

BARBARIANS ON THE GREEN

By The Honorable Kevin Dugan

Early Monday morning on July 23, 1996, a work truck pulled off of Route 51 onto the north golf course in the Village of Raintree located in Charlotte, North Carolina. Three workers in orange reflective vests got out. One of the workers took orange cones off the truck while another began placing the cones in the street to block off one lane. Traffic going east would be slowed during rush hour, but that wasn't the workers' concern.

The driver of the truck started surveying the area. Their job was to get rid of the trees, shrubs, and grass growing between the 15th green and the 16th tee of the north golf course. Maybe he noticed the beauty of the large red oak, maybe not. Once the bulldozer arrived, the clearing would be done in a day. Then the real work would begin.

They were going to build a cell tower. This cell tower, however, would be more than a communications device. It would become a visible symbol of corporate arrogance, greed, and stupidity. It would be Charlotte's Tower of Babel.

The owners of the north and south golf courses, the homeowners in Raintree, had been locked in a 9 year legal battle with the course lessor and operator, Raintree Country Club, Inc. (RCC). One of the main issues was the homeowners' claim that RCC had more than 1000 playing members in violation of the rules (500 per course). RCC is a subsidiary of another wholly owned subsidiary of Club Corporation of America. Through various subsidiaries, Club Corp. is one of the largest operators of private golf courses in this country.

BellSouth Carolinas PCS had promised to pay a yearly rent to RCC to sublease the golf course property to build a cell tower. The homeowners, however, had warned that a cell tower could not be built on the property. For the promised yearly sum of \$35,000.00, RCC would eventually lose the lease to a property that was generating profits of somewhere between 1^{1/2} to 2 million dollars per year! Even at the lowest figure, just one year of profits would have exceeded 40 years of lease payments. That RCC would sublease golf course property for a cell tower in violation of its lease while locked in an on-going lawsuit about other purported lease violations is mystifying. At first glance, it seems to have been a case of greed overcoming all sense.

Of course it might have been just plain arrogance that drove the decision. The homeowners and their lawyers were irritating, but it is hard to believe that they could successfully fight RCC, Club Corp, BellSouth, and their teams of lawyers. RCC lawyers had been winning some of the preliminary rulings in the on-going legal battle and they might have felt that they could keep the steamroller going. Before it would all be over, however, RCC would stand evicted from the North

golf course, the driving range, the clubhouse, the parking area, the swimming pool and the tennis courts. BellSouth would be declared a trespasser on Raintree's property. The tower would fall.

In July 1996, Betsy Smith was President of the Homeowners Association. She was to receive a big surprise that Monday morning when she drove out of Raintree and saw the workers on the golf course. "I just couldn't believe that they were really there to put up a cell tower. I knew they had no right to do so and I had told them so; I was really angry. I immediately started calling our lawyers, the Zoning Commission, and anyone else I knew in City Government."

Someone had called Betsy in early 1996 from a corporation called Gearon & Co., Inc. Gearon identifies sites for BellSouth cell towers. In February 1996, Gearon had entered into an option and sublease agreement with RCC for some land on the golf course. The caller from Gearon told Betsy that they wanted permission from the homeowners to put up the tower. He wasn't going to get what he wanted from her. "I told him that we owned the golf course property and only golf activities are allowed. I also explained that Raintree is a PUD (planned unit development) and nothing can be built without approval of the Homeowner's Architectural Review Committee and he could be sure that they would never allow that. He seemed to listen and I never heard from him again. By summer, I figured they had passed on building the tower. I should have known better."

Gearon assigned its interest in the sublease to BellSouth in April 1996. What Betsy didn't know was that Gearon, RCC and BellSouth were quietly working to get a zoning variance. It was obvious that the homeowners would put up a fight if there were an attempt to get the golf course area rezoned. If they could get the tower up before the homeowners could react, the battle would be all but over. The trick, then, was to get official approval but keep the residents in the dark.

Instead of applying for a zoning change, which would require public hearings, Gearon made an application for an administrative approval. Such an application must have the agreement of the owner. Gearon represented that it had such approval, and RCC submitted the last page of a lease to show that it had the right to consent to Gearon's request. Keith MacVean, on behalf of the Planning Commission, gave approval to build the tower because it was a "minor" change in the zoning plan. He was not aware of all the facts, however, and he now admits that taking only the last page of the purported lease was "not a good idea." He felt like he got "caught in the middle."

Months after the tower was up and operating, the Zoning Board of Adjustment held a hearing that was hotly contested. Evidence revealed that, not only did

RCC fail to submit the portions of the lease which restricted non-golf activities on the golf course, but the one page that they did submit was not even part of the lease for the north course. Furthermore, when Gearon represented that it had the owners' approval to build the tower, it did not tell MacVean that the actual owners and their attorneys had adamantly refused to give such approval on several occasions. Additionally, a purported signature on the original application was not that of the individual represented. MacVean sounds rueful when he relates this story -- it is clear that the experience has made him more wary of such requests.

Despite RCC and BellSouth's ability to build the tower, they underestimated the reaction to their "done deed." Betsy Smith was not about to back down. She is a diminutive woman who speaks her mind. Her Quaker religion will not let her abide injustice. The fact that there was a Goliath to fight only invigorated her. "After I saw that we weren't going to be able to stop the tower from being built, I was a bit down. But I came to realize this was actually the best thing that could have happened as far as our battle with RCC was concerned. Thank God -- Man's greed and pride will work against him." At one point, Betsy put a homemade protest sign up at the entrance to the Village of Raintree that said - "WELCOME TO THE HOME OF THE BELLSOUTH LAND GRAB". A representative of BellSouth Mobility called to chastise her because he considered her action to be a "violent protest."

Betsy was not alone in the fight by any means. The Homeowners Association, through its Board, stood firm and directed its lawyers to begin proceedings to have the tower taken down. More importantly, residents and members of the golf club who previously had ignored the lawsuits began to understand what was at stake.

Most members and residents had not really been concerned about the on-going legal struggle. Periodically they would get information from one side or the other about their respective positions, but to be truthful it all seemed like a lawyer's dream -- endless litigation going nowhere. Raintree has two of the best courses in Charlotte and as long as the golf continued, most took no sides. The cell tower started to change attitudes.

Lewis Wolhar is a typical resident and golfer. "At first," he said, "I thought the original lawsuit wasn't going anywhere and I didn't pay much attention to it. I was irritated when the new club manager began closing the main dining room for outside functions, but the golf course improved and that was most important to me." The cell tower, however, was always there when you left the 15th and walked to the next tee. It was also there each time you drove by the

front entrance. Wolhar began to get miffed each time he saw it. "It wasn't a little thing, you know. It stood probably 150 feet tall, with a huge concrete bunker as a base. You could see it from a long distance. Worse, when the wind blew, the cable on it would flap against the pole, making a constant loud noise. It was hard enough to putt with that noise, I'm just glad I didn't live near it. After a while it just seemed like RCC was getting too greedy about everything." People started calling the tower "Beetle's Needle."

The club manager, Richard Beetle, had arrived in 1992, and he made positive changes to the north and south golf courses. But members began being shut out of parts of their own club as it was used more and more for outside functions. Beetle also began implementing new ways to get non-members on the course. He announced deals with the Tower club, the Town and Country Club, and other associations to allow non-members to play the course. There was a new category of senior golfers added. Then a "Waitlist" category was created -- these people were golfing while supposedly waiting. Also, a new guest policy was announced allowing 11 guests at a time. So, in essence, a non-member who obtained golf privileges through one of the associations could bring 11 other non-members with him. Without public announcement, golf privileges were also extended to area hotels. RCC was able to sell 80,000 rounds of golf in one year, an incredible number for a "private" club.

Even with two courses, good tee times became scarce. "It became bloody ridiculous," remembers English transplant Chris Ions. "Some week-ends your start time would be so late you couldn't very well finish. That's when I knew it couldn't go on like this." When people began complaining that RCC was exceeding the 1000 member limit, Beetle claimed that many so-called "members" did not count because they did not have unlimited access to play.

Richard Beetle was the fair-haired boy of Club Corp and has since been promoted. He could really squeeze the nickel, turn the profit. He had a certain courtly charm, which many found appealing, especially older ladies. Some were immune to his charm however. One unnamed woman referred to him as a , "sockless-gucci-loafer-lightened-hair-pink-shirt-gold jewelry type of guy." When rumors spread that they were planning to build a tower on the golf course, Beetle had to field a number of inquiries. Bob Cook was an officer in the men's golf association so he just asked Beetle about the rumor. "Richard told me that he thought it would look nice to have three flags flying, the U.S. flag, the State flag, and the club flag." Bob gives a little crooked smile when he relates that "All I could think at the time was `Damn, I didn't know we had a club flag.'"

Lee Weaver of WEAVER, BENNETT and BLAND, P.A., has represented Raintree Homeowners Association in virtually every lawsuit in which it has been involved. He knows more about the various leases, covenants, court judgments, and rules governing the common property than anyone else. Weaver looks like a huggable bear of a man, quiet and soft-spoken, with the air of a country lawyer. He is easy to underestimate due to his air of modesty. MacVean, of the Planning Commission, indirectly gave Weaver a great compliment when he noted that Raintree residents' ability to control development within the Village was "unusual." MacVean believes that is mainly due to the diligence that they have exercised in enforcing the covenants. In fact, Weaver's firm, in a landmark N.C. Supreme Court decision that arose out of Raintree, was successful in firmly establishing the right of local homeowners' review committees to enforce building standards they deem appropriate.

RCC, however, did not seem much impressed with Weaver. The hubris reflected by the erection of the tower seemed echoed by the attitude their lawyers took in the legal fight -- they definitely had a swagger to them. Weaver's younger partner, David Bland, likes to tell the story of the first settlement meeting they had with RCC attorneys. Both Bland and Weaver were at the meeting. In came attorneys from a large Charlotte law firm, the regional manager of RCC, and some attorneys from a big Dallas, Texas, firm that does a lot of work for Club Corp. Without much ado, the RCC attorneys let Weaver and Bland know that they were a huge firm with maybe 50 associates and no minor league two-man firm was going to beat them — they would litigate Weaver and Bland to death. There was no talk of settlement; it was more a demand of unconditional surrender. Bland just listened, he figured they were trying to intimidate them and that wasn't going to happen. He said, however, that Lee took great umbrage at their statements. "He kind of pulled himself up and said, 'I'll have you know we are a three-man law firm and we have just hired a new associate!' Weaver and Bland weren't going to quit this case now no matter what.

Shortly after the construction of the tower began, Weaver and Bland swung into action. They were initially successful in getting a temporary Stop Work Order. But that didn't stop anything. After the order was issued, Betsy Smith decided to check on the tower. She took her camera. When she pulled up and got out of her car, the workers on the ground went around the back of the base and she could not take their picture. There was one guy, however, who was literally stuck up a flagpole with nowhere to go. Her pictures were entered as exhibits in the various legal proceedings. That didn't stop the tower, however, for the wheels of justice grind slowly. The homeowners were told by City Council that it could not grant them any relief. They had to pursue legal action. More delay, more expense.

Although neither Bland nor Weaver says it, they must have been pretty discouraged at some point. Because Weaver knew many of the residents at Raintree, he had agreed to take the case at a reduced rate. Years later the rate had not changed, and most of the bill had not been paid. They possibly could get 10% of the value of any property that the homeowners regained in the future, however that was not looking promising. The time spent on all the related legal matters was well over 3000 hours. It was like the story of the tar baby; Weaver had put his hand in years ago, now it seemed as if they were totally stuck. And RCC kept pushing.

RCC knew what it was doing. When they had first gotten the notice of default in 1991 for exceeding the membership limits, there was a meeting with Dallas attorney, Jackson D. Wilson, II, the club manager, Patty Hulsebus, another club attorney, and the regional manager of Club Corp Northeast, Albert Martell. Betsy Smith refers to Wilson as the Cowboy Attorney. .Seven years after this meeting, Martell was to reveal the discussion in an affidavit filed in the North Carolina Court of Appeals. Martell said it was clearly known that RCC had been over the membership limit for years. At the meeting, Martell showed everyone the membership reports reflecting more than 1000 members. He recounted that "Wilson [said] the Homeowners Associations couldn't prove that we were in violation, and that we would simply deny the Homeowners' claims." Martell's statement is highly credible since RCC did continually deny they were in violation and failed to produce the membership list, even when ordered to do so by the Court. Bland expresses great frustration with tactics that he clearly considered to be dishonorable, although he is quick to say he doesn't blame the local attorneys whom he feels did not intentionally misrepresent facts. The Court did take the unusual step of imposing sanctions -- ordering RCC to pay \$1500.00 in attorney fees for not complying with the Courts' discovery order.

If you're fighting to keep a piece of property producing millions in profits, \$1500.00 is small potatoes. The longer RCC delayed and prolonged the litigation, the more the residents were burdened with attorney fees and costs. Predictably, there were residents and members who were frightened by it all. There were the usual doomsayers. Rumors were flying around about secret plans that Weaver had to take over the golf course himself, about "outrageous" attorney fees the homeowners would owe, and about possible assessments that could cause people to lose their homes. Even after the Supreme Court had ruled for the homeowners and RCC was about to finally be thrown out, there were still some people who wanted to keep them!

The tide began to turn at the Zoning Board hearing. Community anger had grown with the erection of the cell tower and residents appeared at the hearing in droves. David Bland led the charge. Bland is a graduate of Wake Forest Law School, class of 1978. He is 6'4" with the build of a swimmer or basketball player. His brown hair has a little gray, and his glasses lend him a quiet air. He listens intently and speaks only when ready. He is quickly analytical by nature. He is the primary civil litigator for the firm. He joined up with Weaver in 1984.

Bland's strategy was to attack the approval process by -showing: that the application signature was falsified; that BellSouth knew that the owners did not give their approval for the tower contrary to what the application indicated; and that placement of a cell tower on common area dedicated to golf was a major zoning change. The failure of RCC to abide by its lease was not really in issue since the Board only rules on zoning matters. After hearing witnesses and arguments, the Board ruled unanimously that the approval was defective because the cell tower and concrete base were "major and substantial changes...." To get approval, the parties would have to go through the rezoning process as required by law. Although BellSouth would keep the tower up as long as the appeals lasted, they never tried to get the subleased golf course property rezoned.

The homeowners finally had a victory after years of legal wrangling! The Homeowners Association put out a special newsletter announcing the good news. This ruling did not directly effect the original civil action regarding the alleged breach of the lease, but Bland and Weaver now had another basis for their claim — subleasing golf course property for non-golf activity. They filed an action for summary ejectment and it was consolidated with the original action, which had yet to reach trial. But the erection of the tower served to break the logjam. RCC could not hide the tower the way they had dragged their feet about producing other evidence. It was sitting there for all to see, and no lawyer's argument could change that.

On June 24, 1997, Judge Claude S. Sitton in Mecklenburg County Superior Court granted plaintiff's motion for partial summary judgment. He held that construction of the tower violated the restrictive covenants, the zoning rules, and RCC's lease. BellSouth was declared a trespasser on Raintree's property. He entered judgment for the homeowners and ordered that RCC be ejected from the premises. Defendants would appeal but a receiver was appointed to protect assets and profits. The defendants would lose their appeals of this decision.

On March 5, 1999, Richard Beetle finally packed up and left the club. A new corporation consisting of members moved in and began operation of the club. The members would also receive \$1,300,000.00 -- half of the profits identified during the receivership. One of the first things done was to suspend

membership sales until the membership limit was reached. All former associations created by RCC were terminated so non-members can no longer play the course except as bona fide guests. The main club area is now open to members on a regular basis.

But RCC has not yet left all of Raintree. Because the north and south courses had separate leases, the violation of the north course lease by itself was not a basis for ejecting RCC from the south course. RCC moved from the clubhouse facilities to a halfway house on the south course. It is a small structure big enough for two. There are two one-stall bathrooms in the back -- okay for a halfway house but not up to RCC's usual clubhouse standards. They tried to create a "cafe" area by putting lawn table and chairs by the halfway house, but the health inspector would not allow it. They were also prohibited from grilling food by the halfway house. The "pro shop" is an outside table under an umbrella. When Beetle and his people moved to the south course, he announced a plan where current members could join the south course for \$110 a month. Very few did so. Nonetheless, all members still ha access to the south course since RCC's "secret" plans to create a club are still in development.

In January 1999, the homeowners gave RCC notice of default with regard to the south course. The basis for the notice was that RCC's lease requires it to operate the south course in conjunction with the operation of the north course, which it obviously can't do. They had 60 days to cure the default. In March, RCC was served with summary ejection proceedings. But they refused to vacate. In fact, they had cut down almost an acre of trees to make a place to park equipment. Then, they widened the golf paths to use as roads for trucks and cars. In addition to the eviction proceedings, the homeowners obtained a temporary injunction to stop RCC from cutting down more trees and from building any structures. Further, RCC was ordered by a zoning inspector to cease and desist immediately from charging fees on the south course since it is a zoning violation. They continued to operate the course. Their continued intransigence has turned all but the most ardent supporters against them --the courses often vacant with the exception of homeowners who informally take to the course in a kind of quiet protest.

Was RCC's conduct at Raintree an anomaly created by a few misguided souls or was it consistent with the corporate culture as it exists in Club Corp and its subsidiaries? The answer to that question will take more study of other clubs under Club Corp's control. An article in the New York Times by Diana Henriques, however, revealed that Raintree is not the only club to complain. In June 1998, Ms. Henriques reported that 7 of Club Corp's 70 country clubs have generated lawsuits by members, homeowners, and a co-owner. That seems a high number for a corporation that espouses the platitude that the member is always right, and if he appears to be wrong, remember that he is always right..

Many of the complaints appear to deal with the alleged overselling of memberships. One affidavit completed for the plaintiffs in a California case was from Michelle Harrison, former Membership Director at Porter Valley Country Club. Harrison stated that she was told by the Club Corp manager to lie about the number of members because they had more than 700 even though 620 was the limit. She also was expected to keep selling memberships. Harrison was told to lie to the Board of Governors and never give them any documentation that showed the true number of members. She said the manager's order to lie was echoed at a training session of the Western Region of Club Corp by two Regional Vice Presidents. This behavior came from a corporation that proclaims "Member is King." Has the Club Corp culture morphed into an Orwellian world where profits give meaning to a clubcorp "newspeak" understood only by those inside this world?

Within a month after Beetle and RCC were evicted, workmen pulled up on the golf course area off of Route 51 by the now infamous cell tower. They were there to pull the tower down. There were no public ceremonies by those who had fought so hard to accomplish that goal. But everyone was aware. As residents turned into Raintree that evening, some pulled over to observe. Some even walked closer to see better, to stand close and witness. Ironically, some of the workers were the same ones who had put the tower up in the first place. Betsy Smith called many of the people who had worked for years to hold RCC, BellSouth, and Club Corp accountable for their actions. David Bland had a great feeling of satisfaction -- rarely is there such a visible symbol of victory and justice. Smith presented Weaver with a replica of the tower with a cowboy sitting on top, impaled by its point. There is talk of putting a plaque up to memorialize the former tower site, but right now there is just grass where the concrete bunker and tower stood. The large red oak was not replaced.

ADDENDUM — In September 1999, The parties settled the remaining disputes and the south course returned to the control of the homeowners. The parties will not reveal the terms of the settlement but say that the dispute was resolved to the mutual agreement of all parties.