BY THE COURT:

DATE SIGNED: May 6, 2022

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT- BRANCH 8 WAUKESHA COUNTY

WISCONSIN BUILDERS ASSOCIATION, et. al.,

Plaintiffs,

vs.

Case: 2021CV226

VILLAGE OF SUSSEX,

Defendant.

DECISION AND ORDER

Plaintiff, Wisconsin Builders' Association (hereinafter, "WBA"), seeks declaratory relief that the Defendant, Village of Sussex (hereinafter "Village"), does not have the legal authority to require as a condition of approval of a plat under Wis. Stat. § 236.13 that sub-dividers enter into a contract with the Village to provide security for the installation of public improvements in greater amounts and for longer periods of time than allowed by statute, and that it does not have the authority to require only cash or a letter of credit rather than a performance bond as security. Further, the WBA seeks injunctive relief against the Village granting temporary and permanent injunctions prohibiting the Village from requiring sub-dividers to enter into contracts with the Village as a condition of approval of a plat that requires security in greater amounts and for longer periods of time than allowed by statute, and that it does not have the authority to require only cash or a letter of credit rather than a performance bond as security and injunctive relief requiring the Village to release any security that it currently is holding from a sub-divider that is in an amount greater than or being held for a period of time longer than allowed by Wisconsin Statute.

The Defendant seeks summary judgment and dismissal of the complaint, based on: 1) the Plaintiff lacks standing and Hidden Hills Development, LLC (hereinafter "Hidden Hills"), a

WBA member is a necessary and indispensable party; 2) changes to statute can not apply retroactively to the Hidden Hills Developer's Agreement; 3) the Village complied with all statutory requirements; 4) the Hidden Hills contract has been fully performed rendering the lawsuit moot.

BACKGROUND

The Village has adopted a Land Division and Development Ordinance, Chapter 18 of the Village's Municipal Code ("Subdivision Ordinance"). (Dkt. 3.) The Village's Subdivision Ordinance requires that before final approval of any plat or certified survey map, the developer shall install street and utility improvements and provide guarantees for their installation. (Sussex Ord. § 18.0207, Dkt. 3, p. 11.) In addition, the Subdivision Ordinance requires that any sub-divider, before commencing with any improvements or other construction on the land, enter into a developer's agreement with the Village agreeing to install the required improvements and file with said agreement a letter of credit meeting the approval of the Village Attorney as to form, in an amount equal to the estimated cost of the improvements and financial security required by the developer's agreement, plus a reasonable percentage for contingencies--said estimate to be made by the Village Engineer--as a guarantee that such improvements will be completed by the developer or the developer's subcontractors not later than the date or dates provided in the agreement and as a further guarantee that all obligations to subcontractors for work on the development are satisfied. (Id.)

In spring of 2017, Hidden Hills Development, LLC ("Hidden Hills") submitted a subdivision plat for approval to the Village for the Hidden Hills Subdivision. (Tomich Aff., ¶ 5.) As required by the Subdivision Ordinance, Hidden Hills entered into a Developer's Agreement with the Village dated June 9, 2017. (Dkts. 4-5.)

The Developer's Agreement required Hidden Hills to install the public improvements reasonably necessary for the development. (Dkt. 4, p. 2.) The Developer's Agreement required Hidden Hills to provide security in the form of cash or a letter of credit in a form approved by the Village's Attorney and in an amount approved by the Village Attorney to guarantee that it would perform its obligations under the Developer's Agreement. (Id., p. 17.) In June of 2017, Hidden Hills provided a letter of credit to the Village as security for completion of the public improvements. (Tomich Aff., Ex. A.) In November 2017, Hidden Hills substantially completed the public improvements. (Tomich Aff., ¶ 11.) On March 27, 2020, Hidden Hills requested that the Village release its letter of credit because the public improvements had been substantially completed for more than 14 months. (Dkt. 6.) Judith Neu, the Village's Engineer/Director of Public Works, responded to the request by stating that the Developer's Agreement requires security for two years after final completion of the work. (Id.) Ms. Neu further stated that the two-year period runs from final completion of the public improvements, and after the top (final) lift of asphalt is completed. (Id.) In addition, Ms. Neu stated that the Developer's Agreement supersedes Wisconsin Statutes. (Id.) On March 27, 2020, Jeremy Smith, the Village's Administrator, further responded as follows: The parties entered into a contract, which is the developer's agreement, which both parties are obliged to honor. The State Law does not supersede a contract entered into in good faith by both parties. The Village attorney John Macy has given us his legal opinion on this and we will be standing by that opinion. (Dkt. 6.)

DISCUSSION

I. Defendant's Motion for Summary Judgment and Dismissal

The Village seeks summary judgment on a number of grounds – the primary focus of which is the relationship between the Village and Hidden Hills and the developer's agreement between the parties. WBA's complaint, though, is not about Hidden Hills exclusively. WBA seeks relief in their complaint that is not Hidden Hills specific. WBA utilized the Hidden Hills agreement as illustrative of how the WBA alleges that the Village violates state law.

So, the viability of the Village's motion begins and ends with whether or not the WBA can seek the relief requested on behalf of its developer members or whether the WBA has to rely upon a member, like Hidden Hills, to seek the relief requested.

This question has been answered by the Court of Appeals in *Metro. Builders Ass'n v. Vill. of Germantown*, 2005 WI App 103. The Metropolitan Builders Association was a not-for-profit trade association whose members were home builders. *Id. at ¶8.* The MBA challenged the Village of Germantown's use of impact fees collected for an aquatic/youth center on a different project that would have provided a splash playground for the community. *Id. at ¶7.* The Village of Germantown challenged whether the MBA had standing to pursue its claim. *Id. at ¶9.* Like the Village of Sussex, in this case, the Village of Germantown argued that for declaratory judgment to be considered by the Court, one of the factors required was a showing that the plaintiff has a pecuniary interest in the outcome, which they argued MBA lacked. The Appellate Court rejected that argument. *Id. at ¶18.*

The Appellate Court concluded that "MBA has standing so long as any of its developer members has the right to challenge the use of the impact fees." *Id. at ¶13.* Further, the Appellate Court found with regard to a personal stake requirement that "[a]s long as individual developers would have a personal stake in the controversy, MBA may contest the use of impact fees on their behalf." *Id. at ¶20.*

Following this precedent, the WBA has standing to pursue on behalf of its developer/builder members a challenge to the Village's contract requirements under its subdivision ordinance. The Village's request for summary judgment on Hidden Hills being an indispensable party, the WBA lacking standing, and mootness of the action due to Hidden Hills contract being fully performed is DENIED.

II. Justiciability of Plaintiff's claims

A controversy is judiciable when: (1) a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy (a legally protectable interest); and (4) the issue involved in the controversy must be ripe for judicial determination. *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982).

The WBA's complaint satisfies all four conditions. WBA is challenging the Village's legal authority to take certain actions that are in violation of Wisconsin Statutes. The Village opposes WBA's claims, so the interests of the WBA and its members and the Village are adverse. As noted above, under *Metro. Builders Ass'n*, the WBA, on behalf of its members, has a legal interest in the controversy between the WBA and the Village. The Village asserts that its ordinance and its standard developer's agreement do not violate the Wisconsin Statutes, and the WBA argues that they do. The issue is ripe for judicial determination, as the Village continues to enforce its Subdivision Ordinance and require developers to enter into developer's agreements that the WBA contend violate Wisconsin Statutes. (See Dkt. 34)

The Village's consistent response, including their final reply brief and oral argument, is to argue that WBA lacks standing or that there is no justiciable controversy surrounding the Hidden Hills agreement. The Village provides very little substantive defense as to whether its ordinance or practice in fact violate Wisconsin statute in the manner WBA alleges. For the reasons set forth above, WBA does have standing to bring the claims and the complaint seeks relief separate and apart from the Hidden Hills agreement.

III. Plaintiff's Request for Declaratory and Injunctive Relief

Having determined that this matter is justiciable, the Court may entertain whether declaratory judgment is a proper remedy. *Miller Brands-Milwaukee v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991). "An injunction is a preventive order looking to the future conduct of the parties. To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of will and injure the plaintiff." *Pure Milk Products Co-op v. National Farmers Organization*, 90 Wis. 2d 781, 800, 280 N.W.2d 691. "To invoke the remedy of injunction the plaintiff must moreover establish that the injury is irreparable, i.e., not adequately compensable in damages." *Id.*

The Village ordinance that WBA challenges, states, in part:

> Before final approval of any plat or certified survey map located within the jurisdictional limits of this Ordinance, the developer shall install street and utility improvements as hereinafter provided or provide guarantees for their installation. The developer shall, before commencing with any improvements or other construction on the land, enter into a developers agreement with the Village agreeing to install the required improvements and shall file with said agreement a letter of credit meeting the approval of the Village Attorney as to form, in an amount equal to the estimated cost of the improvements and financial security required by the developer's agreement, plus a reasonable percentage for contingencies--said estimate to be made by the Village Engineer--as a guarantee that such improvements will be completed by the developer or the developer's subcontractors not later than the date or dates provided in the agreement and as a further guarantee that all obligations to subcontractors for work on the development are satisfied.

Sussex Ord., § 18.0207.

First, WBA argues that the language "shall file a letter of credit meeting the approval of the Village Attorney" violates *Wis. Stat. §* 236.13. The relevant portion of the statute at issue is:

> If the governing body of the town or municipality requires a subdivider to provide security under subd. 1. a., the governing body shall accept a performance bond or a letter of credit, or any combination thereof, at the subdivider's option, to satisfy the requirement.

Wis. Stat. § 236.13(2)(am)1m.a.

Second, WBA argues that the ordinance language which requires the letter of credit to be in an amount "equal to the estimated cost of the improvements and financial security required by the developer's agreement, plus a reasonable percentage for contingencies--said estimate to be made by the Village Engineer" also violates *Wis. Stat. §* 236.13. The relevant portion of the statute at issue is:

> . . . The governing body may not require the subdivider to provide security at the commencement of a project in an amount that is more than 120 percent of the estimated total cost to complete the required public improvements, as determined under subd. 1d.

Wis. Stat. § 236.13(2)(am)1.a.

Third, WBA argues that the Village regularly requires developers to provide said security for longer than the time proscribed by statute. (See Dkt. 34.) The relevant portion of the statute in these claims is:

> If the governing body of the town or municipality requires a subdivider to provide security under subd. 1. a., the governing body may not require the subdivider to provide the security for more than 14 months after the date the public improvements for which the security is provided are substantially completed and upon substantial completion of the public improvements, the amount of the security the subdivider is required to provide may be no more than an amount equal to the total cost to complete any uncompleted public improvements plus 10 percent of the total cost of the completed public improvements.

Wis. Stat. § 236.13(2)(am)1.c.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex. rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Every analysis of statute "'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *Id.*, ¶45 (quoting Seider v. O'Connell, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional

meaning." *Id.*, ¶45.

The plain language of *Wis. Stat. §* 236.13(2)(am)1m.a. mandates that the Village "accept a performance bond or letter of credit, or any combination thereof, at the subdivider's option." The Village ordinance requiring that a developer "shall file a letter of credit meeting the approval of the Village Attorney" is inconsistent with Wisconsin statute and therefore declared unenforceable.

The plain language of *Wis. Stat. §* 236.13(2)(am)1.a. prohibits the Village from requiring a developer to provide security, if security is required, "in an amount that is more than 120 percent of the estimated total cost to complete the required public improvements." The Village ordinance requiring security in an amount "equal to the estimated cost of the improvements and financial security required by the developer's agreement, plus a reasonable percentage for contingencies--said estimate to be made by the Village Engineer" to the extent that it exceeds 120 percent of the estimated total cost to complete the required public improvements is inconsistent with Wisconsin statute and therefore declared unenforceable.

Likewise, the plain language of *Wis. Stat. §* 236.13(2)(am)1.c. limits the Village to requiring security to be provided for a period of no more than "14 months after the date the public improvements for which the security is provided are substantially completed." WBA, both in its complaint and its responsive brief, demonstrated that the Village's practice is to maintain security for longer than a period of "14 months after the date the public improvements for which the security is provided are substantially completed." (See Complaint, ¶¶ 19, 23, 24 and Dkt. 35, 37). The Village did not dispute its practice. There is no Village ordinance that sets a specified time period for when security on an improvement is no longer required. However, requiring a developer to maintain security for a period longer than "14 months after the date the public improvements for which the security is provided are substantially completed" is inconsistent with *Wis. Stat. §* 236.13(2)(am)1.c. Injunctive relief is appropriate with regard to a violation of this statutory timeline as there is no adequate remedy for WBA members as a whole who are required to maintain security by the Village in varying amounts and for varying periods of time in excess of what is required by statute.

IT IS HEREBY ORDERED:

1) To the extent that *Sussex Ord., §* 18.0207 conflicts with *Wis. Stat. §* 236.13 as outlined in this decision, those portions of 18.0207 are declared unenforceable.

2) The Village is permanently enjoined from requiring a subdivider to provide security consistent with Wisconsin Statutes for a period longer than "14 months after the date the public improvements for which the security is provided are substantially completed and upon substantial completion of the public improvements, the amount of the security the subdivider is required to provide may be no more than an amount equal to the total cost to complete any uncompleted public improvements plus 10 percent of the total cost of the completed public improvements."

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL