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July 11, 2016

Ms. Lisa Von Bargen, Director
Community Planning and Development
City of Valdez
P. O. Box 307
Valdez, Alaska 99686

Re: Are Subdivision Covenants Enforceable as Municipal Zoning
Requirements?
Our File No. 157-1

Dear Ms. Von Bargen:

You have asked me on short notice to provide you with an answer to the above question, by your e-mail of July 8, 2016.

The apparent situation is this: A landowner is providing one or more rental cabins on his lot, located in an area of the City that permits such a use as a conditional use. However, the subdivision covenants that apply to the subdivision in question (by the implied consent of all landowners within this subdivision) prohibit rental cabins as an allowable use of the land within that subdivision.

The landowner in question has applied for the needed Conditional Use Permit for the rental cabin or cabins. A subdivision homeowner has requested that the City Planning and Zoning Commission deny the Conditional Use Permit application, on the basis of the prohibition against rental cabins that is contained in the subdivision covenants.

The question is whether the Planning and Zoning Commission may lawfully deny the Conditional Use Application on the basis of the prohibition contained in the subdivision covenants?

The short answer to this question is: No; the Planning and Zoning Commission may not lawfully do so.

There are two related reasons for reaching this conclusion. First, the City of Valdez has adopted a comprehensive planning and zoning code. Among the elements of this code is a provision allowing rental cabins in certain residentially-zoned areas, so long as a conditional use permit is applied for and obtained from the Planning and Zoning Commission.

If the subdivision covenant prohibition against rental cabins were to be recognized by the Commission as a valid reason to deny a Conditional Use Permit where one was otherwise allowable under the Code, the Commission would be in effect acting to recognize that a private contract has the effect of "amending" the duly-adopted provisions of the Valdez Municipal Code. Were this to occur, it would have potentially serious negative implications as to the role of the elected members of the Valdez City Council, who have the authority and duty to establish the building and zoning codes of the City through duly-enacted ordinances, after public notice and hearing.

If the Planning and Zoning Commission were to use the subdivision covenant prohibition as a reason to deny a Conditional Use Permit application, this would in effect be an *ad hoc* "amendment" of the City Code to "prohibit" a use that the enacted Code clearly allows.

The second, related reason that the Planning and Zoning Commission should not use the subdivision covenant as the reason to deny a Conditional Use Permit application is that subdivision covenants are, by their very nature, a private contract between all subdivision lot owners, with requirements and benefits that apply to all of those lot owners. The City of Valdez is not legally a party to that private subdivision contract, and it thus has no legal right or obligation to enforce its terms on any of the parties to that contract. This lack of any legal right would extend to "incorporating" a provision of the covenants as a requirement or prohibition of the municipal zoning code.

Even in a situation where a new subdivision applies for and receives municipal approval on condition that the lot owners adopt a body of protective subdivision covenants to enhance and maintain the living standards of the subdivision, the City would not be a party bound by any provisions that might be adopted by the subdivision's residents to meet this requirement.

Because subdivision covenants are a type of contract mutually accepted and agreed to by the residents as a condition of subdivision lot ownership, the only avenues for enforcement of this contract against an "offending" lot owner are by litigation, arbitration, or mediation. The subdivision covenants themselves (which I have not reviewed) may specify how disputes are to be resolved, but the City of Valdez has no role in this.

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Your enquiry also raised the question of a possible situation (not found here) where the subdivision covenants specify that a local government entity such as the Planning and Zoning Commission could enforce the covenants' land-use controls. Would this permit the Planning and Zoning Commission to prohibit rental cabins where the covenants prohibited them, but the City Code allowed them? I would also have trouble with this, for the reasons stated above. To carry out this possible covenant provision, the Commission would either have to be a legal party to the covenant contract, or would have to specifically accept this delegated duty; *i. e.*, it would need to agree to be substituted for a court or other decision-making body that would normally carry out such a duty.

A related issue, which was not raised by your inquiry, is whether the subdivision covenants could in effect "delegate" to the Planning and Zoning Commission the authority to set certain standards for the subdivision, through the general planning and zoning laws that are applicable city-wide. This would eliminate the need for the covenants to go into detail on these subjects. I see no problem if the subdivision lot owners would agree to a covenant provision like this, thus giving the Commission the authority to set applicable standards for a particular subdivision through requirements that apply to all subdivisions under the general planning and zoning laws.

It goes without saying that subdivision covenants may not legally set enforceable standards at a level lower than the standards applicable to the community generally, under the enacted planning and zoning ordinances. A subdivision covenant such as this would tie the subdivision to a level of standards that is no higher than in the community generally. If that is what the subdivision residents want, they could agree to this standard in their covenants. In such a case, any enforcement of these covenant provisions would be, in actuality, the enforcement by the Commission of existing requirements set by ordinance. If the Commission acted to enforce existing ordinances, it would not be "enforcing" the covenants but the ordinances instead; the fact that the covenants were identical in their terms to the ordinances would simply be a coincidence.

I hope that this letter responds adequately to the questions that you raised in your e-mail to me of July 8, 2016. If it does not, please let me know.

Sincerely yours,



Thomas E. Meacham