



ATTORNEYS AT LAW

GATES WISE SCHLOSSER & GOEBEL

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MEMO

To: Trevi Gardens Homeowners Association

From: Bradley B. Wilson
Gates Wise Schlosser & Goebel

Re: Trevi Gardens Fifth Addition P.U.D. Condominium Zoning & Private Streets

Date: February 3, 2023

BACKGROUND

Trevi Gardens is governed by the Declaration of Covenants, Conditions, Restrictions and By-laws for Trevi Gardens Homeowners Association (hereinafter referred to as the "HOA Covenants"). Contained within the HOA Covenants are the By-Laws of the Trevi Gardens Homeowners Association (hereinafter referred to as the "HOA By-Laws"). Article III of the HOA By-Laws provides for the creation of a Board of Directors to govern the affairs of the Trevi Gardens Homeowners Association (hereinafter referred to as the "HOA"). Pursuant to Article III of the HOA By-Laws, such a Board of Directors (hereinafter referred to as "the HOA Board") has been established.

Within Trevi Gardens there is the Trevi Gardens Fifth Addition P.U.D. Condominium Development (hereinafter referred to as "the Condo Development"). The Unit Owners in the Condo Development are members of the Lots 20 & 21 Trevi Gardens Fifth Addition P.U.D. Condominium Association (hereinafter referred to as the "Condo Association"). The Condo Development is governed by the Declaration of Condominium Ownership Lots 20&21, Trevi Garden Fifth Addition P.U.D. Condominium (hereinafter referred to as "the Condo Declaration"). Under Section 5 of the Condo Declaration the members of the Condo Association were to elect a Board of Directors (hereinafter referred to as the "Condo Board") to govern the affairs of the Condo Development. However, such a board has not been established.

Portions of Messina Drive, Resina Drive and Argenta Drive are located within the boundaries of the Condo Development. (Such portions of Messina Drive, Resina Drive and Argenta Drive are hereinafter collectively referred to as the "Condo Streets"). The Condo Streets are "private streets" and, as a result, are not maintained by the City of Springfield. Under Section 1(f) of the Condo Declaration, the Condo Association is responsible for the maintenance and repair of the Condo Streets. Similarly, Article VI, Section 1(a) of the Condo Association By-Laws (hereinafter referred

to as the "Condo By-Laws") identifies "Operation, care, upkeep, maintenance, replacement and improvement of the Common Elements" as one of the duties of the Condo Board.

The HOA has requested that I address the following questions which have arisen as a result of the above facts. Those questions, and my respective answers thereto, are set forth below.

DISCUSSION

Question: Are the Covenants for Trevi Gardens and the separate set of Covenants for the 5th Additional still active and valid? Or have they somehow expired?

Response: Though the copy the HOA Declaration provided to me lacks a file stamp showing that it was recorded with the Sangamon County Recorder's Office, it is my understanding that the document was, in fact, properly recorded. The copy of the Condo Declaration provided to me contains a file stamp indicating that it was recorded with the Sangamon County Recorder's Office on November 15, 1993 as Document No. 93-93-50928.

Article XII, Section 3 of the HOA Declaration states:

Article XII, Section 3. Perpetuities. If any covenants, conditions, restrictions or other provisions of this Declaration shall be unlawful, void or voidable for violation of the rule against perpetuities, then such provisions shall continue only until twenty-one (21) years after the death of the last survivor of the now living descendants of Mrs. Lillian Carter, mother of former President Jimmy Carter.

Section 25 of the Condo Declaration states:

25. PERPETUITIES AND OTHER RULES OF PROPERTY. If any of the options, privileges, covenants or rights created by this Declaration would otherwise violate (a) the rule against perpetuities or some analagous statutory provision, or (b) any other statuary or common law rules imposing time limits, than such provisions shall continue only until twenty-one (21) years after the death of the survivor of the now living lawful descendants of the incumbent Mayor of the City of Springfield and the incumbent President of the Untied States.

According the above provisions, both the HOA Declaration and the Condo Declaration are still in effect.

Question: If the 5th Additional Covenants are still active and valid, can they be terminated and by what process?

Response: Section 22 of the Condo Declaration, in pertinent part, states:

22. AMENDMENT. The provisions of this Declaration may be ... **rescinded** by an instrument in writing setting forthrescision, signed by the Unit Owners having at least three-fourths (3/4ths) of the total vote and certified by the secretary of the Board; provided, however, that all lien holders of record have been notified by certified mail of such.... rescission, and an affidavit by said secretary certifying to such mailing is a part of such instrument.

Under the above provision, the Condo Unit owners can rescind, or terminate, the Declaration by 3/4ths vote. However, in order for the rescission to be effective, the secretary of the Board of Directors of the Condo Association must: 1) certify the writing instrument rescinding the Declaration; and, 2) sign an affidavit certifying that all lien holders have been properly notified of the rescission of the Condo Declaration. As noted above, the Condo Association has not established a Board of Directors. Therefore, there is no secretary who can perform these obligations. Thus, before the Condo Association could rescind the Condo Declaration, it would first have to establish a Board of Directors. Pursuant to Article IV, Section 2 of the Condo By-Laws, members of the Board were to be appointed by the Declarant, Dual Development Company II. However, it appears that did not occur. Given the passage of time since the recording of the Declaration, it appears that a meeting of the members of the Condo Association would have to be held, during which they could elect a Board of Directors as provided for in Article IV, Section 2 of the Condo By-Laws. Once a Board of Directors is established, the members of the Board would then elect a secretary. Provided that the Condo Association and its Board of Directors follows the procedures set forth in the Condo Declaration and Condo By-Laws, there is nothing inherently improper about creating a Board of Directors for the sole purpose of terminating the Declaration.

Question: Does the 5th Addition area (Argenta Drive, Resina Drive and Messina Drive) discontinue being zoned as a Condominium Association if the 5th Addition Covenants are terminated?

Response: The Condo Development a/k/a “the 5th Addition area” is not zoned as a “Condominium Association”. All of Trevi Gardens, including the Condo Development, is zoned as a Planned Unit Development or “PUD”. A rescission of the Condo Declaration would not alter this zoning classification. A change in the Condo Development’s zoning classification would have to be approved by the City of Springfield via its established process. Given that, by their nature, PUDs may be developed in a manner that does not comply with restrictions applicable to the more “traditional” classifications established in the City of Springfield’s Code of Ordinances, it is unknown whether the City of Springfield would approve a petition seeking the reclassification of Trevi Gardens and/or the Condo Development.

Question: Does the 5th Addition area discontinue being private streets if the 5th Addition Covenants are terminated?

Response: No. In order for Messina Drive, Resina Drive and Argenta Drive to cease being private streets, ownership of those streets would have to be transferred to the City of Springfield.

It is unlikely that the City of Springfield would accept ownership of Messina Drive, Resina Drive and Argenta Drive. Included in the information provided is a 2015 letter from TJ Heavisides, the Development Engineer for the City of Springfield, written in response to a previous request to transfer ownership of Messina Drive, Resina Drive and Argenta Drive to the City. In his response, Mr. Heavisides makes clear that the City would not accept ownership of Messina Drive, Resina Drive and Argenta Drive and "ownership of said streets are to remain under private jurisdiction."

Question: What would the 5th Addition area need to do to end the "private street" and condominium designations?

Response: As noted above, a change in the Condo Development's current PUD zoning classification would have to be approved by the City of Springfield via its established process. In order for Messina Drive, Resina Drive and Argenta Drive to cease being private streets, ownership of those streets would have to be transferred to the City of Springfield.