

Freedom Matters

A Weekly Newsletter

Dane County, Wisconsin

Vol. 2, No. 6

Friday, Feb. 8, 2002

We are a free people in a republic, under a constitution which limits the powers of government to those necessary to secure the unalienable rights of each person to their life, liberty and property. Yet, when a legislature is in session, no one's life, liberty or property is safe. It's the curse of a democracy. That's why we have a republic instead. *Freedom Matters* dedicates itself to the fight to restore our republic. Most of the press and courts fail to do so. They've forgotten that freedom matters.

The Case Against County Exercise of Zoning Powers via Deed Restrictions

by Bob Bowman

I argue that Dane County commits fatal actions, to try to zone via deed restrictions.

The Wisconsin Supreme Court said, in Zupancic: "... we caution that ... [zoning involving deed restrictions] ... might well lead to an ... [action] ... which might be fatal. ... Where the imposition of conditions on land development is desirable, it might better be done by uniform ordinances providing for special uses, special exception and overlaid districts. As stated in Cutler: 'Conditions imposed in such cases have a sounder legal basis because guidelines for their imposition are spelled out in the ordinance.'

That decision adds: "... the ordinance is void because a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers."

Fatality by Poetic Justice: Deed restrictions imposed via the Dane County zoning ordinance are at once repealed by that ordinance. How? The deed restrictions contain the following repeal clause: "A rezone of the property to a different zoning district shall also act to repeal the covenant controls." The deed restriction becomes effective when recorded. But, by the terms of the ordinance [10.255(3)(a)2], the rezone does not become effective until after the deed restriction was recorded. Thus, the repeal clause is in effect when the property is rezoned by the same ordinance amendment that required the deed restriction, thereby repealing that restriction.

This is not a rezone in exchange for a deed restriction. It is conditional zoning. Filing the required deed restriction meets the condition. However, by the terms of the condition, the rezone that it triggers acts at once to repeal the deed restriction. What a twist of poetic justice.

Fatalities of Illegality: I submit that covenant control through deed restrictions is illegal as an

exercise of county land use planning and zoning powers on each of the following counts:

(1) it violates the statutory mandate [s. 59.69(4)] to zone only through an ordinance, which mandate prohibits the county from empowering zoning via any means other than ordinance;

(2) it surrenders or inhibits the legislative power of the county to zone, since legislation does not serve either to enact or to repeal the common law empowerment of deed restrictions;

(3) it violates town-county shared governance [s. 59.69(e)(5) & (6)] since it subverts the statutory mandate that towns vote collectively on zoning regulations (i.e., the county is imposing regulatory deed restrictions via rezone ordinances, on which only one town votes);

(4) it applies arbitrary regulatory zoning, whim by whim, parcel by parcel, and hence not uniformly, thereby violating the uniformity clause of the statutes [s. 59.69(4)];

(5) it thus violates a landowner's constitutional right to due process and equal protection of the laws;

(6) it surrenders or inhibits the legislative power of town and county on land use policies;

(7) it surrenders the discretionary authority of the county to enforce zoning, because the county ordinance, via its required deed restrictions, confers that discretionary authority on landowners and towns;

(8) it gives property rights to neighbors by requiring the covenant to confer the enforcement rights on the basis of property ownership and "in consideration of the mutual benefits passing to and from the owner and ... the parties named as beneficiaries of these restrictions"; but those property rights conferred on the neighbors may thereby inhibit county zoning powers; and

(9) it is in excess or abuse of county authority to act in some or all of these eight foregoing ways.

Let us follow the Supreme Court's advice and decisions. Let us stop this practice of trying to zone via deed restrictions.

To govern illegally is tyranny. It is corrupt. And, as the Court said, ultimately, it is fatal.

Readers' Bulletin Board. e-mail us your comments. Include your name, for publication by *Freedom Matters*

*** Published by Freedom Matters, Inc., Cross Plains, WI. 53528. Michael Byrne, Editor***
To subscribe or unsubscribe, e-mail to rebshar@chorus.net, or call call Bob at (608) 831-6653.
Our e-mail subscriber list is confidential. We will not sell it or reveal it.

Back Issues of Freedom Matters are available on request, as e-mail.