

Question: Whether restrictions and covenants set forth in a recorded developer agreement between the city and a developer remain in force despite the sale of the property through the tax foreclosure procedure set forth in Chapter 75, Wis. Stats.

Answer: The restrictions and covenants in the developer agreement survive the tax foreclosure and remain in full force and effect.

Factual background: The City of Waukesha and Donald Kilps entered into a development agreement on or about January 29, 1976, for the development of a subdivision known as Grandview Square. Paragraph 5 of the agreement states that all areas designated "green areas" on the preliminary plat are intended to be maintained as common open space, accessible to all residents of the subdivision. The recorded documents also indicate that all provisions of the agreement are a "part of the zoning regulations" of the city.

The areas designated green areas in the development are under the control of a single homeowners association which the developer was required to establish. Grandview Square Homeowners Association, Inc., was registered on October 19, 1977, by the developer. The corporation was involuntarily dissolved on November 19, 1983. There is no reason to believe that a successor homeowners association has ever been formed.

Outlot 1, an area of green space within the subdivision, was foreclosed upon in June 1984 by the County for failure to pay real estate taxes. The property was eventually purchased by William Brennan who currently proposes to improve Outlot 1 with a single family residence.

Applicable law: Section 75.14(4), Wis. Stats., addresses the effect of a tax foreclosure upon existing restrictions and covenants. Valid and enforceable restrictions and covenants running with the land survive tax foreclosure and are enforceable thereafter. This section applies to "usual restriction and covenants limiting the use of property, the type, character and locations of buildings..." The restrictions as to use set forth in the recorded developer's agreement in this matter are therefore valid and enforceable against subsequent purchasers.

There is a procedure set forth in city ordinance, section 22.52(6) for changing or making additions to a developers agreement in a planned unit development overlay district such as Grandview Square. As the owner of Outlot 1, Mr. Brennan can request a change to the developer agreement. Upon a request submitted, both Plan Commission and Common Council must review and approve a substantial alteration to the agreement. The standards and findings required in subsection (4) must be considered in any determination to change the agreement. As to residential PUD's, one finding that must be made is whether there is adequate consideration provided for the permanent preservation of open space areas. In addition, the council would have to find that such changes are necessary to comply with the overall purpose of Chapter 22 as well as sec. 62.23(7)(b), Wis. Stats., which authorizes the planned development districts.

Given the history of the subdivision and the authority of the city to require changes to the agreement, this ordinance seems to provide an avenue for the owner to obtain a change to the agreement that would allow his proposed construction. It might also provide an avenue for the city to require the subdivision residents to abide by the terms of the agreement, i.e. create the homeowners association and obtain title to the open space if they want to retain the benefits of the agreement.

The current owner may also have a viable civil action against all current residents of the subdivision based on breach of covenant. Where there is abandonment of the original plan contained in a covenant, courts may decide not to enforce the covenant where the character of the situation has changed so that it is not possible to accomplish the purposes intended by the covenant. The change may result from the failure of property owners to observe or comply with the terms of the covenant. See, *Ward v. Prospect Manor Corp.*, 188 Wis. 534 (1926) and *Pietrowski v. DuFrane*, 247 Wis. 2d 232, 634 N.W.2d 109 (Ct. App. 2001).

In conclusion, if the property owner seeks a change to the agreement pursuant to 22.52(6), the request probably has to be heard by Plan Commission and the Common Council. I believe that the owner desires to do so. On the other hand, the property owner has a civil suit to pursue if not successful.