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Wisconsin Appeals Court Accepts Master Planned Community Regimes

A new decision from Wisconsin's Court of Appeals adopts the concept of a master planned community that is made up of a series of condominiums, common areas, amenities and other parcels, and specifically rules that the control turnover provision of one such project is enforceable. The court rejected the notion that such a master planned community falls under our condominium law's provisions for control turnover, which would put a three- or ten-year limit on developer control. Perhaps the most unusual part of the decision is the court's acceptance of the master planned community framework despite the fact that Wisconsin has not yet adopted a law on the subject. The decision, *Solowicz v. Forward Geneva National*, 2008AP10 (Wis. 5-13-2008), 754 N.W.2d 853, is recommended for publication. It was issued on December 23.

The decision concerns Geneva National, which is a 1,600-acre development in Walworth County including many condominiums and also non-condominium amenities and parcels, all built under a master plan.

Geneva National has several governing bodies. The condominiums are governed by one master condominium association. The Geneva National Trust "was established to preserve and maintain the natural environment within the property [to] preside over the Architectural Review Committee" and to enforce architectural standards. The Geneva National Community Association manages and maintains roads, utilities and other property common to the entire development and land within Geneva National that is not included in the condominiums. The Community Association was created by the master declaration which set up the governance structure, use restrictions and other rights and development structure, known as the Community Declaration.

The lawsuit was about Article IX of the Community Declaration, which reserves developer control over certain actions of the Community Association and Trust boards prior to conveyance of 85% of the maximum number of units that may be designated for single family and multi-family residences. Several condominium unit owners sued to remove Article IX, which would have given them immediate control over the entire community, including land slated to become new condos but not yet declared and built. Their original claim was that all of Geneva National was an expandable condominium and that the 10-year control period for an

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expandable condo had expired. They later modified their claim to be that, even if the entire project was not a condominium, Article IX was an unreasonable burden on the property and thus void.

The Court of Appeals affirmed the trial court's rejection of the unit owners' claims. It held that Geneva National is a master planned community, not one condominium. The court said

> "[w]e agree that master-planned communities are an entirely different type and level of development than condominiums." Based on a model law and statutes adopted in other states concerning master planned communities, the court said: ¶24 Geneva National fits the definition of a master-planned community and its scope goes beyond a condominium venture. Geneva National has a master plan (the Restrictive Covenant) that guides the development of 1600 acres of land into the Developer's vision--a distinct golf and leisure community. And the Covenant's restrictions, preserving the natural environment and maintaining a cohesive community through architectural standards, in concert with its golf courses and other leisure offerings, create this community. The community's inhabitants have a common interest in those offerings, and potential buyers who dislike the balance of amenities and restrictions, need not purchase property within the community.

The court specifically held that our condominium law does not govern the structure of such a master planned community.

The court went further, finding that Article IX was a reasonable control provision. Relying largely on information supplied in the *amicus curiae* brief we filed, the court found that the Article IX control provision tracked very well with a model law adopted by the National Conference of Commissioners on Uniform State Laws, which is known as the Uniform Common Interest Ownership Act.

In such a large development, the court said, a fixed 10-year limitation on developer control would be unworkable. The court found reasonable the Article IX provision that the developer will turn over control after conveyance of 85% of the maximum number of residential units. Further, it said, the unit owners had bought into the project with the governance structure fully disclosed and could not now ask the court to intervene to change that structure:

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> Here, in the circuit court's words, Solowicz bought-in with his "eyes wide open." If Solowicz is now opposed to how the Developer maintains this unique community, if he now dislikes the Developer's power to amend the Covenant and make capital improvements so as to realize the fruits of its investment, then his remedy is to sell his condominium to end the contract. We will not void an entire method of community development because a few condominium owners have formed their own ideas about what the future of planned communities should be. Nor will we make a public policy decision to limit this type of development when the Covenant complies with contract principles and provides clear and specific standards that follow the policy of the Uniform Act and the RESTATEMENT. Therefore, we affirm the circuit court's grant of summary judgment for the Developer.

This decision is important for the State of Wisconsin because it gives a clear road map for development of projects that will contain a number of condominiums and other amenities and related commercial property. As our client's brief said:

> Geneva National is a model for large-scale investment in Wisconsin's vital tourism and recreation industries. A reversal might dampen the prospects for additional investment in Wisconsin real estate and could be a warning to developers and lenders to take their large-scale projects to other states instead.

We recognize that there are disagreements at this particular project over assessments and other planning decisions. Reinhart and its client took no position on those issues and filed a “friend of the court" brief only on the public policy issue of master planned communities. What is very useful about this decision is the public policy the court adopted in approving, rather than curtailing this type of development structure.

J. Bushnell Nielsen is a Shareholder at Reinhart Boerner Van Deuren s.c. in the Waukesha office. Mr. Nielsen served as counsel for *amicus curiae* (friend of the court) Wisconsin REALTORS® Association in the *Solowicz* appeal discussed in this article.

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