and patio homes on the course.¹⁸⁷ The private operator of the golf course confirmed the sale of the course to the developer, resulting from the golf course losing money.¹⁸⁸ In the same county, Sanctuary Club sold at a foreclosure auction in January 2020.¹⁸⁹ With a finalized recent change in ownership of the yearlong overgrown club, residents struggle with general uncertainty and lack of communication about development plans.¹⁹⁰ Near Columbia, Windermere Club filed for Chapter 11 bankruptcy in July 2020 to avoid foreclosure, and now an outside investor may help continue operations.¹⁹¹ Neighborhood groups oppose residential development but have attempted to work out a solution with the owner.¹⁹² These are just a few courses that exemplify an ongoing trend from prior years of bankruptcies, closures, and rezoning controversies around the state.¹⁹³

Zoning decisions must comply with the South Carolina Local Government Comprehensive Planning Enabling Act of 1994.¹⁹⁴ To

186. See Kacen Bayless, *Bluffton area golf course could be rezoned and developed. Neighbors are fighting back*, ISLAND PACKET (Mar. 2, 2020), <https://www.islandpacket.com/news/local/article240699271.html> (mentioning two other courses were auctioned this past year due to financial problems).

187. See *id.* (citing concerns in traffic, construction, flooding, and loss of property values).

188. See *id.* (reporting no final development proposal and no submission of rezoning plans to county).

189. See Stephen Fastenau, *Closed Beaufort Co. golf course has raised questions about possible development*, ISLAND PACKET (Mar. 10, 2020), <https://www.islandpacket.com/news/business/real-estate-news/article241030836.html> (stating closure in January 2019).

190. See *id.* (attributing uncertainty to golf business in general since Great Recession).

191. See Mike Fitts, *Amid tough times for golf, another troubled course near Columbia could make way for homes*, POST AND COURIER (Jul. 9, 2020), https://www.postandcourier.com/news/amid-tough-times-for-golf-another-troubled-course-near-columbia-could-make-way-for-homes/article_5bea8c74-c20a-11ea-ad85-eb7921b48032.html [<https://perma.cc/2J2P-5VQF>] (noting developer’s interest in nearby acres of undeveloped land, but with potential need to use course land as well).

192. See *id.* (including solutions such as continuing course operation or leaving land undeveloped for conservation or recreation purposes).

193. See Jeff Wilkinson, *Northeast residents up in arms over plan to build 100s of homes on former golf course*, STATE (Apr. 22, 2019) <https://www.thestate.com/latest-news/article229366129.html> (reporting on “political showdown,” *i.e.* rezoning of Crickentree Club).

194. See S.C. CODE § 6-29-310 (1976) *et seq.* (providing state’s process for planning and zoning).

rezone a parcel of land – or amend a zoning regulation or map – the governing authority or its delegated planning commission must hold a public hearing on the amendment, with conspicuous prior notice.¹⁹⁵ The comprehensive plan, through which zoning ordinances exist, must be reviewed every five years and updated every ten years.¹⁹⁶ The state does not have a constitutional requirement to rezone a municipality in whole at a single time.¹⁹⁷ This process of citizen involvement is an asset to the practice itself as it may allow for more accurate representation of the community at large, though perhaps at the expense of efficiency of repurposing altogether.¹⁹⁸

C. Dry & Dead: Arizona's Covenant Gridlock

As an outlier compared to takings and zoning, covenants involve legal issues that may exist outside the purview of government action.¹⁹⁹ To see how covenants may cause years of confusion absent non-judicial government involvement, consider one Arizona developer's legal battles.²⁰⁰ A court ruling in 2019 marked the intended end of a longstanding dispute concerning the dilapidated Ahwatukee Lakes Golf Course.²⁰¹ In *Swain v. Bixby Village Golf Course, Inc.*, the Arizona Court of Appeals affirmed that a covenant required continued restoration and operation of a golf course on

195. *See id.* § 6-29-760 (noting governing authority may authorize planning commission to hold hearing in its place).

196. *See id.* § 6-29-510(E) (“The local planning commission shall review the comprehensive plan . . . to determine whether changes in the amount, kind, or direction of development . . . make it desirable to make additions or amendments to the plan.”).

197. *See Momeier v. John McAlister, Inc.*, 231 S.C. 526, 531 (finding city could rezone small area, “so long as its action is not arbitrary or unreasonable”).

198. *But see* Casey Watson, *Anger, tears fill room after Indian Wells Golf Course rezoning approved by planning commission*, WMBF (Apr. 4, 2019), <https://www.wmbfnews.com/2019/04/05/anger-tears-fill-room-after-indian-wells-rezoning-decision/> (noting heavy participation of homeowners against rezoning who spoke at meeting and lost in 151-142 vote).

199. *See Powell v. Washburn*, 211 Ariz. 553, 559 (2006) (upholding restriction in covenant that was more stringent than zoning ordinance, reasoning enforcing intent of parties involved is “cardinal principle”).

200. For further discussion of Ahwatukee and Club West delays and non-performance of covenants despite court order, see *infra* notes 201-211 and accompanying text.

201. *See* Danielle Miller, *Court of Appeals rules Ahwatukee golf course must be restored*, FOX 10 PHX. (Sept. 20, 2019), <https://www.fox10phoenix.com/news/court-of-appeals-rules-ahwatukee-golf-course-my> [<https://perma.cc/7BLG-RGZE>] (interviewing residents around golf course).

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the property.²⁰² However, the feud continued, as an Arizona Superior Court judge found the owner ignored three separate restoration orders.²⁰³ Now, the case is on the docket for petition for certiorari by the United States Supreme Court.²⁰⁴

The situation unfolded in May 2013, when the owner corporation Bixby Village Golf Course, Inc. closed the golf course.²⁰⁵ The following year, plaintiffs sued the Bixby corporation, claiming the closure violated the Covenants, Conditions, and Restrictions declaration as part of the property.²⁰⁶ In the years before the Court of Appeals decision, ownership transferred to an investment LLC, upon which the duty to uphold the covenant was found.²⁰⁷ Around this time, the president of the Bixby corporation, Wilson Gee, was dealing with another golf course closure at Club West Golf Course, which had been effectively abandoned since 2016 due to Gee's financial mismanagement.²⁰⁸ Club West has since shifted ownership and is now under a new plan to minimize development while maximizing recreational amenities.²⁰⁹ However, both Ahwatukee Lakes and Club West remain vacant, lacking direction and vision on how to convert the property use.²¹⁰ When golf course disputes reach

202. See *Swain v. Bixby Vill. Golf Course, Inc.*, 247 Ariz. 405, 414 (2019) (upholding covenant as matter of public policy).

203. See Paul Maryniak, *Judge finds Lakes course owner defied restoration orders*, AHWATUKEE FOOTHILLS NEWS (Aug. 26, 2020), https://www.ahwatukee.com/news/article_5593d0fc-e702-11ea-9013-cf7084f63ad1.html [https://perma.cc/S9UJ-ABGW] (reporting on sanctions against owner).

204. See *ALCR, LLC v. Linda W. Swain*, 450 P.3d 270 (Ariz. Ct. App. 2019), cert. denied, 2020 WL 6551786 (U.S. Nov. 9, 2020) (No. 20-288) (showing docket proceedings).

205. See *Swain*, 247 Ariz. at 408 (“[Owner] placed a barbed-wire fence around the perimeter, drained the lakes, shut off all power, stripped the sod off the greens, and removed hundreds of irrigation heads.”).

206. See *id.* at 407-08 (noting grantor's intention for covenant).

207. See *id.* at 410-12 (construing covenant to “give effect to the intentions of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created” (quoting *Powell v. Washburn*, 211 Ariz. 553, 557 (2006))).

208. See Paul Maryniak, *Club West future sinks again into uncertainty*, AHWATUKEE FOOTHILLS NEWS (Nov. 20, 2019), https://www.ahwatukee.com/news/article_3109e478-0b0d-11ea-a442-c7ba627f28f1.html [https://perma.cc/Y6QL-EKUP] (reporting on Gee's high water bills as catalyst for 2016 shutdown).

209. See AZRE, *Here are the revitalization plans for Club West Golf Course land*, AZ BIG MEDIA (Jul. 3, 2020), <https://azbigmedia.com/real-estate/commercial-real-estate/here-are-the-revitalization-plans-for-club-west-golf-course-land/> [https://perma.cc/29CT-XHC5] (reporting on committee meetings and dialogue with community members).

210. See Andy Lenartz, *Federal outdoors act: hope for Lakes, Club West*, AHWATUKEE FOOTHILLS NEWS (Aug. 20, 2020), https://www.ahwatukee.com/opinion/article_6c442f10-e23c-11ea-a568-839a506a4d96.html [https://perma.cc/8GFE-Q62G] (finding hope in increased federal funding).

crossroads like these, challengers can consult the government by way of the judiciary, which may be better equipped to resolve disputes between private parties.²¹¹

IV. FORE! AN ANALYSIS ON THE EFFECTIVENESS OF LAND USE CONTROLS IN GOLF COURSE REPURPOSING

Of these three land use mechanisms that consistently arise in dead golf course disputes, each practice serves different interests by yielding varying outcomes – namely, the transfer of ownership to government through eminent domain, the regulated use of the property through zoning, and the enforcement of existing uses through covenants.²¹² However, when considering the issue of how to transform a dead course into an overall benefit to the surrounding community, the land use control that deserves the most use going forward is eminent domain.²¹³ Once government acquires the idle property, decisions involving appropriate future land use or enforceability of preexisting conditions may proceed with fewer obstacles.²¹⁴ A government taking may be the most extreme option, but the inference follows that subsequent government actions will be less controversial and better informed, provided the public involves itself in voicing its desired outcomes within the community.²¹⁵

A. Driving the Change: Eminent Domain as Necessary Evil

Unlike dying courses, eminent domain as a practice is likely not going away anytime soon.²¹⁶ Members of the general public must therefore understand that the “public use” requirement exists quite literally in their favor, and that states are at least attempting to

211. See *Auther v. Furst*, No. 1 CA-CV 07-0405, 2008 WL 4965347 at *4 (Ariz. App. 2008) (recognizing no “case or controversy” standing requirement in Arizona state courts, meaning those with “a direct stake in the outcome of the controversy” may challenge covenant).

212. For further discussion on legal standards and purposes of takings, zoning, and covenants, see *supra* notes 51-137 and accompanying text.

213. See generally Stephen F. Broadus IV, *Ten Years After: Kelo v. City of New London and the Not So Probable Consequences*, 34 Miss. C.L. REV. 323, 331-344 (2015) (surveying states’ eminent domain legislation and noting its permissible use in abandoned and blighted properties and public nuisances).

214. See *id.* at 330 (inferring state eminent domain legislation “demonstrates that states are unwilling to go as far as the Supreme Court did in *Kelo*” in upholding eminent domain use).

215. See Somin, *supra* note 74, at 2108-11 (providing survey data of public’s overwhelmingly negative opinion of *Kelo*).

216. See, e.g., *City of Omaha v. Tract No. 1*, 778 N.W.2d 122, 127 (Neb. Ct. App. 2010) (describing general historical justification for eminent domain’s existence as “sovereign power which exists independent of the [state] Constitution”).

craft legislative reform to ensure the non-abuse of government takings power.²¹⁷ A broad reading of public use or public purpose would essentially yield results that generally benefit communities at large in numbers, though perhaps at the expense of the smaller, more immediate or intimately invested communities – and this is the exact result expected from a utilitarian ethics standpoint.²¹⁸ Yet, difficulty lies in discerning which community has the greater influence, either through size or political power, which thereafter raises questions as to whose interests should be prioritized.²¹⁹ Thus, in potential tiebreaker cases, the prevailing interest could arguably inhere within the party whose interest or stake in the land itself is more unique or precious.²²⁰

In considering the *Moundbuilders* dispute, common sense can lead one to the conclusion that a unique Native American burial site likely holds more concentrated irreplaceable value to that side than the land does to the golf course owner.²²¹ This falls in line

217. See *id.* at 2154 (noting general public's overall unawareness of post-*Kelo* eminent domain legislation); see also *Edens v. City of Columbia*, 228 S.C. 563, 571 (1956) (“Our controlling decisions are to the effect that ‘public use’ means just that and private property cannot be taken except for public use, without the consent of the owner.”). But see *id.* at 571-72 (describing range of strictness in how broadly ‘public use’ may be defined, with narrower definitions more protective of private property from government).

218. See, e.g., Steven Mintz, *Eminent Domain and Google's Proposed Campus in San Jose*, ETHICS SAGE (Dec. 13, 2017), <https://www.ethicssage.com/2017/12/eminent-domain-and-googles-proposed-campus-in-san-jose.html#:~:text=another%20ethical%20reasoning%20method%20is%20Utilitarianism%2C%20sometimes%20known%20as%20Consequentialism.&text=IN%20eminent%20domain%20cases%2C%20it,greater%20benefits%20for%20the%20community> [https://perma.cc/VF68-UWPV] (noting issue with utilitarianism is “ends justifies the means” approach, which may not contemplate that increased economic value can cost community's quality of life).

219. See Ohio History Connection, *Newark Earthworks*, OHIO HISTORY CTR. (2020), <https://www.ohiohistory.org/visit/museum-and-site-locator/newark-earthworks> [https://perma.cc/Z9TB-QX7X] (describing significance of grounds to Hopewell Culture).

220. See *Hopewell Culture*, NAT'L PARK SERV. (May 24, 2018), <https://www.nps.gov/hocu/learn/historyculture/hopewell-ceremonial-earthworks.htm> [https://perma.cc/V2J7-EDLY] (detailing initiative and process for World Heritage Site status for greater Ohio earthworks network, signifying earthworks' “such outstanding universal value that its conservation is important for current and future generations”).

221. See *Interior Proposes Hopewell Ceremonial Earthworks as Nomination to World Heritage List*, U.S. DEP'T. OF THE INTERIOR (May 24, 2018), <https://www.doi.gov/pressreleases/interior-proposes-hopewell-ceremonial-earthworks-nomination-world-heritage-list> [https://perma.cc/QZ8K-2UQ2] (reporting DOI's proposed nomination of Octagon Earthworks and greater “Ceremonial Earthworks” for UNESCO World Heritage Site status); see also *Heritage List*, UNESCO, <http://whc.unesco.org/en/list/> [https://perma.cc/N29T-KK6T] (last visited Mar. 2, 2021) (listing current twenty-four World Heritage sites in United States of comparable universal value).

with the deontological theory to respect human dignity, especially in contexts where one community has an arguably more special connection to the real property itself, compared to just a financial interest.²²² Government should exercise its discretion in directing the proper conveyance of property as a sort of mediator, achievable through its sovereign takings power.²²³ However, danger for abuse of discretion lies in this suggestion to investigate the value that each competing party attaches to the property.²²⁴ Such an inquiry implicates concerns from other areas of law that could derail the current takings and eminent domain standards, for instance, by awakening First Amendment concerns.²²⁵

An additional consideration to the overall effectiveness of eminent domain in bringing benefit to the intended populations is the payment of just compensation.²²⁶ OHC offered the owners \$800,000 for compensation, based on a fair market, good faith appraisal, which is an ongoing issue in the litigation.²²⁷ This dilemma of choosing which compensation amount to offer raises an essential question: how can “just” compensation or “fair” market value adequately account for the non-monetary, subjective value attached to

222. See *Babbitt v. Youpee: Allotment and the Continuing Loss of Native American Property and Rights to Devise*, 19 U. HAW. L. REV. 265, 265 (1997) (noting history of American ownership heritage “resulted in the disenfranchisement of Native American tribes from their most essential element: their land”).

223. See *Kohl v. United States*, 91 U.S. 367, 370 (1875) (recognizing government’s sovereign eminent domain right as right to purchase and condemn). *But see id.* at 373-74 (noting right is for government “to take private property for its own public uses, and not for those of another”).

224. Cf. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 703-04 (Jan. 1990) (considering irreplaceability of real property, noting insufficiency of damages to compensate for specific value individual places on property).

225. See, e.g., *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (declaring “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional” and thus subject to strict scrutiny); see also Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 62-64 (Nov. 2014) (describing inquiry into First Amendment litigants’ sincerity of religious beliefs).

226. See Paige Boldt, *Condemning Fair Market Value: An Appraisal of Eminent Domain’s “Just Compensation”*, 1 TEX. A&M J. PROP. L. 131, 137 (2012) (suggesting Fifth Amendment imposes “public use” and “just compensation” as two distinct limitations on government’s eminent domain authority that give private parties “protection of individual liberty against [sovereignty]”).

227. See *State ex rel. Ohio History Connection v. Moundbuilders Country Club Company*, 143 N.E.3d 614, 619-20 (affirming trial court’s finding of no bad faith even if OHC received separate appraisal that valued site more than double); see also *Ohio Supreme Court sets date for ancient burial mound case*, ASSOCIATED PRESS (Jan. 15, 2021), <https://apnews.com/article/newark-ohio-eminent-domain-courts-4c879646921e96f1051843a2eb78f9e8> (reporting Ohio Supreme Court will hear arguments on April 13 whether OHC made good faith offer).

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a specific parcel of real property?²²⁸ An analysis of the role and proper valuation of “just compensation” is beyond the scope of this Comment’s focus, although an idea relevant to the *Moundbuilders* dispute is that just compensation aims to make up for losses in real estate development and investment, which may be easier to provide to the party operating a golf course than it would to the party with the more spiritual connection to the land that money may not fulfill.²²⁹

Another complicating factor in the *Moundbuilders* case is that the dispute did not involve a closure of a golf course, or even a government entity initiating the proceedings in a traditional sense; rather, the private course is still in operation as it markets its design around the earthworks, and OHC is a nonprofit entity, not dissimilar from the entity at issue in *Kelo*.²³⁰ Yet, these marked differences do not detract from the benefits that eminent domain may provide for dead courses.²³¹ Namely, eminent domain could be a way for government to deliberately decide how a parcel of property should be used, and the *Moundbuilders* case is an example of how this may unfold in instances of competing interests.²³² The large caveat with this strategy, however, is that the public use must actually be *public* and “not to benefit a particular class of identifiable individuals,” though *Kelo* helped lower this burden for the government by expanding the definition of public use.²³³

228. See Maria M. Maciá, *Pinning Down Subjective Valuations: A Well-Being Analysis Approach to Eminent Domain*, 83 U. CHI. L. REV. 945, 951 (2016) (positing idea that monetary valuations may not make individual property owner whole).

229. See Aaron N. Gruen, *Takings, Just Compensation, and the Efficient Use of Land, Urban, and Environmental Resources*, 33 URB. L. REV. 517, 529 (2001) (comparing uniqueness of real property to market demands and consumer preferences involved with real estate investment and development).

230. See Clare Roth, *Ohio History Connection Wins Eminent Domain Fight Over Newark Earthworks*, WOSU (May 13, 2019), <https://radio.wosu.org/post/ohio-history-connection-wins-eminent-domain-fight-over-newark-earthworks#stream/0> [<https://perma.cc/82W6-7MU4>] (noting country club leased land from OHC since 1930s and OHC’s inability to acquire lease since then); see also MOUNDBUILDERS COUNTRY CLUB, *The Course*, MCC, <https://www.moundbuilderscc.com/Default.aspx?p=dynamicModule&pageid=367880&ssid=279999&vnf=1> [<https://perma.cc/N8P2-J2R5>] (last visited Jan. 5, 2021) (describing uniqueness of own golf course within country club).

231. See, e.g., *Berman v. Parker*, 348 U.S. 26, 33 (1954) (indicating public welfare is broad and inclusive of physical, aesthetic, and monetary values, and eminent domain is “merely the means to the end”).

232. *But see Kelo v. City of New London, Conn.*, 545 U.S. 469, 477-78 (2005) (limiting eminent domain from being used to confer private benefit upon private party, or to disguise private benefit under “public benefit”).

233. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (prohibiting “purely private” takings).

Although rapid changes currently surround the state of golf, the government's use of eminent domain to acquire the dead courses does not appear as a common occurrence, perhaps due to the public disdain for the practice itself and the potential it has in causing irreconcilable conflict between the interested parties.²³⁴ Nonetheless, instances still appear of eminent domain use over golf courses.²³⁵ For example, in Chester County, Pennsylvania, a school board voted to acquire part of Meadow Brook Golf Club, despite opposition from the club's owners.²³⁶ After almost a year of further delays and objections filed against the school district, the Chester County Common Pleas Court nonetheless upheld the acquisition in 2014.²³⁷ Aside from community backlash, perhaps governments hesitate to use eminent domain over golf courses due to a lack of resources to undertake such large projects.²³⁸ Denver, Colorado faced a lawsuit upon using eminent domain to take thirty-five acres of a golf course to build a flood prevention system – leading to a multi-million dollar loss for the city in 2019.²³⁹ In Florida, the

234. See, e.g., *Eminent Domain*, NAT'L GOLF COURSE OWNERS ASS'N, <https://www.ngcoa.org/info-centers/advocacy/taxation/eminent-domain> [<https://perma.cc/3439-NP22>] (last visited Feb. 7, 2021) (providing organization's monitoring of potential eminent domain proceedings against golf course owners); see also *No heroes, many villains in Phoenixville eminent domain dispute*, DAILY LOCAL NEWS (Dec. 7, 2013), https://www.dailylocal.com/news/national/no-heroes-many-villains-in-phoenixville-eminent-domain-dispute/article_6539cb90-1dc7-538f-aa1e-88ce7af72292.html (“[E]very side is a little bit at fault in this twisted process [of school board taking golf course] . . . [E]minent domain is a difficult issue for any community . . .”).

235. For further discussion of examples of eminent domain use against golf course parcels, see *infra* notes 236-240 and accompanying text.

236. See Frank Otto, *UPDATED: Judge rules against golf course in eminent domain case*, DAILY LOCAL NEWS (June 30, 2014), https://www.dailylocal.com/news/national/updated-judge-rules-against-golf-course-in-eminent-domain-case/article_c33833fa-fa85-511f-8520-f409f51ea6d4.html [<https://perma.cc/8CBG-69J8>] (citing school board's posited purpose to build elementary school and early learning center).

237. See Frank Otto, *Phoenixville's Meadow Brook Golf Club to shut down per court order*, MERCURY (Sept. 19, 2014), https://www.pottsmmerc.com/news/phoenixvilles-meadow-brook-golf-club-to-shut-down-per-court-order/article_ebb28d92-eedf-5f9e-b317-b2bdf31103a7.html (adding plans for school site to include maintenance building and athletic fields).

238. But see Shaila Dewan, *Eminent Domain: A Long Shot Against Blight*, N.Y. TIMES (Jan. 11, 2014), <https://www.nytimes.com/2014/01/12/business/in-richmond-california-a-long-shot-against-blight.html> [<https://perma.cc/XR3V-2KQR>] (reporting on city's use of eminent domain as attempt to ameliorate mortgage crisis, with posited public purpose to prevent foreclosures and blight).

239. See Editorial Board, *Editorial: Denver must stick to its guns to protect Park Hill open space*, DENVER POST (Nov. 13, 2019), <https://www.denverpost.com/2019/11/13/park-hill-golf-club-open-space/> [<https://perma.cc/Y9B9-HEE7>] (finding liability in addition to city's initial two million dollars spent in 1997 for perpetual conservation easement).

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remediation of long-term use of chemicals and herbicides at dead courses adds extra environmental concerns that may further complicate eminent domain strategy.²⁴⁰ Yet, these issues of strapped resources or environmental externalities may become less of a problem the sooner a decision is made for the proper use of the course.²⁴¹

Despite this Comment's advocacy for increased use of eminent domain, the ethical concerns over the proper role of government in society are most pointed in this context, as many people presumably oppose government taking their property without having a fair chance for bargaining.²⁴² Those in favor and in opposition of eminent domain have appreciable arguments – perceivably, proponents' assertion that taking property may lead to greater amenities and economic opportunities, or critics' assertion that government should not liberally impose cost and delay burdens upon undeserving seized property owners.²⁴³ In the case of the disgruntled citizen who falls victim to eminent domain, there exists a sentiment that government is not treating humans with respect to their dignities and rights – deontological principles in short.²⁴⁴ While the state may succeed under utilitarianism by ultimately benefitting a greater amount of constituents as a whole, the individuals harmed in the process demonstrate the conflict in deontology.²⁴⁵ Notwithstanding this ethical conundrum, the public should at least demand as

240. See, e.g., Benjamin Paley & Dan Christensen, *Arsenic and old sludge: A Hollywood environmental story*, FLA. BULLDOG (Feb. 5, 2020), <https://www.floridabulldog.org/2020/02/arsenic-and-old-sludge-a-hollywood-environmental-story/> [<https://perma.cc/989L-V74G>] (addressing controversial use of sludge as part of “pilot soil management test program”).

241. See *Reusing Cleaned Up Superfund Sites: Golf Facilities Where Waste is Left on Site*, U.S. ENVTL. PROTECTION AGENCY at 44 (Oct. 2003), <https://sempub.epa.gov/work/HQ/174399.pdf> [<https://perma.cc/SF3H-TY9V>] (describing four successful golf course Superfund remediation projects to comply with Environmental Protection Agency).

242. See D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280, 1293 (Apr. 2010) (“Yet, surprisingly, courts have not uniformly decided, and the Supreme Court has never definitively addressed, what due process demands when a state initiates an eminent domain action.”).

243. See generally Mark S. Dennison, *Eminent Domain: Proof of Lack of Reasonable Necessity for Taking of Property*, 71 AM. JUR. PROOF OF FACTS 3d 97 §§ 1-17 (2003) (providing expansive overview of eminent domain law and how “necessity” is key factor in litigation).

244. See *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 772 (Fla. 1974) (Roberts, J., concurring in part, dissenting in part) (“The American people dislike government regulation . . . and tolerate it only when they believe it to be justified by compelling considerations of public good.”).

245. For further discussion of utilitarianism and deontological ethics, see *supra* notes 153-160 and accompanying text.

much fairness in the procedure itself to balance with the high level of deference already afforded to the government in justifying its taking.²⁴⁶

B. Keeping Score: Public Participation in the Zoning Process

The public's demand in procedural fairness relates directly to issues with the next-best land use control, zoning.²⁴⁷ Interestingly, the South Carolina judiciary has not been as involved in the recent zoning disputes throughout the state – at least since the 2013 state supreme court ruling in *Dunes West Golf Club, LLC v. Town of Mount Pleasant*.²⁴⁸ Considering that decision ruled against the property owner by finding no *Penn Central* regulatory taking in the town's zoning amendment, perhaps property owners today would fare better if they focus their energies towards administrative processes at the local board level before hastily resorting to the courts.²⁴⁹ While zoning disputes certainly invoke legal questions of the legitimacy of government exercising power, much of the tension results from social and political issues that warrant compromise among the adversaries.²⁵⁰

246. See generally *Eminent Domain Abuse Survival Guide: Grassroots Strategies for Winning the Fight Against Eminent Domain Abuse*, INST. FOR JUSTICE at 9-24 (2015), <https://ij.org/wp-content/uploads/2015/08/survival-guide.pdf> [<https://perma.cc/K6TR-WK6D>] (providing strategies for public to combat government's use of eminent domain through grassroots campaigns and legislative reform). Cf. Cavarrio Carter, *System Check: Balancing Texas's Need for Natural Resources Exploration with Texas Landowner Rights in Light of Texas Rice Land Partners v. Denbury Green Pipeline-Texas*, 2 LSU J. ENERGY L. & RESOURCES 309, 310 (2014) (highlighting landowners' concerns in state abusing eminent domain power).

247. See Harvard Law Review Association, *IV. Zoning and Procedural Due Process*, 91 HARV. L. REV. 1502, 1503-04 (1978) (suggesting zoning decisions blur line between legislation and adjudication, and if such decisions deprive protected property interest, then procedural requirements include notice and hearing in front of neutral decisionmaker).

248. But see Lucas High, *Beaufort County killed plans for this Massive Bluffton development. Now it's being sued.*, ISLAND PACKET (Oct. 3, 2017), <https://www.islandpacket.com/homes/article176781216.html> (reporting on lawsuit filed by South Carolina golf course in response to county's denial of rezoning application). For further discussion of the *Dunes West* case and its significance in takings and zoning jurisprudence, see *supra* notes 113-115 and accompanying text.

249. See *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 321 (2013) (finding no taking in town's zoning that "incidentally impacted [property owner's] ability to maximize profit from the developing of its land"); see also *Taking Action to Reduce Planning Litigation Risks*, MUN. ASS'N OF S.C. (Apr. 2020), <https://www.masc.sc/Pages/newsroom/uptown/April-2020/Take-Action-to-Reduce-Planning-Litigation-Risks.aspx> [<https://perma.cc/9UR3-L4D>] (providing strategies for governments to avoid litigation and identifying desired balance between individual and community rights).

250. See, e.g., *McGlothlin v. Hennelly*, 370 F. Supp. 3d 603, 616-17 (D.S.C. 2019) (applying libel standard to statements about golf course company owner's

Inherent in zoning disputes is the question of which community's interests the decisionmaker should uphold foremost.²⁵¹ As courses continue to close, a simple suggestion of dispute resolution is to give attention to those who are in immediate proximity to the golf course and to prioritize those individuals' interests first.²⁵² However, recall that physical proximity may only be one among many representative factors of the community at large.²⁵³ To assume that the immediate neighbors' concerns should be prioritized when the greater municipal community could have entirely different conceptions of the best use of the land could lead to shortsighted decisions.²⁵⁴ If the community believes in its sense of ownership in the land at issue, it should be proactive in coordinating with government in deciding the necessary amenities or purposes to the land.²⁵⁵ This responsibility exists outside of the town hall meeting, and this involvement should ideally come before the issues of eminent domain or rezoning even appear.²⁵⁶ Considering

rezoning application); see also Arthur J. Anderson, *Taking the Mulligan: The Land Use Regulatory Hurdles in Golf Course Repurposing*, 36 PRACTICAL REAL EST. L. 18, 25-26 (Nov. 2020), retrieved from <https://www.jdsupra.com/legalnews/taking-the-mulligan-the-land-use-17390/> (summarizing opposition to developments in two South Carolina counties and concluding "numerous legal and political factors" invoked in rezoning disputes).

251. See, e.g., Bradley Pough, *Neighborhood Upzoning and racial Displacement: A Potential Target for Disparate Impact Litigation?*, 21 U. PA. J.L. & SOC. CHANGE 267, 271, 291 (suggesting zoning enables discrimination).

252. See Jonathan A. Wiley, *The Impact of Commercial Development on Surrounding Residential Property Values* at 19-21 (Apr. 2015), <https://www.gamlms.com/images/jonwiley.pdf> [<https://perma.cc/L7NC-K3N3>] (using mathematical calculations for zoning's effects on property values to inform policy judgments).

253. For further discussion on common characteristics of the definition of "community," see *supra* notes 144-147 and accompanying text.

254. See, e.g., *Sheppard v. Zoning Bd. of Appeal of Bos.*, 903 N.E.2d 593, 597-98 (Mass. Ct. App. 2009) (noting dispute among immediate neighbors in board's granting of variances that "exacerbate the density problems [that Boston's] zoning regulations were meant to address").

255. See, e.g., Michaela Winberg, *How zoning works in Philly, and how you can get involved*, BILLY PENN (Sept. 14, 2018), <https://billypenn.com/2018/09/13/how-zoning-works-in-philly-and-how-you-can-get-involved/> [<https://perma.cc/7RAZ-UVJ8>] (suggesting Philadelphia citizen participation by calling Registered Community Organizations and attending Zoning Board of Adjustment meetings).

256. See Jessica Garrow, *Public Engagement: The Key to Building Inclusive Communities*, AM. PLANNING ASS'N (Oct. 12, 2016), <https://www.planning.org/blog/blogpost/9113458/> [<https://perma.cc/NC8C-KYCD>] (describing engagement strategies in regional planning commissions). This proactivity may yield better results in a broader planning process, which differs from zoning by providing a vision for community for which zoning is a tool to advance. See *What is the Relationship Between Planning and Zoning?*, SHELBY CTY. DEP'T OF DEV. SERVS. <https://www.shelbyal.com/DocumentCenter/View/55/RelationshipPlanningZoning> [<https://perma.cc/ZJ3W-LYW2>] (last visited Jan. 5, 2021) (describing role of community planners).

courts defer to the judgment of the legislative bodies in zoning disputes under the rational basis standard, community members would find it in their best interest to ensure their concerns are heard before conflict may even arise.²⁵⁷

Yet, for these members to know exactly what they want in their community ahead of time may be an unreasonable demand requiring impossible foresight at times.²⁵⁸ Hence, the simpler route is for government actors to guide the community planning process instead, with the help of the neighborhood planners.²⁵⁹ These decisionmakers on zoning boards should have consistent histories of adjudications that yield net positive results, perhaps indicated by political and economic success or positive intergroup relations in neighborhoods where golf courses lie.²⁶⁰ The community members have the reciprocal responsibility to monitor these government actors' conduct, and decisions by board members or state actors that are based *solely* on political or financial gain should raise red flags.²⁶¹ Concerned citizens should scrutinize whether the state ac-

257. See *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (noting general rule that legislation is presumed valid and will be sustained if classification drawn by statute is rationally related to legitimate state interest).

258. See *ULI Community Catalyst Report Number 1: Involving the Community in Neighborhood Planning*, URB. LAND INST. at 2, 4 (2005), retrieved from http://uli.org/wp-content/uploads/2012/07/Report-1-Involving-the-Community-in-Neighborhood-Planning.ashx_.pdf [<https://perma.cc/HG3K-KP27>] (describing community members as source of long-term "momentum" in collaborative planning, for which "[i]t is not possible to implement all the elements of . . . at once").

259. See *id.* at 4 (placing responsibility upon planners to structure planning process that allows for ongoing community participation); see also Massachusetts Citizen Planner Training Collaborative, *Roles & Responsibilities of Planning & Zoning Boards Part I*, CITIZEN PLANNER TRAINING COLLABORATIVE at 18 (2016), <https://www.hamiltonma.gov/wp-content/uploads/2016/12/Roles-responsibilities-of-Planning-Boards-Part-I.pdf> [<https://perma.cc/WA4L-BZML>] (listing responsibilities of planning board that include advising or coordinating with government, developers, and public).

260. See Patricia E. Salkin, *Providing for Alternate Members on Planning and Zoning Boards: Drafting Effective Local Laws*, 6 APA PLANNING & ENV. L., 3, 4-5 (Aug. 2009), <http://mrsc.org/getmedia/6CFE1817-43AF-48E3-B885-ACB7B7EE65CF/M58Salkin.aspx> [<https://perma.cc/98BG-KVVT>] (describing zoning board member appointment strategies).

261. See Patricia E. Salkin, *Ethics Allegations in Land Use Continue to Fill the Court Dockets*, 26 ZONING AND PLANNING L. REPORT 1, 1-3 (Apr. 2003), retrieved from <https://www.albanylaw.edu/centers/government-law-center/about/publications/past-publications/Documents/Ethics%20Allegations%20in%20Land%20Use%20Continue%20to%20Fill%20the%20Court%20Dockets.pdf> [<https://perma.cc/KA64-V6UN>] (noting cases of ethical considerations as applied to architects, attorneys, bankers, planners).

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tor may be misusing power or acting with malice, as may be indicated by these improper motives.²⁶²

Albeit, this monitoring process is easier said than done, and individuals' extent of influence upon government decisionmakers could be extremely difficult to identify or evaluate.²⁶³ At the same time, the appointment of a zoning or planning board effectively calls upon these actors to choose the best outcomes for their constituents, which may entail tough decisions on finances, environment, public health, and quality of life.²⁶⁴ If all else, residents could at least hope that the zoning board gives proper consideration to these factors, in addition to other principles of effective land use planning.²⁶⁵ As applied to the South Carolina closures, the most effective course of action to manifest the citizens' hopes is for them to appear in front of the boards and petition for consideration of these concerns, though results and effectiveness may vary.²⁶⁶

After the boards internalize this public feedback, government actors then face basic utilitarian questions of what land use decision will bring the greatest net benefit to the community; yet deontological principles should not be ignored in these processes.²⁶⁷ Government actors are in a presumably better position to protect underserved or disenfranchised populations within the community as mandated by deontological ethics, because they maintain sover-

262. See *Dorr v. City of Ecorse*, 305 F. App'x. 270, 277-78 (6th Cir. 2008) (awarding punitive damages for mayor's unreasonableness).

263. *But see* League of California Cities, *Planning Commissioner's Handbook*, INST. FOR LOCAL GOV'T at 5, https://www.ca-ilg.org/sites/main/files/file-attachments/resources_PCH_sec1.pdf [<https://perma.cc/Q28L-W9WU>] (last visited Feb. 7, 2021) (outlining public service values that commissioners should internalize).

264. See Patricia E. Salkin, *It's In the Cards: Ethical Considerations in Land Use for Lawyers*, PLANNING, ZONING, & EMINENT DOMAIN § 6.02[1] (2007), <https://www.albanylaw.edu/centers/government-law-center/about/publications/past-publications/Documents/Its%20in%20the%20Cards-%20Ethical%20Considerations%20in%20Land%20Use%20for%20Lawyers%20and%20Clients.pdf> [<https://perma.cc/7TSG-BM4Y>] (implying these considerations underlie issues of conflicts of interest).

265. See *APA Policy Guide on Smart Growth*, AM. PLANNING ASS'N (Apr. 14, 2012), <https://www.planning.org/policy/guides/adopted/smartgrowth.htm> [<https://perma.cc/JL53-VUHL>] (identifying sixteen core principles of "smart growth").

266. See Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. L. 447, 457-58 (2004) (questioning how particular interests of board members may stack against community interests).

267. See Spencer Gardner, *A History of Zoning, Part II: The Problem Zoning Solves*, STRONG TOWNS (July 18, 2017), <https://www.strongtowns.org/journal/2017/7/17/a-history-of-zoning-part-ii-the-problem-zoning-solves> [<https://perma.cc/4679-G2MT>] (describing historical misuses of zoning to exclude populations and inferring immorality in non-priority of integrating populations).

eign power over the people.²⁶⁸ However, mere deference towards government's rational decision making may not be enough to protect particularly vulnerable populations if their concerns are not obvious.²⁶⁹ Ideally, the government's decision should result in an improved quality of life for the populations who engage and make their voices heard, and that cannot happen without continuous public feedback.²⁷⁰ But even with robust public participation, governments are still imperfect entities that will inevitably ignore these populations in some zoning or planning processes, or at worse, make decisions that directly harm these populations.²⁷¹ This risk of further damaging already vulnerable community populations exists within eminent domain use as well though, so in either case the public shall remain vigilant as to whether the land use decision skews towards an arbitrary exercise of state power.²⁷²

Altogether in balancing these issues of building trust in government, minimizing burdens upon community members, and internalizing public feedback, the ideal strategy in repurposing dead

268. *But see* State v. Peeler, 321 Conn. 375, 461 (2016) (Zarella, J., dissenting) (describing “popular sovereignty” existent in American government, where “the people hold the power, and the government has only the power the people delegate to it”).

269. *See* Sylvania Dev. Corp. v. Calvert Cty., Md., 48 F.3d 810, 818 (4th Cir. 1995) (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (providing standard for government to pass Fourteenth Amendment Equal Protection Clause zoning challenge that application of law “must be ‘reasonable, not arbitrary . . . having a fair and substantial relation to the object of the legislation’”). This would imply that government can, but is not required to internalize special circumstances for its decision to pass scrutiny. *See id.* (requiring only equal application of law to similarly situated persons, “[b]ut this does not mean that persons in different circumstances cannot be treated differently under the law”); *see also* Clayland Farm Enters., LLC v. Talbot Cty., Md., 987 F.3d 346, 356-57 (4th Cir. 2021) (requiring same standard for substantive due process zoning challenges, where state action must have foundation in reason, and not be arbitrary or irrational exercise of power).

270. *See, e.g.,* Ind. Forest All. v. McDonald, No. 1:16-cv-03297-JMS-MPB, 2017 WL 131739 at *7 (S.D. Ind. 2017) (providing example of agency soliciting feedback for environmental analysis); *see also* Robert H. Freilich & Derek B. Guemmer, *Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda*, 21 URB. LAWYER 511, 514 (1989) (highlighting electorate's “ultimate control over land-use policy,” advocating for voter control over public policy).

271. *See, e.g.,* Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, 173-74 (1975) (disallowing township to “make it physically and economically impossible to provide low and moderate income housing in the municipality” through land use regulation).

272. *See* Dick M. Carpenter II, Ph.D. & John K. Ross, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse*, INST. FOR JUSTICE at 6 (June 2007), https://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf [<https://perma.cc/EMY3-DHKW>] (providing data on eminent domain abuse adversely affecting minority and impoverished populations).

courses should follow: government should invoke eminent domain to the extent practicable to obtain the parcel.²⁷³ Asserting this land use control foremost instead of opting for compounded regulation thereby avoids the issue of whether regulatory takings occur, which further minimizes the potential delay in litigating over the *Penn Central* factors.²⁷⁴ Once this more perceivably harmful act is complete, *i.e.* condemnation and payment to the private owner, the responsibility shifts to zoning boards to secure the future use of the property through the requisite zoning classification.²⁷⁵ While government would have discretion in defining the public use of the property, community members could provide input on how to best fulfill that vision of public purpose, either through participation in zoning board meetings or even earlier in the comprehensive planning process.²⁷⁶ Through the state's administrative procedure of notice and comment, members of the public can ensure that the ethical issues under either theory that may have arisen within the community as they relate to the traditional role of golf in the state – *i.e.* segregation, politics, class division, etc. – are actively being fixed and geared towards a sustainable future in the community.²⁷⁷

273. See Matthew L. Cypher & Fred A. Forgey, *Eminent Domain: An Evaluation Based on Criteria Relating to Equity, Effectiveness, and Efficiency*, 39 URB. AFF. REV. 254, 266 (Nov. 2003) (noting minimal project delay when municipalities employ eminent domain).

274. See *Weiss v. People ex rel. Dep't. of Transp.*, 468 P.3d 1154, 1160-61 (Cal. 2020) (describing distinction between eminent domain law where public entity initiates complaint and condemnation procedure versus inverse condemnation law where property owner alleges occurrence of government taking).

275. See *Dep't of Pub. Works and Bldgs. v. Ass'n of Franciscan Fathers*, 360 N.E.2d 70, 75-76 (Ill. App. Ct. 1976) (noting rezoning possibility after government acquisition by eminent domain and how probability of rezoning affects calculation of just compensation).

276. See, *e.g.*, *City of St. Charles v. DeVault Mgmt.*, 959 S.W.2d 815, 823-24 (Mo. App. 1997) (finding rezoning ordinances did not constitute amendment to Comprehensive Plan and eminent domain use did not conform to Comprehensive Plan).

277. See, *e.g.*, Michael McCann, *Why Private Golf Clubs Are Legally Still Able to Discriminate Against Women*, SPORTS ILLUSTRATED (July 1, 2019), <https://www.si.com/golf/2019/07/01/private-golf-clubs-muirfield-augusta-women-discrimination> [<https://perma.cc/5HQL-ZGEU>] (reporting controversies with male-only membership policies in golf courses globally, including recently Scotland's Muirfield and Georgia's Augusta National); see also Kadie Martin, *So Much to Comment On, So Little Time: Notice-and-Comment Requirements in Agency Informal Rulemaking under the Administrative Procedure Act*, 61 B.C. L. REV. E-SUPPLEMENT II-132, 138-140 (Apr. 2020), retrieved from <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/14/> [<https://perma.cc/JTX7-2973>] (providing summary of federal notice and comment rulemaking procedure).

C. Joining the Club: Covenants as Compromise

Eminent domain can be effective as an active solution to the issue of closed and abandoned golf courses, whereas zoning and public involvement could be better used as damage control or as a way to ensure that the property continues to have a beneficial use.²⁷⁸ However, within the context of privately owned golf courses and country clubs, government involvement is less effective as public access in the traditional sense is diminished.²⁷⁹ Therefore, within private courses, covenants should continue to control the land use disputes to the extent equitable; considering residents of the country clubs are the likely core of the community, their unique agreements that run with the land should be honored.²⁸⁰ Still, the respective local judiciary can exist as an amenable legal forum when needed to ensure these agreements are just and fair in operation, demonstrable through “the mutual benefit of the owners of all lots in the particular tract.”²⁸¹

However, a common problem with covenants appears to be how impractical they may actually operate in practice.²⁸² The largest detriment with this situation in Arizona is the unreasonable delays.²⁸³ Perhaps a reform of covenant law is on the horizon, as Supreme Court jurisprudence is especially lacking in this area.²⁸⁴ An affirmed bright-line rule perhaps analogous to termination of

278. For further discussion of effectiveness of eminent domain and zoning, see *supra* notes 216-277 and accompanying text.

279. See, e.g., *Quail Creek Prop. Owners Ass’n, Inc. v. Hunter*, 538 So. 2d 1288, 1289 (Fla. App. 1989) (finding “no state action” implicated in parties’ “purely private” covenant).

280. See, e.g., *Canewood Homeowners Ass’n, Inc. v. Wilshire Inv. Props., LLC*, 515 S.W.3d 212, 218 (Ky. App. 2017) (upholding homeowners association’s retained right to enforce restrictive use on golf club facility).

281. *Wallace v. Hoffman*, 84 N.E.2d 654, 656 (Ill. App. Ct. 1949) (finding resident’s right to enforce covenant under implied circumstances of mutual benefit); see also *Save the Prairie Soc’y v. Greene Dev. Group, Inc.*, 752 N.E.2d 523, 528-29 (Ill. App. Ct. 2001) (finding this “equitable right” of plaintiff who lacked privity).

282. See *Soc’y Hill at Piscataway Condo. Ass’n, Inc. v. Twp. of Piscataway*, 445 N.J. Super. 435, 450 (2016) (noting New Jersey rule that changed circumstances, illegality of covenant, or voidness for public policy may make covenant impractical or unenforceable).

283. For further discussion of length of litigation, see *supra* notes 201-210 and accompanying text.

284. See Alisha Jarwala, *The More Things Change: Hundley v. Gorewitz and “Change of Neighborhood” in the NAACP’s Restrictive Covenant Cases*, 55 HARV. C.R.-C.L. L. REV. 707, 707, 709 (2020) (identifying *Shelley v. Kraemer* as lead case controlling covenant law, finding racially restrictive covenants violative of the Fourteenth Amendment); see also Thomas Shepherd, *A Shadow of Ohio’s Racist Past? Or a Lingering, Tangible Impact? An Examination of Unenforceable Restrictive Covenants*, 48 CAP. U. L. REV. 43, 48-49, 52 (2020) (acknowledging over seventy years passed since *Shelley*,

trusts could fare well in situations such as these when the intention, reliance, upkeep of responsibilities, and succession of ownership devolve into flurry, resulting in years of mismanagement and battles of expectations.²⁸⁵ Although property law generally aims to appreciate the uniqueness and irreplaceability of any parcel at issue, that appreciation should not come at the expense of practicality.²⁸⁶

Yet, even if the law or covenant is well established or unambiguous in the case, issues remain whether the private individuals will ultimately uphold their ends of the agreement.²⁸⁷ Even after the litigation finishes and there is a judgment on the enforceability of a covenant, the ensuing obligation remains upon the losing party.²⁸⁸ The Ahwatukee Lakes dispute in Arizona shows how willful neglect of obligations may still persist, even in the face of court orders.²⁸⁹

Lastly, and perhaps to the chagrin of private country club community members, government can find its additional role in private golf course management by enacting its own covenants with private communities.²⁹⁰ These covenants would likely mirror zoning

but recognizing Congress extended protections against racially restrictive through 1968 Fair Housing Act).

285. See UNIF. TRUST CODE § 410(a) (2000) (“[A] trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.”). *But see Piscataway*, 445 N.J. Super. at 450 (incorporating this already into its state law for termination of covenants).

286. See James Simon, *Civil Asset Forfeiture in Virginia: An Imperfect System*, 74 WASH. & LEE L. REV. 1295, 1328-29 (2017) (discussing value in uniqueness in real property); see also *Conservation Easements*, WILDLANDS CONSERVANCY, <https://www.wildlandspa.org/conservation-easements/> [<https://perma.cc/3AHM-LYP4>] (last visited Oct. 25, 2020) (noting benefits of conservation easements for landowner and neighboring community).

287. See 17A Am. Jur. 2d *Contracts* § 669 (“When performance of a duty under a contract is due, a failure to perform is a breach.”). This leaves the question of what remedies are available for breaches of covenants, which operate analogously to contracts. See *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 800 (1978) (quoting *Pool v. Denbeck*, 196 Neb. 27, 30 (1976)) (“Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of plan of development protected by such covenants.”).

288. See *Swain v. Bixby Vill. Golf Course, Inc.*, 247 Ariz. 405, 413 (2019) (granting resident plaintiffs injunction against golf course owner defendant’s failure to uphold covenant, reasoning “equitable considerations, such as the parties’ relative hardships, the parties’ misconduct, public interest, and adequacy of other remedies”).

289. See *Maryniak*, *supra* note 203 (reporting golf course owner’s noncompliance with court order to restore golf use to property).

290. See Noah M. Kazis, *Public Actors, Private Law: Local Governments’ Use of Covenants To Regulate Land Use*, 124 YALE L.J. 1790, 1794 (Mar. 2015) (advocating for balance between public and private law enforcement).

schemes within the private community or some other exercise of the government's police power to prevent the lack of upkeep or the threat of dilapidation, perhaps in exchange for select public services.²⁹¹ In order for these agreements to succeed, there must be a compatible goal between the private residents in the community association and the local government, which should point towards fruitful future use of the golf course.²⁹² To further expand government involvement in these private communities, residents in support of preexisting private covenants or existing bylaws within the community should try to obtain additional security through positive governmental action, for example by petitioning the government to use its regulatory power to shuffle the bundle of property rights through rezoning.²⁹³ While such regulatory regimes may irk certain individuals with stake in the land, the deference would remain to government to promote utility for the greater impacted community if the residents support the idea, and to ensure moral land use practices exist within the community.²⁹⁴

V. THE FINAL HOLE: CLOSING REMARKS ON THE LAND USE CONTROLS AND STATE OF GOLF

Each land use control discussed is useful in individualized ways, and so the application to dead golf courses posits distinct sets of issues in the respective communities.²⁹⁵ Eminent domain gives the government more room to be proactive in its desired use of land, and for this reason its use should be prioritized in the case of dead courses that detract from a community's value.²⁹⁶ Yet, govern-

291. See generally *id.* at 1806-11 (comparing and contrasting zoning to covenant enforcement).

292. See *id.* at 1804-06 (describing two New York City programs combining zoning and covenants: one where City merged rezoning and restrictive declarations within its E-Designation program to "achieve the same result . . . to make environmental remediation requirements easier for the city to monitor" and one where covenant was added to public plaza space "to augment [the City's] enforcement powers on a case-by-case basis" (internal quotation marks omitted)).

293. See David E. MacEllven, *Land Use Control Through Covenants*, 13 HASTINGS L.J. 310, 310 (1962) (noting land subject to private restriction via covenants may also be subject to public restriction via zoning).

294. For further discussion of utilitarian ethics, see *supra* notes 155-157 and accompanying text.

295. For further discussion of how each tool operates in theory and for which purposes, see *supra* notes 51-137 and accompanying text.

296. See Candace Taylor, *Golf-Home Owners Find Themselves in a Hole*, WALL STREET J. (Jan. 10, 2019), <https://www.wsj.com/articles/golf-home-owners-find-themselves-in-a-hole-11547135191> [<https://perma.cc/889U-KJJK>] (reporting dead courses' detriment to property values in surrounding residential community). Cf. Patrick Sisson, *Blight and vacant land are a national crisis for smaller cities*, CURBED

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ment should not proceed recklessly as the practice carries high risk of upsetting community members and leaving interest groups deeply resentful for discrete losses of property ownership.²⁹⁷ Where the utility of eminent domain ends, ridding or repurposing dead courses via zoning or planning amendments appears the most well-rounded, non-offensive, and publicly accessible way to change the land.²⁹⁸ However, the broad avenues for community input here could let government have its way in the end if no consensus exists between concerned citizens behind their advocacy, or if the government fails to satisfy the expressed community concerns.²⁹⁹ Lastly for covenants, their restrictive use of golf course property will likely prove more of an obstacle than a tool in transforming golf course land, unless coupled with extra-governmental land controls geared towards a compatible end.³⁰⁰

Though COVID-19 posits an uncertain potential shift in the longstanding popularity of golf in the future, communities should nonetheless understand the legal tools available to guide the sustained use of golf course property.³⁰¹ Even though a golf course may lie stagnant, change is abound as comprehensive plans update, government purchases properties, private sellers pass to private buyers, and the law continues to expand.³⁰² With this, the community

(June 25, 2019), <https://archive.curbed.com/2019/6/25/18716105/blight-vacant-land-abandoned-property-lot-land-bank> [<https://perma.cc/4XWX-3CNX>] (noting abandoned property's concentration in "areas that are losing jobs, investment, and economic opportunity," and noting economic disparity within urban areas where "[t]he winners get reclaimed rail lines. The losers get high grass and weeds").

297. For further discussion of how government takings may spoil relations with the affected public, see *supra* notes 242-246 and accompanying text.

298. *But see* Ilya Somin, *America's Weak Property Rights Are Harming Those Most in Need*, ATLANTIC (Mar. 24, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/weak-property-rights/608476/> [<https://perma.cc/A5WS-P65N>] (noting harmful effects of exclusionary zoning on poor, minority, and working class populations and potential for zoning to destroy more economic value than it may create).

299. For further discussion of the allocation of responsibility between community members and government actors, see *supra* notes 251-266 and accompanying text.

300. For further discussion of ineffectiveness of covenants as a governmental tool, see *supra* notes 282-289 and accompanying text.

301. *See* Candace Taylor, *Before Covid, Golf Club Communities Were in the Rough. Now They're Seeing Green.*, WALL STREET J. (Dec. 9, 2020), <https://www.wsj.com/articles/golf-club-communities-covid-11607528976> [<https://perma.cc/QGN2-8LLB>] (reporting surge in demand for residential golf club communities).

302. *Cf. Major Golf Developments in 2020*, NAT'L CLUB GOLFER (July 14, 2020), <https://www.nationalclubgolfer.com/news/major-golf-developments-in-2020/> [<https://perma.cc/4Z4P-ED>]3 (claiming golf "is becoming more popular all the time" despite challenges to industry).

and government at large can at least work together to ensure these legal tools bring benefit to the people as intended.³⁰³

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303. For further discussion of how ethical theories can guide governments in bringing benefit to communities, see *supra* notes 138-167 and accompanying text.

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