

**CITY OF MADISON, WISCONSIN**

<b>REPORT OF:</b> City Attorney	<b>PRESENTED</b>	<u>June 5, 2007</u>
	<b>REFERRED</b>	_____
<b>TITLE:</b> Storage of Carts Used for Automated Recycling and Refuse Collection	<b>REREFERRED</b>	_____
	<b>REPORTED BACK</b>	_____
<b>AUTHOR:</b> Michael P. May	<b>ADOPTED</b>	<b>POF</b>
<b>DATED:</b> May 18, 2007	<b>RULES SUSPENDED</b>	_____
	<b>ID NUMBER</b>	_____

**TO THE MAYOR AND COMMON COUNCIL:**

**RE:** Ordinance – Create new Sec. 10.18(13) to set aside and declare unenforceable covenants in deeds and various other agreements which govern the storage, placement, location or use of carts required by the City for recycling and trash and renumbering current Sections 10.18(13) and (14) to Sections 10.18(14) and (15), respectively.  
Legistar File No. 00677

At its meeting on May 15, 2007, the Common Council referred this matter to the City Attorney's Office for a further report on the proposed ordinance. Issues were raised at that meeting regarding whether the ordinance falls within the City's legal authority to overturn restrictive covenants.

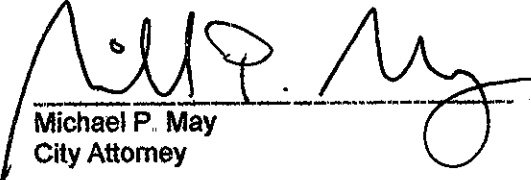
Governmental bodies, including municipalities, have the authority to set aside restrictive covenants when those covenants significantly interfere with the government's police powers. The restrictive covenant must be one that is found to significantly affect the public health, safety, and welfare. See, for example, *Overlook Farms v. Alternate Living*, 143 Wis. 2d 485 (Ct. App. 1988), which set aside restrictive covenants on group homes in residential neighborhoods. Similarly, as Council members may recall, the Council last year passed an ordinance setting aside certain restrictive covenants related to grocery store leases on the ground that it negatively impacted public health, safety, and welfare.

At the time this ordinance was drafted some two years ago, the City had received information that a number of residents in the City would not participate in the use of recycling carts due to restrictive covenants on where such carts could be placed. The ordinance was prepared to deal with what was perceived as a significant threat to public health, safety, and welfare.

However, the ordinance was not enacted at that time. Since then, the City has proceeded with its recycling cart project. Our office checked with the City Streets & Sanitation Department, and there have been no complaints since the institution of the recycling program about violations of restrictive covenants. This evidence strongly suggests that the covenants at issue are not interfering with persons' use of the recycling carts. If that is the case, the perceived threat certainly has not become actual, nor has it risen to the level where the Council could readily determine that the threats meet the threshold of a significant problem to the public health, safety, and welfare.

It is possible that, as continued use of the recycling carts, and the introduction of garbage collection carts go forward in Madison, additional complaints may be made and there may be a basis for setting aside such restrictive covenants. However, based upon the evidence available to date, we do not believe that the facts support the exercise of the City's powers as to these restrictive covenants.

Because of the changed circumstances from the time the ordinance was proposed, I recommend that this ordinance be placed on file without prejudice.



Michael P. May  
City Attorney

MPM:pah