

CITY OF MADISON  
**CITY ATTORNEY'S OFFICE**  
Room 401, CCB  
266.4511

**MEMORANDUM**

TO: Kevin Briski, Parks Division Superintendent  
Steven Cover, Director, Department of Planning & Community &  
Economic Development

FROM: Doran Viste, Assistant City Attorney

DATE: January 20, 2012

RE: Breese Stevens Athletic Field

I was asked to review the deed for Breese Stevens Athletic Field (the "Field") and to determine the legal restrictions imposed upon the City by the restrictive covenant contained therein. After further review by the City Attorney's Office of the deed, an investigation into the heirs of the grantors, and an examination of the law on the issue, it is the City Attorney's Office's opinion that the restrictive covenant is not legally enforceable.<sup>1</sup> However, whether and to what degree the City disregards this restrictive covenant is a policy matter best left to other decision makers.

*The Breese Stevens Family*

Based upon research conducted by the City Attorney's Office, we have determined that there are no more living direct lineal heirs of Breese Stevens.<sup>2</sup>

Breese Jacob Stevens was born in New York in 1834 and eventually moved to Madison where he was a prominent lawyer, University of Wisconsin Regent in 1881, City Mayor in 1884, curator of the State Historical Society, and local businessman. His first wife, Emma Curtiss Fuller, died on September 18, 1870 as a result of complications that arose during the birth of their only child, Amelia Emma Fuller Stevens on September 12, 1870. Breese Stevens remarried Mary Elizabeth Farmer (Stevens) on October 25, 1876 and they later had one daughter, Helen Elizabeth Breese Stevens (b. December 13, 1878). Breese Stevens died in 1903, leaving his wife and two daughters as his heirs. He did have surviving brothers and sisters, and numerous nieces and nephews, although it appears they all continued to reside in New York and New Jersey.

Breese Stevens' widow, Mary Elizabeth Farmer Stevens (M. Elizabeth Stevens), subsequently died in 1925, leaving her daughter and step-daughter as heirs.

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<sup>1</sup> This conclusion is conditioned upon the unlikely discovery of an unknown and undiscovered direct lineal heir of either of the grantors or the application of the "general plan or scheme" doctrine as described further in this memo.

<sup>2</sup> The City Attorney's Office reviewed the records of the State Historical Society, the Wisconsin State Journal, cemetery records, and other public records in its search for the direct lineal heirs of Breese Stevens. It is possible, although unlikely, that an unknown heir exists, although no such suggestion exists in the public records.

Breese Stevens' oldest daughter Amelia Stevens does not appear to have ever married, nor had any children. She died in 1961, apparently without any direct heirs.

Breese Stevens' youngest daughter Helen Elizabeth Breese Stevens married Dr. Reginald H. Jackson, Sr., on June 4, 1908. Dr. Reginald H. Jackson, Sr. was the son of prominent Madison and Wisconsin physician Dr. James Jackson. Elizabeth and Reginald had one son, Dr. Reginald H. Jackson, Jr. (b. May 15, 1909). Elizabeth Stevens (Jackson) died on December 1, 1957, following her husband's death on September 7, 1939. Her son, the last living direct heir of Breese Stevens, died on March 13, 1986. Dr. Jackson, Jr. never married and never had any children, leaving no direct heirs.

Based upon a review of these records, it does not appear that there are any living heirs of Breese Stevens or his daughters. While it is possible there could be some unknown direct lineal heir (e.g., given the cultural times in question an "illegitimate" or disabled child that was not publicly acknowledged), none are known to the City at this time and none has come forward or been made known over the last century, making such a possibility remote at best.

#### *History of the Acquisition and Restrictive Covenant*

In 1923, the City entered into a land contract with Breese Stevens' surviving spouse (M. Elizabeth Stevens) and his two surviving children, Amelia F. Stevens and Elizabeth Stevens Jackson, for the purchase of Block 159 in the Original Plat of Madison so that the City could build an athletic field at that location. This land contract (executed on November 10, 1923 and recorded on November 21, 1923, Vol. 62 of Misc. Records at p. 256, Doc. 429613) required the City to pay a total of \$35,000 to acquire the property (equivalent to roughly \$460,000 today). In addition to the terms regarding payment and maintenance of the stadium, an express condition of the land contract was that "said block shall forever be known and designated as the 'Breese Stevens Athletic Field', and that said premises shall never be used for any other purpose than that of an athletic field." The Common Council and the City accepted these terms of the land contract.

On December 1, 1936, Amelia Stevens and Elizabeth Stevens Jackson deeded Block 159 to the City of Madison in satisfaction of the land contract, acknowledging full payment of the \$35,000. By this time, M. Elizabeth Stevens had passed away, leaving the two daughters as Breese Stevens' sole living direct heirs. As part of this warranty deed (recorded on December 14, 1936 in Vol. 379 of Deeds at p. 171, Doc. 591365) the grantors imposed a restrictive covenant upon the City's use of the land, specifically that

It is understood and agreed, as a condition of this agreement and as part of the consideration thereof, that said block shall forever be known and designated as the "Breese Stevens Athletic Field," and that said premises shall never be used for any other purpose than that of an athletic field.

The deed itself is silent as to who has the authority to enforce this restrictive covenant, how the restrictive covenant may be enforced, and the consequences of a breach of the

covenant. Of note, the deed does not include a reversionary clause that would cause the property to revert back to the grantor, or their heirs/beneficiaries/designees in the event of a breach, and in fact makes no mention of the heirs of the grantors having any rights.

### *Review of State Law*

Because the City's acquisition of the Field was a purchase, and not a gift or dedication, there are no State laws regarding the enforcement or lifting of the restrictive covenant.

Under Wis. Const. Art. XI, Sec. 3a, if a City accepts a gift or dedication of land made with the condition that the land be devoted to a special purpose and the condition subsequently becomes impossible or impractical, the City may, upon a 2/3 vote of the Council, either grant the land back to the grantors or accept a waiver of the conditions from the grantor, or petition a court to lift the condition. This provision was codified as Wis. Stat. Sec. 66.1025. However, these provisions only apply to land acquired "by gift or dedication." The City's acquisition of the Field was by purchase, the full purchase price of \$35,000 being acknowledged by the grantors in the deed. While it is practically impossible to say in 2012 whether this price was the fair market value of the property in 1923, there is no indication in the record that this acquisition was in any way considered by the parties to be a gift or dedication. Therefore, it is my conclusion that State law does not control whether the restrictive covenant is enforceable, nor does it proscribe a procedure the City must follow to lift these conditions.

### *Enforceability of the Restrictive Covenant*

Because State law does not control, the question of whether the restrictive covenant is enforceable is a matter of common law. Under the common law, a restrictive covenant creates an enforceable contract or agreement between the grantor and the grantee for the benefit of a specified, or possibly unspecified, party or property. However, only those parties who are in privity of estate with the grantor or beneficiary may enforce the terms of a restrictive covenant.

Looking at the deed for the Field, the deed creates an enforceable agreement only between Amelia F. Stevens and Elizabeth Stevens Jackson as grantors, along with their direct heirs<sup>3</sup>, and the City of Madison as grantee. The deed does not create any third party beneficiaries, i.e. it does not state that the agreement is made for the benefit of the citizens of Madison or is enforceable by any property owner in the properties adjacent to

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<sup>3</sup> While not expressly stated in the deed, it is well established that the use of the words "heirs and assigns" is not necessary to create an equitable servitude which will pass with the land, although such use is an indication of the intent of the grantor. See Clark v. Guy Drews Post of American Legion, 247 Wis. 48, 53 (Wis. 1945). For enforcement of the terms of the restrictive covenant and analysis of privity of estate, I believe that the only heirs relevant are direct lineal heirs (i.e., children and grandchildren). I am not aware of any case law that would give a non-lineal relative (e.g. sibling, cousin, second cousin, uncle, aunt, etc.) any right to claim privity of estate and therefore the power to enforce an agreement where such authority is not expressly given. In this case, where no express right is even given to the heirs, I think that equity would side in the City's favor against said enforcement since it appears that the intent of the grantors was to honor their father Breese Stevens as his survivors. Accordingly, I think even if the grantors' heirs can be said to have privity of estate with the City and the right to enforce the restrictive covenant, I believe that this right can only be said to have extended to those who were descended from Breese Stevens.

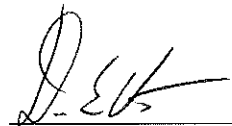
the Field. In this case, silence as to any third party beneficiary means that no such right was created.<sup>4</sup>

As no third party right to enforce the restrictive covenant was created, the only parties who ever had a right to enforce the terms of the restrictive covenant were the grantors and their direct heirs. As noted above, the grantors now have no surviving direct heirs, Amelia dying in 1961 without any children or a spouse, and Elizabeth's sole child dying in 1986 also without any children. Therefore, given these unusual facts, there are no longer any parties alive who have the power to enforce the terms of the restrictive covenant against the City. As a result, the City cannot be subject to a suit for specific performance should it either rename Breese Stevens Athletic Field or allow non-athletic use of the Field. In effect, subject to the unlikely scenarios set forth elsewhere in this memo, the restrictive covenant is no longer enforceable against the City.

### *Conclusion*

Based upon an extensive review of the records relating to this matter, and an examination of Wisconsin law, it is my conclusion that the City may proceed to allow non-athletic uses of Breese Stevens Athletic Field, or even rename the facility, without any legal repercussions as there is no one alive who has the power to enforce the terms of this restrictive covenant against the City. However, I would caution that while the City may disregard the restrictive covenant without legal consequences, there may be policy reasons why the covenant should be followed. Such determinations are best made elsewhere than the City Attorney's Office.

Let me know if you have any questions or comments.



Doran Viste

cc: Ald. Maniaci  
Mayor Soglin  
City Attorney May

<sup>4</sup> It should be noted that the "general plan or scheme doctrine" could conceivably apply here. Under this doctrine, an unnamed third party may enforce a restrictive covenant if it can show that the covenant was "inserted [by the grantor] for the purpose of carrying out a general plan or scheme of development." See Ward v. Prospect Manor Corp., 188 Wis. 534, 537 (Wis. 1926) and Crowley v. Knapp, 94 Wis. 2d 421, 425-426 (Wis. 1980). In this case, if it is shown that the grantors, at the time of the conveyance of the Field in 1936, owned other nearby property and later conveyed that property with the express understanding that there would forever be a nearby athletic field named Breese Stevens Athletic Field for the use and enjoyment of these properties, then this doctrine would apply and give the unnamed third party enforcement rights. However, no such plan or scheme is known to have existed here or has come to the City's attention, and such a plan or scheme (which usually deals with matters such as restrictions on building use or improvements) dealing with nearby athletic fields is unlikely. Therefore, while it is very unlikely that this doctrine applies to give an unknown third party enforcement rights of the restrictive covenants, the City Attorney's Office cautions that it has not looked further into this matter as to do so would require extensive and very costly title searches, along with a significant amount of staff time. Should a party later claim privity of estate under this doctrine, the City could assess the claim at that time, thereby putting the burden on such a property owner to establish their privity of estate under this doctrine.

591365

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A. D., 1936

This Indenture, Made this 1st day of December

between Amelia Fuller Stevens, also known as Amelia F. Stevens, Elizabeth Breese Stevens Jackson, also known as Elizabeth Stevens Jackson, parties of the first part, and the City of Madison, a municipal

duly organized and existing under and by virtue of the laws of the State of Wisconsin located at Madison, Wisconsin, party of the second part.

Witnesseth, That the said parties of the first part, for and in consideration of the sum of Thirty-Five Thousand Dollars (\$35,000.00)

to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, aliened, conveyed and confirmed, and by these presents do give, grant, bargain, sell, remise, release, alien, convey and confirm unto the said party of the second part, its successors and assigns forever, the following described real estate, situated in the County of Dane and State of Wisconsin, to-wit:

Block One Hundred Fifty-nine (159) in the City of Madison, according to the recorded plat thereof.

It is understood and agreed, as a condition of this agreement and as part of the consideration thereof, that said block shall forever be known and designated as the "Breese Stevens Athletic Field," and that said premises shall never be used for any other purpose than that of an athletic field.

This deed is executed and delivered in full performance of a certain land contract made by M. Elizabeth Stevens, Amelia F. Stevens, and Elizabeth Stevens Jackson to the grantee under date of November 10, 1923, and recorded in the office of the Register of Deeds in and for Dane County on the 21st day of November A. D. 1923, Vol. 62 of Misc. Records at p.258, Doc. No. 429613.



Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining; and all the estate, right, title, interest, claim or demand whatsoever, of the said party of the first part, either in law or equity, either in possession or expectancy of, in and to the above bargained premises, and their hereditaments and appurtenances.

To Have and to Hold the said premises as above described with the hereditaments and appurtenances, unto the said party of the second part, and to its successors and assigns FOREVER.

And the said Amelia Fuller Stevens and Elizabeth Breese Stevens Jackson for themselves, their heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, its successors and assigns, that at the time of the sealing and delivery of these presents that they are well seized of the premises above described, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law, in fee simple, and that the same are free and clear from all incumbrances whatever,

and that the above bargained premises in the quiet and peaceable possession of the said party of the second part, its successors and assigns, against all and every person or persons lawfully claiming the whole or any part thereof, they will forever WARRANT AND DEFEND.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the 1st day of December, A. D., 1936.

SIGNED AND SEALED IN PRESENCE OF

NOTARY PUBLIC  
DANE CO. WIS.  
Doris Schaefer  
James H. Mark

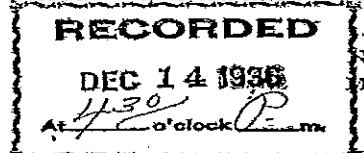
Amelia Fuller Stevens (SEAL)  
Elizabeth Breese Stevens Jackson (SEAL)  
APPROVED AND DELIVERED  
Notary Public  
Dane County, Wis.

State of Wisconsin,

Dane County, } ss.

Personally came before me, this 1st day of December, A. D., 1936, the above named Amelia Fuller Stevens and Elizabeth Breese Stevens Jackson

to me known to be the persons who executed the foregoing instrument and acknowledged the same.



Notary Public  
Dane County, Wis.  
My commission expires Feb 12 A. D., 1940