

**FILED**  
**06-20-2024**  
**Door County**  
**Clerk of Circuit Court**  
**2024CV000081**  
**Honorable David L. Weber**  
**Branch 2**

STATE OF WISCONSIN

CIRCUIT COURT

DOOR COUNTY

ADAM WHITE, BRIGID WHITE, and CAPTAIN'S  
COTTAGE LLC.  
10775 N. Bay Shore Drive  
Sister Bay, WI 54234

Plaintiffs,

v.

Declaratory Judgment  
Case Code: 30701  
Case No. 24-CV-

VILLAGE OF SISTER BAY; JULIE SCHMELZER,  
as Village Administrator for the Village of Sister  
Bay; and NATE BELL, DENISE BHIRDO, KURT  
HARFF, LOUISE HOWSON, PATRICE  
CHAMPEAU, LILLY OROZCO, and ALISON  
WERNER, as members of the Board of Trustees for  
the Village of Sister Bay  
2382 Maple Drive  
Sister Bay, WI 54234

Defendants.

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## SUMMONS

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THE STATE OF WISCONSIN, to each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The complaint which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the

requirements of the statutes. The answer must be sent or delivered to the court, whose address is **Door County Clerk of Courts, 1209 South Duluth Avenue, Sturgeon Bay, Wisconsin 54235**, and to the **Wisconsin Institute for Law & Liberty**, Plaintiff's attorneys, whose address is **330 East Kilbourn Avenue, Suite 725, Milwaukee, Wisconsin 53202**. You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated: June 20, 2024.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

*Electronically signed by Luke N. Berg*

Richard M. Esenberg (# 1005622)

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*Attorneys for Plaintiffs*

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## COMPLAINT

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Plaintiffs Adam and Brigid White, and Captain's Cottage LLC, by their undersigned attorneys at the Wisconsin Institute for Law & Liberty and Attorney Bjorn Johnson, LLC, hereby allege as follows:

## INTRODUCTION

1. Wisconsin law gives homeowners the right to rent their home on a short-term basis. Wis. Stat. § 66.1014.

2. Property owners also have a right under Wisconsin law to continue a non-conforming use after a change to local zoning laws, preventing municipalities

from retroactively applying zoning changes to existing properties. *E.g.*, Wis. Stat. §§ 62.23(7)(h); 61.35 (applying the same to Villages).

3. Notwithstanding those clear legal rights, the Village of Sister Bay, in an apparent attempt to drive short-term-rental owners out of business, has taken the position that, merely by applying for a short-term-rental license, properties lose the right to all of their vested, non-conforming uses, and must update their property every year to conform to whatever changes the Village has made to their zoning code.

4. Thus, in order for property owners to exercise their rights under Wis. Stat. § 66.1014, the Village forces them to give up their rights under Wis. Stat. §§ 62.23(7)(h) and 61.35. This position violates the Village's own ordinances, state law, and Plaintiffs' constitutional rights.

5. To make matters worse, in this particular case, when the Plaintiffs attempted to appeal the Village's decision to deny them a short-term-rental license, the Village prevented Plaintiffs from appealing and further denied them any opportunity for a hearing on the license denial, again violating its own ordinances, state law, and procedural due process.

6. As a direct result of these violations, Plaintiffs are being forced to cancel all of their rental reservations starting July 1, causing them to lose substantial income until their ability to rent their property is restored. Plaintiffs seek, and this Court should grant, a temporary injunction allowing Plaintiffs to continue renting their property until this case is resolved. And it should ultimately order the Village

to grant Plaintiffs a short-term-rental license, and declare that their existing driveway, which has long been in place, is protected by the non-conforming use rules.<sup>1</sup>

### **PARTIES**

7. Plaintiffs Adam and Brigid White live in the Village of Sister Bay (“the Village”), and, through an LLC, own a home at 10775 N. Bay Shore Drive that they rent on a short-term basis.

8. Plaintiff Captain’s Cottage LLC is a limited liability company that directly owns the property at issue (10775 N. Bay Shore Drive). Plaintiffs Adam and Brigid White are the sole members and owners of Captain’s Cottage LLC.

9. Defendant Village of Sister Bay (the “Village”) is a village in Door County, Wisconsin.

10. Defendant Julie Schmelzer is the Village Administrator.

11. Defendants Nate Bell, Denise Bhirdo, Kurt Harff, Louise Howson, Patrice Champeau, Lilly Orozco, and Alison Werner are the members of the Board of Trustees for the Village.

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<sup>1</sup> Plaintiffs will be seeking damages as well but will first submit a notice of claim with the Village, consistent with Wis. Stat. § 893.80. After the Village responds to the notice of claim, Plaintiffs will amend this complaint or file a separate action and move to consolidate it with this one. There is no requirement that the Plaintiffs submit a notice of claim prior to seeking the injunctive relief that they seek in this case.

## **JURISDICTION AND VENUE**

12. This is an action for declaratory and injunctive relief under Wis. Stat. §§ 806.04 and 813.01.

13. Venue in this Court is proper pursuant to Wis. Stat § 801.50(2).

## **BACKGROUND**

14. Adam and Brigid White live and work in the Village of Sister Bay.

15. Like many others in the Village, they own (through an LLC) a cottage along the shore of Green Bay, at 10775 N. Bay Shore Drive, that they rent on a short-term basis.

16. They have owned the property since 2020 and have been renting it on a short-term basis since then, without incident. Prior to that, the previous owner also rented it on a short-term basis since 2018.

17. The income from this property is a major source of income for the Whites.<sup>2</sup>

18. As they have done every year since the Village began requiring a license in 2021, the Whites applied for a short-term-rental license on March 1, 2024, the very first day that the application period opened.

19. On April 23, 2024, the Whites received an email from Defendant Julie Schmelzer, the Village Administrator, denying their request for a short-term-rental

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<sup>2</sup> For readability, this Complaint refers to the Plaintiffs collectively as “the Whites.”

license. A true and correct copy of that email is attached to this complaint as Exhibit A.

20. The email raised a few questions and minor issues with respect to their application—all of which easily could be answered or resolved—but also raised one major concern about the driveway and parking at the home. The email described “the parking situation” as the “most significant issue.”

21. More specifically, Schmelzer’s email stated that the Whites’ home must provide “at least 2, but not more than 4, legal parking stalls,” that each stall must be “10’ x 20’, asphalt, out of the right-of-way, and at least ten feet from the neighboring lot line,” and that “[t]he driveway must be at least 10’ wide but not more than 24’.” Ex. A, ¶ 1.

22. These requirements are found in the Village’s zoning code, at §§ 66.0403(1), (2), (6)(b), (10)(d)1, 66.0406(5).<sup>3</sup>

23. Upon information and belief, all but one of these requirements were adopted between 2004 and 2006.

24. The Village adopted a major revision to its zoning code in 2004 and has amended it repeatedly since then. *See* Sister Bay Village Code § 66.1710 (containing a “chronological listing of changes” to the Village’s zoning code).

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<sup>3</sup> The Village’s ordinances are available online at <https://www.sisterbaywi.gov/resident-responsibilities-and-village-ordinances/>



25. The driveway width requirements, surfacing requirement (asphalt), and parking-stall size requirements were in the original 2004 zoning code, but not in the zoning code before 2004, as far as counsel have been able to determine.

26. The ten-foot setback requirement was adopted in 2006, by Ordinance No. 120-061306.

27. The requirement to have at least two parking spaces was in place as early as 1995.

28. The White's property, however, was built in 1919, and its current driveway/parking area has been in place long before the Village added these parking requirements to its zoning code.

29. Indeed, the Village has never taken issue with the driveway/parking on the Whites' property until this year.

30. Thus, pursuant to both the Village's own ordinances and state law, as explained in more detail above and below, despite the Whites' existing driveway's nonconformance with the current zoning code, the Whites have a vested right to continue their use and that right is protected from retroactive application of the Village's changes to its zoning code.

31. On April 29, 2024, counsel for the Whites responded to Schmelzer's email explaining that their existing driveway/parking area is a vested nonconforming use and asked Schmelzer to reconsider that reason for the license denial. A true and correct copy of this email exchange is attached to this complaint as Exhibit B.

32. Schmelzer responded an hour later as follows: “[W]e respectfully disagree. If the owner doesn’t want to meet code, or think he has to meet code, we will have to withhold issuing a license.” Ex. B at 2.

33. The Village’s short-term-rental ordinance provides that, if a license is denied, a property owner “may appeal the decision to the Board of Trustees upon filing an Appeal Form within fourteen (14) days of the written decision and paying the required appeal fee.” Sister Bay Village Ordinance § 18.56(F).<sup>4</sup>

34. The ordinance further provides that, upon the filing of an appeal, “[t]he Board shall hold a hearing *as soon as possible* and determine whether the decision should be upheld or reversed.” *Id.* (emphasis added).

35. Two hours after receiving Schmelzer’s email, Counsel for the Whites replied indicating that the Whites intended to appeal the denial of their license and asked for the form to appeal.

36. Schmelzer never responded to that request.

37. The Village does not have any “Appeal Form” for the denial of a short-term-rental license.

38. The Village’s “Forms” page on its website does not contain any such form. *See* <https://sisterbaywi.gov/applications/>.

39. And, as just noted, Defendant Schmelzer, the Village Administrator, chose not to respond when the Whites’ counsel asked for the form.

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<sup>4</sup> Available at <https://storage.googleapis.com/juniper-media-library/57/2024/05/18%20-%20Business%20Regulation%20approved%20042224.pdf>

40. The Village also never established any “appeal fee” for an appeal from the denial of a short-term-rental license.

41. Indeed, the Village’s fee schedule<sup>5</sup> does not contain any such fee.

42. And, after the Whites’ counsel called attention to the lack of any fee, the Village Board, during its board meeting on May 19, 2024, admitted on the record that it had not established a fee.<sup>6</sup>

43. At their June 18, 2024 meeting, the Village Board finally added an agenda item to establish a \$500 fee to appeal to the Village Board, but this fee will not go into effect until July 1.<sup>7</sup>

44. Because the Village had not created an “Appeal Form” or set any appeal fee, making it impossible for the Whites to appeal under the process set forth in Village Ordinance § 18.56(F), the Whites’ counsel submitted a request for review pursuant to Wis. Stat. § 68.08. A true and correct copy of this petition is attached to this complaint as Exhibit C.

45. Chapter 68 of the Wisconsin Statutes provides a generic procedure for seeking review of any “administrative determination” of an “officer or employee of a municipality,” including a “denial ... of a[ ] ... license.” Wis. Stat. §§ 68.01; 68.02(1).

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<sup>5</sup> Available at <https://storage.googleapis.com/juniper-media-library/57/2024/01/2023%20Fee%20Schedule%20adopted%20062023.pdf>

<sup>6</sup> See <https://www.youtube.com/watch?v=eeJKWrc5f5I> at 24:20–26 (“We don’t have a fee? Not in the schedule, no. So we will create one tonight.”).

<sup>7</sup> See [https://files.heygov.com/sisterbaywi.gov/meetings/me\\_01j0bmfeymvf7e20w3ek6571kc/061824-village-board-meeting-packet.pdf](https://files.heygov.com/sisterbaywi.gov/meetings/me_01j0bmfeymvf7e20w3ek6571kc/061824-village-board-meeting-packet.pdf) at page 80.

46. Out of an abundance of caution, the Whites' counsel submitted the petition on May 6, within the fourteen days required by Village Ordinance § 18.56(F), and also indicated in the petition that it was being filed under *either* Chapter 68 *or* "Chapter 18 of the Village of Sister Bay Municipal Code as applicable."

47. The petition further noted that the Whites would "pay any lawfully required appeal fee upon notice of such hearing and reference of such Village resolution or ordinance establishing such appeal fee for appeals to the Village Board of Trustees."

48. Two days later, on May 9, the Whites received a letter from the Village's attorney, Randall J. Nesbitt, stating that their request for review was denied, that "an appeal has not been commenced and no hearing will be scheduled" because "no appeal fee has been received by the Village of Sister Bay"—a fee that did not exist—even though the Whites offered to pay the appeal fee as soon as the Village told them what it was. A true and correct copy of this letter is attached to this complaint as Exhibit D.

49. Despite denying their appeal allegedly for failing to pay the fee, no one from the Village told the Whites what the fee was—because no such fee existed.

50. On May 20, the Whites made one "final attempt to exhaust their remedies within the municipality before seeking judicial relief" by sending a letter to Julie Schmelzer, the Village Administrator, Randall Nesbitt, the Village Attorney, and all members of the Village Board. A true and correct copy of this letter is attached to this complaint as Exhibit E.

51. The letter recounted the facts described above and explained that the license denial violated their legally protected rights. The letter also outlined the Village's procedural violations by failing to allow the Whites to appeal the license denial.

52. Among other things, the letter requested a "Resolution or Order overturning the denial of the STR license" as well as a "Resolution or Order confirming and establishing the legal nonconforming status of the relevant aspects of" the property at issue.

53. The letter asked for a response by the Village Board's June 18 board meeting.

54. To date, no one from the Village or on behalf of the Village has responded to the White's May 20 letter.

55. The Whites' current short-term-rental license (as with all short-term-rental licenses issued by the Village) expires on June 30.

56. The Defendants' delay and refusal to allow the Whites to appeal the denial has caused and increased the damages to them, by preventing them from having a license in place after July 1.

57. Due to Defendants' actions, the Whites have been forced to cancel all reservations of their property after July 1, reservations totaling, so far, \$52,500.

58. The Whites have also incurred significant attorney's fees attempting to resolve this issue with the Village.

## CAUSES OF ACTION

### **CLAIM ONE: Violation of Village Ordinances §§ 66.901, 66.0911**

59. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

60. Village Ordinance § 66.0901 provides that “[t]he lawful non-conforming use of land or water; or a lawful non-conforming use on a conforming or non-conforming lot which existed at the time of the adoption or amendment of this chapter may be continued, although the use does not conform with the provisions of this chapter.”

61. Likewise, Village Ordinance § 66.0911 provides that “[t]he use of a structure existing at the time of the adoption or amendment of this chapter may be continued although the structure’s size or location does not conform to the established building setback, height, parking, loading and/or access provisions of this chapter.”

62. Renting a single-family home on a short-term basis is a permitted use under the Village’s zoning code for the Whites’ property. Village Ordinance § 66.0311(1)(a).

63. Nothing in the Village’s ordinances related to short-term-rentals, §§ 18.51 et seq., provides that the mere application for a short-term-rental license invalidates any grandfathered, non-conforming aspect of a property.

64. To the extent that the Village claims that its ordinances do have such an effect, they violate and/or are preempted by state law, and/or are unconstitutional.

65. The existing driveway/parking area at the White's property is a grandfathered non-conforming use under the Village's own ordinances.

66. Defendants are violating their own ordinances by attempting to force the Whites to give up their grandfathered non-conforming use, by denying them a short-term-rental license.

**CLAIM TWO: Violation of Wis. Stat. § 66.23(7)(h)**

67. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

68. Like the Village's own ordinances, Wis. Stat. § 66.23(7)(h) provides that "[t]he continued lawful use of a building, premises, structure, or fixture existing at the time of the adoption or amendment of a zoning ordinance may not be prohibited although the use does not conform with the provisions of the ordinance."

69. This section is applicable to villages through Wis. Stat. § 61.35.

70. This section provides only two situations in which the right to the continued use of a non-conforming feature of a property will be lost, neither of which apply here: if the nonconforming use is "discontinued for a period of 12 months," or if the "[t]he total structural repairs or alterations in such a nonconforming building, premises, structure, or fixture ... during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture."

71. To the extent the Village argues that its ordinances allow it to eliminate non-conforming uses in other ways, its ordinances violate and/or are preempted by

state law, and/or are unconstitutional. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 64, 373 Wis. 2d 543, 892 N.W.2d 233.

72. The existing driveway/parking area at the White's property is a grandfathered non-conforming use under state law that the Village "may not ... prohibit[ ]."

73. Defendants are violating state law by attempting to force the Whites to give up their grandfathered non-conforming use to obtain a short-term-rental license.

**CLAIM THREE: Violation of Wis. Const. art. I, § 1**

74. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

75. The Wisconsin Supreme Court has long held that Article I, § 1 of the Wisconsin Constitution provides similar due process protections as the federal constitution. *See, e.g., Miller v. Zoning Bd. of Appeals of Vill. of Lyndon Station*, 2023 WI 46, ¶ 13, 407 Wis. 2d 678, 991 N.W.2d 380; *Mayo v. Wisconsin Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678.

76. Many courts have held that the retroactive application of zoning laws would violate due process; and thus any preexisting, nonconforming use must be permitted to continue after a change in zoning laws. *See generally*, 8A McQuillin Mun. Corp. § 25:249 (3d ed.).

77. The Wisconsin Supreme Court held the same in *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 53 N.W.2d 784 (1952), finding that, if an ordinance prohibiting a trailer on a property "were to be construed as being retrospective in



operation, it would be unconstitutional and invalid.” The Court favorably quoted McQuillin for the proposition that “zoning regulations cannot be made retroactive and neither can prior nonconforming uses be removed nor existing conditions be affected thereby.”

78. Wisconsin courts have continued to recognize that *Des Jardin* stands for this proposition. See, e.g., *Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, ¶ 21, 381 Wis. 2d 704, 913 N.W.2d 118 (“The nonconforming use doctrine is implicated when lawful uses of land are made unlawful by a change in zoning regulations.”); *Adams Outdoor Advert. Ltd. P’ship v. City of Madison*, 2017 WI App 56, ¶ 13, 377 Wis. 2d 728, 902 N.W.2d 808 (“*Des Jardin* stands for the proposition that ‘zoning regulations cannot be made retroactive and neither can prior nonconforming uses be removed nor preexisting conditions be affected thereby.’”), *aff’d*, 2018 WI 70, 382 Wis. 2d 377, 914 N.W.2d 660.

79. And Wisconsin courts have repeatedly emphasized that “[l]egal nonconforming uses are protected because of concerns that retroactive application of zoning ordinances would be unconstitutional.” *Hussein v. Vill. of Germantown Bd. of Zoning Appeals*, 2011 WI App 96, ¶ 12, 334 Wis. 2d 764, 800 N.W.2d 551; *State ex rel. Covenant Harbor Bible Camp of Cent. Conf. of Evangelical Mission Covenant Church of Am. v. Steinke*, 7 Wis. 2d 275, 283, 96 N.W.2d 356 (1959); *Sauk Cnty. v. Trager*, 113 Wis. 2d 48, 56, 334 N.W.2d 272 (Ct. App. 1983) (“Zoning ordinances can not be applied retroactively where vested or substantial rights are involved.”), *aff’d*, 118 Wis. 2d 204, 346 N.W.2d 756 (1984).

80. Defendants are violating Plaintiffs' due process right by attempting to force the Whites to give up their vested non-conforming driveway to obtain a short-term-rental license.

**CLAIM FOUR: Violation of Village Ordinance § 18.56(F)**

81. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

82. As noted above, Village Ordinance § 18.56(F) gives property owners a right to appeal the denial of a short-term-rental license to the Village Board of Trustees.

83. Defendants violated that plain legal right by: (1) failing to create an "Appeal Form" or adopt any "appeal fee," which, per the ordinance, are required to appeal; (2) refusing to provide the Whites with any appeal form or inform them of the amount of the fee when they asked for it; (3) rejecting their attempt to appeal on their own form, which they submitted within the required 14 days; and (4) denying the Whites a hearing on the merits of their appeal.

84. Defendants' failure to follow their own appeal process has caused and increased the financial damages to the Whites.

85. Had the Whites been permitted to appeal back in April, and had the Board held a hearing on their appeal "as soon as possible," as the Village's ordinance requires, the Whites would have been able to resolve the issue and obtain a new license before July 1.

86. Instead, they have been forced to cancel all of their reservations after July 1, losing substantial income.

**CLAIM FIVE: Violation of Wis. Stat. ch. 68.**

87. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

88. As noted above, Wisconsin Statute chapter 68 gives those who are “adversely affected by an administrative determination” of a municipal employee, including the “denial ... of a[ ] ... license,” the right to a review of that determination, in order to “afford a constitutionally sufficient, fair and orderly administrative procedure and review” that is consistent with “due process.” Wis. Stat. §§ 68.001; 68.01, 68.02(1).

89. Defendants violated that plain legal right by: (1) denying the Whites’ petition for review without holding any hearing or following the procedures set forth in Chapter 68 on the grounds that there is an alternative review procedure under the Village’s ordinances; (2) refusing to accept the Whites’ appeal under the Village ordinances for failure to pay an appeal fee that did not exist and had not been established, and refusing to tell the Whites what the appeal fee was; and (3) failing to provide the Whites with any hearing on the merits of their appeal.

90. Defendants’ failure to follow the review process under Chapter 68 has caused and increased the financial damages to the Whites.

91. Had the Whites been permitted to appeal back in April, and had the Board held a hearing on their appeal “as soon as possible,” as the Village’s ordinance

requires, the Whites may have been able to resolve the issue and obtain a new license before July 1.

92. Instead, they have been forced to cancel all of their reservations after July 1, losing substantial income.

**CLAIM SIX: Violation of procedural due  
process under Wis. Const. art. I, § 1**

93. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

94. As noted above, the Wisconsin Supreme Court has long interpreted Article I, section 1 of the Wisconsin Constitution as providing similar procedural due process protections as the federal constitution. *E.g.*, *Mayo*, 2018 WI 78, ¶ 35.

95. And the most “basic element of due process is the right to a fair hearing conducted before a fair tribunal.” *Cnty. of Dane v. Pub. Serv. Comm’n of Wisconsin*, 2022 WI 61, ¶ 42, 403 Wis. 2d 306, 976 N.W.2d 790; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.”); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (due process requires, “at the very minimum,” “some kind of notice” and “some kind of hearing”).

96. Defendants violated Plaintiffs’ right to procedural due process by denying them any hearing or appeal of the denial of their license and the unilateral decision by Defendant Schmelzer to eliminate their vested property interest in the non-conforming aspect of their property.

97. Defendants' failure to provide procedural due process has caused and increased the financial damages to the Whites.

98. Had the Whites been permitted to appeal back in April, and had the Board held a hearing on their appeal "as soon as possible," as the Village's ordinance requires, the Whites may have been able to resolve the issue and obtain a new license before July 1.

99. Instead, they have been forced to cancel all of their reservations after July 1, losing substantial income.

### **REQUEST FOR RELIEF**

Plaintiffs therefore request the following relief:

A. A temporary injunction allowing the Whites to continue renting their property while this case proceeds;

B. A permanent injunction requiring the Village to grant the Whites' application for a short-term-rental license;

C. A declaration that the Whites' have a vested right to use the property for short term rentals despite the fact that the existing driveway/parking area does not meet the current requirements in the Sister Bay zoning code and that such use by the Whites is protected by state law, Village ordinances, and the Wisconsin Constitution, and which cannot be eliminated as a condition to obtaining a short-term-rental license.

D. Award costs and any such other relief as the Court deems appropriate.<sup>8</sup>

Dated: June 20, 2024

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

Electronically signed by Luke N. Berg

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<sup>8</sup> As mentioned above, the Plaintiffs will be seeking damages as well but will first submit a notice of claim with the Village, consist with Wis. Stat. § 893.80. After the Village responds to the notice of claim, Plaintiffs will amend this complaint or file a separate action and move to consolidate it with this one.

**From:** Julie Schmelzer <[julie.schmelzer@sisterbaywi.gov](mailto:julie.schmelzer@sisterbaywi.gov)>

**Sent:** Tuesday, April 23, 2024 12:05 PM

**To:** Adam White <[adam@whitefamilycottages.com](mailto:adam@whitefamilycottages.com)>

**Subject:** STR License - N Bay Shore Drive

Adam,

I have reviewed your application for a short-term rental license and have found several issues, one major, which prevents us from issuing a license at this time.

1. The most significant issue is your parking situation. You must be able to provide at least 2, but not more than 4, *legal* parking stalls. Legal means each stall is 10' x 20', asphalt, out of the right-of-way, and at least ten feet from the neighboring lot line. The driveway must be at least 10' wide but not more than 24'. Your plan shows one stall north of the home, adjacent to the road, but an inspection revealed no true parking stall/asphalt area, and if it did exist, it doesn't meet setbacks. You also show 'pullover' parking in the public right-of-way, which is not allowed, and the asphalt must be removed from the public right-of-way.
2. Your application shows you're renting 10774 N Bay Shore Drive, but the attachments make it look like you're renting 10775. Which address/attachments are correct? Please resubmit the first page of the application reflecting the correct address of the property.
3. You have a newer deck on the water side of the cottage. It needs a permit. I don't know if it meets setbacks, but you need to apply for a permit to get the review process started. I cannot issue a license as long as a violation is onsite, so you should go online and complete an application and submit the required fee. Any questions about forms or fees contact Janal in our office at 920-854-4118 or [janal.suppanz@sisterbaywi.gov](mailto:janal.suppanz@sisterbaywi.gov).
4. You haven't had a DATCP inspection in 3 years, but I see you applied for one. Has that been completed? I can't issue a license until that has either been completed or you have a private home inspection (see Ch. 18 to determine what is required).
5. Your property rules need to be amended to reflect garbage bins cannot overflow and the lids must close tightly.
6. Your rules also need a site plan attached, that gets posted with the rules. But, that site plan must show where parking is available, no parking on grass, no camper parking, and no boat parking in excess of 24 hours. This can't be submitted however until we resolve the parking issues mentioned above.

Be advised the property cannot be rented after July 1 until the above matters are resolved and a license has been issued.

Julie Schmelzer, Village Administrator

**CONFIDENTIALITY NOTICE:** This message is confidential and is intended only for the individual(s) or entities named. It may also be privileged or otherwise protected by work product or other legal rules. If you have received it by mistake, please let us know immediately by e-mail reply and delete it from your system. You may not copy this message or disclose its contents to anyone.

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From: **Bjorn Johnson** <[bjorn@attorneybjornjohnson.com](mailto:bjorn@attorneybjornjohnson.com)>

Date: Mon, Apr 29, 2024 at 3:50 PM

Subject: Re: 10775 North Bay Shore Drive Short-Term Rental

To: Julie Schmelzer <[julie.schmelzer@sisterbaywi.gov](mailto:julie.schmelzer@sisterbaywi.gov)>

Cc: Nate Bell

<[nate.bell@sisterbaywi.gov](mailto:nate.bell@sisterbaywi.gov)>, [adam@whitefamilycottages.com](mailto:adam@whitefamilycottages.com) <[adam@whitefamilycottages.com](mailto:adam@whitefamilycottages.com)>, <[janal.suppanz@sisterbaywi.gov](mailto:janal.suppanz@sisterbaywi.gov)>

Julie:

Both the code and state law grandfather-in and protect them from the parking requirements you claim preclude renewal of the license here. They are compliant with the code because of their nonconforming status. Thus, they are compliant with the provisions of Ch. 18 so they should be re-issued their license.

Please have a conversation with Randy about this because there should be no need for unnecessary further action—appeals, litigation, etc.—when the law is on their side. My clients have likewise engaged the attorneys at WILL, and it is not in the interests for the Village of Sister Bay to be at the forefront of constitutional litigation pertaining to this easily-resolvable STR grandfathering issue. Maybe the Village is prepared for such a case. But this case is not the proper vehicle to fight the STR's on.

In the meantime, please provide me with a § 18.56 F. Appeal Form if the Village has created a form for this type of appeal to the Board; if not, I can draft one that substantially complies with the code. Our appeal will be filed within the week if this is not resolved. Our intent would be to have a hearing held at the regular Village Board meeting in May. Also, my clients filed the necessary paperwork with Janal to meet the permit requirements for the deck indicating their full pledged effort to comply with the lawful requirements of the code you have otherwise mentioned. Please provide us with an update on that permit application (Janal).

As for the cancelled Wednesday meeting, all communications are to be made, through me, in writing now. The purpose of that Wednesday meeting was to provide you with the documents necessary to comply with the other outstanding matters in your 04-23-24 email. I will now be providing you with this information shortly.

Again, I anticipate this same issue to arise in other application contexts, so a speedy resolution should be in everyone's best interests.





On Mon, Apr 29, 2024 at 2:01 PM Julie Schmelzer <[julie.schmelzer@sisterbaywi.gov](mailto:julie.schmelzer@sisterbaywi.gov)> wrote:

Bjorn, we respectively disagree. If the owner doesn't want to meet code, or think he has to meet code, we will have to withhold issuing a license. He does have appeal rights if he'd like to exercise them though and see where things end up.

Adam, with an attorney retained I will have to cancel our Wednesday meeting and everything should go through Bjorn. When people hire a lawyer, to avoid the 'he said she said' we typically don't have conversations with the applicant outside of their attorney. Would you prefer to reschedule to a time your attorney can be present/when I have a longer meeting slot available?

Julie Schmelzer, Village Administrator

**From:** Bjorn Johnson <[bjorn@attorneybjornjohnson.com](mailto:bjorn@attorneybjornjohnson.com)>  
**Sent:** Monday, April 29, 2024 12:58 PM  
**To:** Julie Schmelzer <[julie.schmelzer@sisterbaywi.gov](mailto:julie.schmelzer@sisterbaywi.gov)>  
**Cc:** Nate Bell <[nate.bell@sisterbaywi.gov](mailto:nate.bell@sisterbaywi.gov)>; [adam@whitefamilycottages.com](mailto:adam@whitefamilycottages.com)  
**Subject:** 10775 North Bay Shore Drive Short-Term Rental

Julie:

The owners of Captain's Cottage LLC, Adam White and Brigid White, have retained me pertaining to STR legal issues at 10775 North Bay Shore Drive. Specifically, the 1st issue pertaining to parking (zoning) in your email on 04-23-24.

The Village cannot condition renewal of their STR license on immediate compliance with the new zoning code provisions when their property has a legal nonconforming status. And a change of use does not occur by them simply re-applying for and obtaining an annual STR license. Not only does R-1 explicitly recognize "Single-family dwellings, *including short-term rentals*" as one-in-the-same land use (which itself should indicate no change of use could ever occur here), this situation is clearly on the *Waukesha County v. Seitz*, 140 Wis. 2d 111, 117–118, 409 N.W.2d 403 (Wis. App. 1987) (*Seitz I*) side of cases ("... a mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it"). And this legal issue is even disposed of by *Racine County v. Cape*, 2002 WI App 19 ¶ 14, 250 Wis. 2d 44, 636 N.W.2d 782:

"... a change in the method or quantity of production of a nonconforming use is not an entirely new use when the original character of the use remains the same. This holding allows the operator of a nonconforming use to incorporate modern technology into his or her business without fear of losing that business."

Not only does the *Cape* case squarely address the situation here—renewing and obtaining a license is effectively the same as incorporating modern technology—it is also worth emphasizing that *the Village itself has required* the renewal of the STR license pursuant to Ch. 18, Art. IV of the municipal code. A municipality cannot require a certain thing, and then turn around and claim that the thing it has required is a change of use invalidating a legal nonconforming status. The Village has no authority to claim otherwise. As such, without any legal support for this particular reason for denying the White's license, the Village is opening itself to constitutional violations. See *Hussein v. Village of Germantown Board of Zoning Appeals*, 2011 WI App 96 ¶ 12, 334 Wis. 2d 764, 800 N.W.2d 551 ("Legal nonconforming uses are protected because of concerns that *retroactive application of zoning ordinances would be unconstitutional.*") (*emphasis added*). This is not the STR matter/issue the Village wants to break its back over.

This should be resolved immediately without need for further action. Please contact me no later than the end of the day on Friday to confirm their STR license has been renewed (or

conditionally renewed on resolving all other issues raised in your 04-23-24 email because I believe everything else will be fixed).

If this is not resolved by this week, then my clients will appeal to the Village Board pursuant to § 18.56 F. to reverse your denial. Enough of the Trustees support the grandfathering of existing STR's, like the Whites here, and it is possible this same issue may arise in other application contexts. But there should be no need for any further action because the law clearly does not support denying the renewal of their STR license for the parking (zoning) reason you have stated in your 04-23-24 email.

Sincerely,

**Attorney Bjorn Johnson**

10698 North Bay Shore Drive, PO Box 257

Sister Bay, WI 54234

920-421-1154

[www.attorneybjornjohnson.com](http://www.attorneybjornjohnson.com)



## **REQUEST FOR REVIEW OF DETERMINATION**

Captain's Cottage LLC, the Appellant, by its attorney, ATTORNEY BJORN JOHNSON LLC, requests a review of an initial determination of the Village of Sister Bay Administrator pursuant to Wis. Stat. § 68.08, or Chapter 18 of the Village of Sister Bay Municipal Code as applicable, and states the grounds upon which such determination should be reversed:

### **GENERAL BACKGROUND**

1. The Appellant, Captain's Cottage LLC, (the "Appellant") is a domestic limited liability company with its principal office at 10775 North Bay Shore Drive, Sister Bay, WI 54234. The Registered Agent for Appellant is Adam R. White.

2. The Appellant is the owner of real estate located at 10775 North Bay Shore Drive, Sister Bay, WI 54234.

3. Appellant's members, under White Family Cottages LLC, purchased the real estate in 2020, and Appellant took title of ownership to the real estate no later than 2023.

4. Located at Appellant's real estate, there has existed a single-family residence since on or around the year 1919. The property has been used as a single-family residence at all times since 1919 and to the date hereof.

5. In 2004, the Village adopted Chapter 66 of the Municipal Code, the Village's first set of zoning ordinances. This is the earliest point in time in which Appellant's property achieved a legal nonconforming status under the zoning ordinances.

6. As of 2018, the owners of the property charged rent for a fee of the single-family residence for fewer than 30 consecutive days, and, as of 2021, as required by Wis. Stat. § 66.1014(2)(d)2.b. and (now) Village Ord. § 18.52, Appellant's members were issued a short-term rental ("STR") license by the Village of Sister Bay.



7. Since then, Appellant/Appellant's members have successfully applied-for and renewed the STR license for every subsequent cycle year until now.

8. In March 2024, Appellant applied for renewal of its STR license for the annual cycle which is set to begin on July 1, 2024.

9. Appellant has otherwise complied with all lawful requirements for renewal of its STR license, as it has done so in the past.

10. On April 23, 2024, in an email, the Village Administrator denied the renewal of Appellant's STR license. This denial email is attached hereto as Exhibit A.

11. Among other issues which have been or will be resolved, the Village Administrator denied renewal of Appellant's STR license because code allegedly was not met:

1. The most significant issue is your parking situation. You must be able to provide at least 2, but not more than 4, *legal* parking stalls. Legal means each stall is 10' x 20', asphalt, out of the right-of-way, and at least ten feet from the neighboring lot line. The driveway must be at least 10' wide but not more than 24'. Your plan shows one stall north of the home, adjacent to the road, but an inspection revealed no true parking stall/asphalt area, and if it did exist, it doesn't meet setbacks. You also show 'pullover' parking in the public right-of-way, which is not allowed, and the asphalt must be removed from the public right-of-way.

See Exhibit A.

12. In a follow-up conversation with Appellant's members, the Village Administrator also added that Appellant was no longer "grandfathered" from certain requirements of the zoning code, and thus denied renewal of the STR license, because re-applying for the STR license allegedly constitutes a change of use invalidating Appellant's legal nonconforming status. The Village Administrator did not contest, and therefore has conceded the classification of, the lawful nonconforming status of Appellant's property prior to the alleged loss of any lawful nonconforming status.

13. The Village Administrator's denial of Appellant's renewal application, and the particular reasons cited thereto, constitute the administrative initial determination which is the subject of this action (the "initial determination").

#### **MUNICIPAL PROCEDURE**

The Appellant hereby realleges and incorporates herein by reference as though fully set forth all of the statements contained in paragraphs 1 through 13 above.

14. Appellant is exercising its rights provided in Wisconsin Chapter 66 to have this administrative initial determination reviewed and reversed as provided therein.

15. The administrative determination as stated herein above constitutes an "administrative determination" under Wis. Stat. § 68.01 and constitutes an "initial determination" under Wis. Stat. 68.09(1).

16. The Village Administrator is an "officer or employee of the municipality" of the Village of Sister Bay under Wis. Stat. § 68.01, and the Village Administrator is a "municipal authority" under Wis. Stat. § 68.05.

17. Appellant has a substantial interest which is adversely affected by this administrative initial determination, and is a "person aggrieved" whose rights, duties or privileges have been adversely affected by this initial determination under Wis. Stat. § 68.06.

18. This initial determination as stated herein is a reviewable determination under Wis. Stat. § 68.02.

19. Appellant did not have a hearing substantially in compliance with Wis. Stat. § 68.11 when the initial determination was made, thus Appellant, as required by law, is following the procedures set forth in Wis. Stats. §§ 68.08 & 68.09.

20. Pursuant to Wis. Stats. §§ 68.08 & 68.09(2) and Appellant's accompanying document, APPOINTMENT TO PROVIDE INDEPENDENT REVIEW, Appellant is requesting the Village provide an "independent review" of this initial determination by another person, committee or agency of the Village. Said document is incorporated herein by reference.

21. As stated therein, Appellant requests this independent review to be conducted by the Village President and/or the Village's Attorney, both of whom constitute "another person" of the Village, or "another . . . committee" of the Village, or both, under Wis. Stat. 68.09(2), and also would constitute a "municipal authority" under Wis. Stat. § 68.05.

22. To the extent the Village may have opted out of any Chapter 68 provisions pursuant to Wis. Stat. § 68.16 via Village Ord. § 18.56 F., Appellant then provides such appeal notice and requests the independent review be conducted by a hearing of the Village Board of Trustees in strict compliance with Wis. Stat. § 68.11. Appellant will pay any lawfully required appeal fee upon notice of such hearing and reference of such Village resolution or ordinance establishing such appeal fee for appeals to the Village Board of Trustees.

23. Pursuant to Wis. Stats. §§ 68.09(3)&(5), Appellant demands review of the initial determination to be completed within 15 days of receipt of this request for review, such review to provide a copy of a decision affirming, reversing, or modifying the initial determination and stating the reasons for such decision. Appellant waives any mailing requirements under Wis. Stat. § 68.09(5) on the condition a copy of the decision is delivered to Appellant's attorney via e-mail.

24. At the request of the municipal authority conducting the independent review, Appellant reserves the right under Wis. Stat. § 68.09(4) to provide supplemental written evidence and argument in support of Appellant's position with respect to the initial determination to assist a decision on review.

25. Appellant further reserves the ability to make any additional allegations not stated herein.

**ALLEGED GROUNDS FOR REVERSAL**

The Appellant hereby realleges and incorporates herein by reference as though fully set forth all of the statements contained in paragraphs 1 through 25 above.

26. Appellant has lawfully complied with all licensing requirements under Village Ord. Ch. 18, Art. IV and is in full compliance with the zoning ordinances of Chapter 66 of the Village Code, particularly due to the legal nonconforming status of Appellant's property.

27. Appellant's property has not undergone a change of use, meaning the legal nonconforming status of Appellant's property has not been eliminated.

28. To the extent any provisions of Chapter 66 of the Village Code allegedly eliminates Appellant's legal nonconforming status, those provisions of Chapter 66 are preempted by Wisconsin state law.

29. Failure to reverse the initial determination would cause the Village's final determination to not be according to law.

30. Failure to reverse the initial determination would cause the Village's final determination to be arbitrary, capricious, and oppressive, and without any rational basis.

31. Failure to reverse the initial determination would cause the Village's final determination to violate 42 U.S.C. § 1983.

32. Failure to reverse the initial determination would cause the Village's final determination to unlawfully deprive Appellant of property without due process of law, in violation of the U.S. Constitution and Wisconsin Constitution.



33. Failure to reverse the initial determination would cause the Village's final determination to unlawfully deny Appellant of equal protection of the laws, in violation of the U.S. Constitution and Wisconsin Constitution.

34. Failure to reverse the initial determination would cause the Village's final determination to unlawfully take Appellant's property without just compensation, in violation of the U.S. Constitution and Wisconsin Constitution.

35. Denying Appellant's STR license renewal for other reasons not stated herein may violate the 2<sup>nd</sup> Amendment to the U.S. Constitution.

36. Failure to reverse the initial determination would cause the Village's final determination to cause monetary and other damages to Appellant.

**WHEREFORE**, the Appellant, Captain's Cottage LLC, requests reversal of the initial determination as follows:

- (a) Reversal of the initial determination;
- (b) Order to the Village Administrator to renew and issue Appellant's STR license for the cycle beginning on July 1, 2024 (conditioned on resolving any outstanding licensing issues);
- (c) Refund of fees incurred pursuant to Wis. Stat. § 68.125.

Dated at Sister Bay, Wisconsin, this 6<sup>th</sup> day of May, 2024

**ATTORNEY BJORN JOHNSON LLC**

*Electronically signed by Bjorn A. Johnson*

Bjorn A. Johnson  
Attorneys for Plaintiff  
State Bar No. 1107912

ADDRESS:  
P.O. Box 257  
Sister Bay, WI 54234  
Email: [bjorn@attorneybjornjohnson.com](mailto:bjorn@attorneybjornjohnson.com)  
Telephone: 920-421-1154

**EXHIBIT A**

**From:** Julie Schmelzer <[julie.schmelzer@sisterbaywi.gov](mailto:julie.schmelzer@sisterbaywi.gov)>

**Sent:** Tuesday, April 23, 2024 12:05 PM

**To:** Adam White <[adam@whitefamilycottages.com](mailto:adam@whitefamilycottages.com)>

**Subject:** STR License - N Bay Shore Drive

Adam,

I have reviewed your application for a short-term rental license and have found several issues, one major, which prevents us from issuing a license at this time.

1. The most significant issue is your parking situation. You must be able to provide at least 2, but not more than 4, *legal* parking stalls. Legal means each stall is 10' x 20', asphalt, out of the right-of-way, and at least ten feet from the neighboring lot line. The driveway must be at least 10' wide but not more than 24'. Your plan shows one stall north of the home, adjacent to the road, but an inspection revealed no true parking stall/asphalt area, and if it did exist, it doesn't meet setbacks. You also show 'pullover' parking in the public right-of-way, which is not allowed, and the asphalt must be removed from the public right-of-way.
2. Your application shows you're renting 10774 N Bay Shore Drive, but the attachments make it look like you're renting 10775. Which address/attachments are correct? Please resubmit the first page of the application reflecting the correct address of the property.
3. You have a newer deck on the water side of the cottage. It needs a permit. I don't know if it meets setbacks, but you need to apply for a permit to get the review process started. I cannot issue a license as long as a violation is onsite, so you should go online and complete an application and submit the required fee. Any questions about forms or fees contact Janal in our office at 920-854-4118 or [janal.suppanz@sisterbaywi.gov](mailto:janal.suppanz@sisterbaywi.gov).
4. You haven't had a DATCP inspection in 3 years, but I see you applied for one. Has that been completed? I can't issue a license until that has either been completed or you have a private home inspection (see Ch. 18 to determine what is required).
5. Your property rules need to be amended to reflect garbage bins cannot overflow and the lids must close tightly.
6. Your rules also need a site plan attached, that gets posted with the rules. But, that site plan must show where parking is available, no parking on grass, no camper parking, and no boat parking in excess of 24 hours. This can't be submitted however until we resolve the parking issues mentioned above.

Be advised the property cannot be rented after July 1 until the above matters are resolved and a license has been issued.

Julie Schmelzer, Village Administrator

**CONFIDENTIALITY NOTICE:** This message is confidential and is intended only for the individual(s) or entities named. It may also be privileged or otherwise protected



*Law Firm of*  
**CONWAY, OLEJNICZAK & JERRY, S.C.**

Since 1976

May 8, 2024

*Randall J. Nesbitt*  
*RJN@lcojlaw.com*

Attorney Bjorn Johnson  
10698 N. Bay Shore Drive  
Sister Bay, WI 54234

**Re: Request for Review of Determination**

Dear Atty. Johnson:

I must advise that your request for a determination under Wis. Stat. §68.08 on behalf of Captain's Cottage LLC is misplaced, and therefore denied by the Village of Sister Bay.

Section 68.03 provides that determinations which are subject to administrative or judicial review procedures under other statutes, and any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s.68.16, are not subject to review under Chapter 68.

The village of Sister Bay has in place an ordinance specifically established to accommodate reviews of denial, suspension, revocation, or not processing applications for a Short Term Rental License; section 18.56 of the Village of Sister Bay Municipal Code.

That section meets the provisions of Wis. Stats. §68.03 by providing for administrative review of a license denial. As such, there is no review available under Chapter 68 for the denial which you have requested review of.

The review available under the Village Ordinance would be under Village of Sister Bay Municipal Code sect. 18.56 F., which provides as follows:

F. Any Operator who, by the Village Board or the Board's designee, has been denied a license, had a license suspended or revoked, or whose license application was not processed, may appeal the decision to the Board of Trustees upon filing an Appeal Form within fourteen (14) days of the written decision and paying the required appeal fee. The Board shall hold a hearing as soon as possible and determine whether the decision should be upheld or reversed.

To date the requirements for implementing an appeal under the above section have not been fulfilled as no appeal fee has been received by the Village of Sister Bay. In light of those deficiencies, an appeal has not been commenced and no hearing will be scheduled.

**Exhibit**

**D**

*Law Firm of*  
**CONWAY, OLEJNICZAK & JERRY, S.C.**

May 8, 2024

Page 2

Please let me know if you have any questions.

Very truly yours,

**LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.**

By: 

Randall J. Nesbitt

Legal Counsel to Village of Sister Bay

4997826

cc: Heidi Teich, Village of Sister Bay  
Julie Schmelzer, Village of Sister Bay Administrator  
Nate Bell, Village of Sister Bay President

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Business and Corporate

Employment and Labor

Real Estate and Land Use

Water and Environmental

Municipal and Administrative

## ATTORNEY BJORN JOHNSON

Monday, May 20<sup>th</sup>, 2024

Nate Bell, Village President

Via email: nate.bell@sisterbaywi.gov

With copies to:

Denise Bhirdo, Trustee

Via email: denise.bhirdo@sisterbaywi.gov

Julie Schmelzer, Village Administrator

Via email: julie.schmelzer@sisterbaywi.gov

Patrice Champeau, Trustee

Via email: patrice.champeau@sisterbaywi.gov

Randall Nesbitt, Village Attorney

Via email: rjn@lcojlaw.com

Kurt Harff, Trustee

Via email: kurt.harff@sisterbaywi.gov

Village Administration Staff

Via U.S. Mail:

P.O. Box 769

Sister Bay, WI 54234

Louise Howson, Trustee

Via email: louise.howson@sisterbaywi.gov

Lilly Orozco, Trustee

Via email: lillyorozco@sisterbaywi.gov

Alison Werner, Trustee

Via email: alison.werner@sisterbaywi.gov

**RE: Village's Grandfathering Rules: Captain's Cottage LLC Short-Term Rental License**

Village Trustees:

I represent Captain's Cottage LLC which is the owner of property located at 10775 North Bay Shore Drive on the waters of Green Bay and in the R-1 zoning district. The member owners of the LLC are Adam White and Brigid White, who live across the street at 10774 North Bay Shore Drive (collectively, "my Clients"). My Clients' property at 10775 is currently licensed as a short-term rental ("STR") by the Village. The subject of this letter concerns the Village's unlawful denial of and refusal to renew and issue my Clients' STR license for the cycle beginning July 1<sup>st</sup>, 2024. This is my Clients' final attempt to exhaust their remedies within the municipality before seeking judicial relief.

Exhibit  
E

The structure of this letter is as follows. Section I provides a factual background of the events giving rise to this situation. Section II outlines the Village's reasoning for denying my Clients' license renewal. Section III explains several legal causes of action to which my Clients are prepared to litigate. Section IV discusses the available judicial remedies to which my Clients are now entitled to as a matter of law. Section V offers the Village some final conditions as one last effort to avoid a lawsuit.

## **I. Factual Background.**

Last year, when the Village reviewed and passed its new set of STR ordinances in May and June<sup>1</sup>, there were multiple assurances made by the Village to the public that existing STR's would be grandfathered. It has now become clear that promise to the public was a lie. Recent events have shown that the Village never had any intention of protecting grandfathered—legal nonconforming—STR's, but instead had every intention of abusing the Village's zoning powers to try to oust STR's from Sister Bay, like my Clients', because municipalities are generally prohibited from doing so under state statute.<sup>2</sup>

Located at my Clients' waterfront property, there has existed a single-family dwelling and residence since on or around the year 1919. This property has been used as a single-family dwelling and residence at all times since. When the Village passed its zoning code in 2004 (and all subsequent amendments), the property acquired certain legal nonconforming protections from the new zoning requirements. In essence, the nonconforming aspects of the property became grandfathered.

As of 2018, the property charged rent for a fee of the single-family dwelling and residence for periods less than 30 consecutive days, and, as of 2021, as required by law, my Clients were issued an STR license by the Village. Since then, my Clients have successfully applied-for and renewed their STR license for every subsequent cycle year until now.

When the applications opened for the upcoming STR licensing period beginning on July 1<sup>st</sup>, 2024, my Clients, as they have always lawfully done in the past, timely applied for renewal of their STR license and paid the now required \$1500 fee. On 04-23-24, however, the Village denied their STR license renewal and issuance, primarily in-part<sup>3</sup>, via the following statement in an e-mail:

I have reviewed your application for a short-term rental license and have found several issues, one major, which prevents us from issuing a license at this time.

1. The most significant issue is your parking situation. You must be able to provide at least 2, but not more than 4, legal parking stalls. Legal means each stall is 10' x 20', asphalt, out of the right-of-way, and at least ten feet from the neighboring lot line. The driveway must be at least 10' wide but not more than 24'. Your plan shows one stall north of the home, adjacent to the road, but an inspection revealed no true

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<sup>1</sup> Ord. Nos. 2023-004 & 006.

<sup>2</sup> Wis. Stat. § 66.1014(2)(a).

<sup>3</sup> All other issues for denial either have been actually resolved or resolved in principle.

parking stall/asphalt area, and if it did exist, it doesn't meet setbacks. You also show 'pullover' parking in the public right-of-way, which is not allowed, and the asphalt must be removed from the public right-of-way.

## II. License Denial Reasoning.

My Clients' license renewal and issuance was presumably denied under the following reasoning:

The Village's STR licensing chapter generally requires compliance with the Municipal Code before a license may be issued.<sup>4</sup> Relevant here are two provisions for the number of and setbacks for parking spaces under the Village's zoning code.<sup>5</sup> The general rule for the number of parking spaces for a single-family dwelling, whether an STR or not, requires a minimum of 2 parking spaces. And the general rule for the setbacks is the parking spaces must be 10 feet from the side lot line. The parking for 10775 North Bay Shore Drive has never conformed to those requirements.

Generally and historically, the parking at properties like 10775 North Bay Shore Drive would be grandfathered from those two provisions as a legal nonconformity, meaning the existing parking may continue without needing to conform to the 2-space and 10-foot setback rules.<sup>6</sup> But, the parking allegedly lost its nonconforming status for one—two reasons.<sup>7</sup> First, applying for an STR license allegedly changed the use<sup>8</sup> of the property from single-family residential to a short-term rental. Second, according to most of the drafting history behind last year's ordinance amendments, applying for an STR license increased the intensity of the single-family residential use, pursuant to a provision of the recently enacted § 66.0923 of the Sister Bay zoning code last year via. Ord. No. 2023-004:

### **Sec. 66.0923 Intensification of Non-Conforming Uses**

Any time a use is intensified by increasing the number of occupants, traffic, sales, or similar expansion of the use, the non-conforming features of the lot, such as non-conforming driveways, parking areas, signs, landscaping, open space, or other [n]on-conformities shall be brought into compliance with this Chapter. . . .

So, the reasoning goes, because applying for an STR license resulted in a change of use from single-family residential to short-term rental and/or an intensification of the single-family residential use, this change of use or intensification invalidated any legal nonconforming protections for the property. Because the property would no longer be a protected legal nonconformity, the property is out of compliance

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<sup>4</sup> § 18.55 B.

<sup>5</sup> §§ 66.0403(10)(d)1. (number of spaces) & 66.0406(5)(b) (setbacks).

<sup>6</sup> §§ 66.0901 & 66.0911.

<sup>7</sup> The Village did not and has not contested the prior existence of the property's legal nonconforming status or any vested rights acquired therein. Therefore, the Village has conceded that point and it is not at issue here. The only issue is whether the property has lost its legal nonconforming status.

<sup>8</sup> A change of use is one way for a nonconformity to lose its protected legal nonconforming status.



with the 2-space minimum and 10-foot setback zoning rules. And because the property would not be in compliance with the zoning rules, and thus the Municipal Code, the property therefore does not comply with the STR licensing requirements. So, the STR license application was denied, and the license was not renewed and issued for cycle beginning July 1, 2024.

This reasoning is all incorrect as a matter of law. A change of use does not occur by applying for an STR license. And an intensification cannot legally eliminate the protections for legal nonconformities. If those two things are true, the Village's reasoning for denying the license falls apart. If there is no change of use or intensification eliminating the legal nonconforming status, then the legal nonconformities may be continued even in light of not strictly complying with the 2-space and 10-foot setback zoning rules. If that is the case, then the zoning code is fully complied with, and, as such, the Municipal Code. So, then there is full compliance with the Village's STR licensing chapter—meaning the STR license should have been renewed and issued for the upcoming cycle as a matter of law.

In light of this unlawful denial, my Clients make the following general statements. **They will not be forced to tear up their yard and landscaping** just to add additional parking spaces in a different area of the yard to which they are not legally required to do so when they are grandfathered from such requirements. As such, due to the looming threat of fines for operating without a license, they have been forced to cancel their 2024 rental reservations after July 1<sup>st</sup>. These renters' vacations have been ruined, and, as of the date of this letter, my Clients have lost out on 35 nights of rental occupancy already causing \$1,500.00 in lost nightly rental revenue totaling \$52,500.00 in damages. The fines for operating without a license can reach as high as \$5,000.00 per day.<sup>9</sup> So it is no surprise they are taking proactive measures to prevent such fines from hurting themselves financially or further ruining someone else's vacation on shorter notice. As will be discussed, this situation has now given rise to multiple grounds for legal action available to my Clients against the Village.

### III. Legal Causes of Action.

#### A. Applying for an STR License is not a Change of Use.

The exact terms of Sister Bay's zoning code expressly combines single-family dwellings and short term rentals as the same land use: "Permitted Uses: (a) Single-family dwellings, *including short-term rentals*."<sup>10</sup> So, even by those exact terms, no change of use can ever occur in these types of license application scenarios. It is the same land use by the Village's own rules.

And, furthermore, Wisconsin case law is clear that short-term rentals are included within the definition of a single-family dwelling and residence land use:

What matters is residential use, not the duration of the use. The words "single-family," "residential" and "dwelling" do not operate to create time restrictions that the legislative body did not choose to include in the ordinance.

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<sup>9</sup> § 18.59.

<sup>10</sup> § 66.0311(1)(a) (emphasis added) (one permitted use listed among others).



...

There is nothing inherent in the concept of residence or dwelling that includes time.<sup>11</sup>

So, as a matter of law, no change of use can ever occur here because the use of the land is still used as a single-family dwelling and residence *just for shorter interval periods of time*. Applying for the STR license, therefore, is simply following the regulations and requirements that the Village itself has required of STR's, no different than a bar being required to obtain a Village liquor license: the underlying land use remains the same at all times, just that it is now required to be licensed.

## **B. Intensification cannot legally eliminate a legal nonconformity.**

Even if a change of use does not occur here, it is likely alleged by the Village that the property has undergone an intensification under § 66.0923 (see above for the text of that section) and therefore must now bring the parking areas into compliance with the zoning code. But § 66.0923 is both unlawful on its face and as-applied here for the following reasons.

### 1. Preemption Action.

Under the Wisconsin Constitution, certain municipal ordinances are preempted (in effect, superseded) by state statutes of statewide concern.<sup>12</sup> Wisconsin statutes provide rights for nonconformities that go above and beyond those provided by Sister Bay's zoning code, even in light of § 66.0923:

*Nonconforming uses.* The continued lawful use of a building, premises, structure, or fixture existing at the time of the adoption or amendment of a zoning ordinance may not be prohibited although the use does not conform with the provisions of the ordinance. The nonconforming use may not be extended. . . .<sup>13</sup>

Over time, Wisconsin case law has further clarified this requirement—that a nonconformity shall not be prohibited and may be continued unless it is extended—pursuant to the change of use doctrine:

If an increase in volume, intensity or frequency of use is coupled with some identifiable change or extension, the enlargement will invalidate a legal nonconforming use. However, a mere increase in the volume, *intensity* or frequency of a nonconforming use *is not sufficient to invalidate it*.<sup>14</sup>

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<sup>11</sup> See *Heef Realty & Invs., LLP v. City of Cedarburg Bd. of Appeals*, 2015 WI App 23 ¶¶ 12–13, 361 Wis. 2d 185, 861 N.W.2d 797.

<sup>12</sup> WI Const. Art. XI, § 3(1); see also *City of South Milwaukee v. Kester*, 2013 WI App 50 ¶ 18, 347 Wis. 2d 334, 830 N.W.2d 710 (“[a]n ordinance regulating an area of statewide concern is preempted only if: (1) the legislature has expressly withdrawn the power of municipalities to act, (2) the ordinance logically conflicts with state legislation, (3) the ordinance defeats the purpose of state legislation, or (4) the ordinance violates the spirits of state legislation.”).

<sup>13</sup> Wis. Stat. § 62.23(7)(h) (omitted additional sentences not relevant here).

<sup>14</sup> *Waukesha County v. Seitz*, 140 Wis. 2d 111, 117–118, 409 N.W.2d 403 (Wis. App. 1987) (emphasis added) (commonly known as “*Seitz I*”).

[A] change in the method or quantity of production of a nonconforming use is not an entirely new use when the original character of the use remains the same. This holding allows the operator of a nonconforming use to incorporate modern technology into his or her business without fear of losing that business.<sup>15</sup>

The intensification provisions of § 66.0923 of Sister Bay's zoning code directly conflicts with these statewide principles. The only disqualifying scenario for a nonconformity under state statute is if it is extended; primarily, if there is a change of use. And case law has said that a mere increase in the intensity of a nonconformity is not sufficient to invalidate it. These requirements cannot be more clear. § 66.0923 of the zoning code would allow intensification to serve as the sole basis to invalidate a nonconformity. That is in direct conflict with these statewide legal requirements. So, § 66.0923 must be preempted and is therefore invalid under the state nonconforming use statute and the relevant case law. Lastly, it is worth noting the case law has clearly established that incorporating modern technology does not invalidate the nonconformity, so the need to apply for a Village-required license should not either. Applying for a required license is nowhere close to the line of becoming a change of use.

## 2. Substantive Constitutional Actions.

Assuming the intensification issue would not be resolved by the preemption doctrine, there are several more fundamental constitutional issues associated with giving § 66.0923 its full force and effect. Wisconsin case law has noted such constitutional issues arising under the retroactive application doctrine, stating: "[l]egal nonconforming uses are protected because of concerns that retroactive application of zoning ordinances would be unconstitutional."<sup>16</sup> Retroactive application gives rise to due process claims<sup>17</sup> under the Wisconsin Constitution<sup>18</sup> and the U.S. Constitution.<sup>19</sup> This would be a wide-open constitutional question under Wisconsin law, and is highly susceptible to extended litigation to resolve the legal questions that would especially arise in this particular case scenario.

Although the issue has not been addressed by Wisconsin courts, presumably because such ordinances are clearly preempted by state law as discussed earlier, two principles of the retroactive application doctrine weigh heavily in my Clients' favor. First, this would be a scenario in which the ordinance unconstitutionally "takes or impairs vested rights."<sup>20</sup> My Clients' have a vested right here in their legal nonconforming status, and the application of § 66.0923 purports to take away or impair those vested rights. Second, considerations of fairness under the doctrine strongly weigh in favor of my Clients. As the United States Supreme Court has stated:

. . . the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.

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<sup>15</sup> *Racine County v. Cape*, 2002 WI App 19 ¶ 14, 250 Wis. 2d 44, 636 N.W.2d 782.

<sup>16</sup> *Hussein v. Vill. of Germantown Bd. of Zoning Appeals*, 2011 WI App 96 ¶ 12, 334 Wis. 2d 764, 800 N.W.2d 551.

<sup>17</sup> See generally *Neiman v. American National Property & Casualty Co.*, 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160.

<sup>18</sup> WI Const. Art I., § 1.

<sup>19</sup> U.S. Const. Amend. XIV, § 1.

<sup>20</sup> *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64 ¶ 49, 370 Wis. 2d 500, 881 N.W.2d 702.

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal. In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.<sup>21</sup>

As such, my Clients' case would be ripe to resolve these difficult constitutional questions applied to this Village ordinance which purports to arbitrarily eliminate nonconformities—which do not weigh in the Village's favor here given this arbitrary deprivation of my Clients' property interests.

Consider further how the potential overbroad reach of § 66.0923 shocks the conscience, especially given the possible applicability of § 66.0923 to uses that *are* conforming. Notice how § 66.0923 does not clearly state that it would only apply to *nonconforming* uses: “Any time a use is intensified . . . .” (emphasis added). So, there is potential for this language to apply over-broadly to *all* uses that allegedly increase in intensity, not only nonconforming uses. Consider the implications of the following hypotheticals:

- Gas station with a nonconforming number of driveways alleged to have an increase in traffic could be forced to remove additional driveways.
- Coffee shop with insufficient parking spaces alleged to have an increase in sales could be forced to provide such parking spaces or risk being shut down.
- A family residing in a single-family home with insufficient parking spaces could be forced to add additional parking spaces purely because the family increases the occupancy by having another child.

That is not a rational rule for Sister Bay. And § 66.0923 would theoretically give the Village free reign to terrorize property owners in future years by changing the zoning requirements from year-to-year, only to force unreasonable compliance each year with new zoning provisions as a condition of renewing a license. That is not rational urban planning. That is an arbitrary command from the government to force irrational property compliance. In sum, the intensification provisions of § 66.0923 are highly constitutionally problematic for the Village—and it has now caused great damage to my Clients.

Lastly, three additional substantive constitutional issues are present here, which my Clients are prepared to allege, but do not warrant an in-depth discussion at this time. First, for similar reasons as the due process issues stated above, equal protection claims arise under the Wisconsin Constitution<sup>22</sup> and U.S. Constitution.<sup>23</sup> Second, the actions of the Village here have operated to create an unconstitutional regulatory taking of property without just compensation in violation of

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<sup>21</sup> *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (quotations omitted).

<sup>22</sup> WI Const. Art. I, § 1.

<sup>23</sup> U.S. Const. Amend. XIV, § 1.

the Wisconsin Constitution<sup>24</sup> and U.S. Constitution.<sup>25</sup> Lastly, certain firearm restrictions of the STR licensing chapter<sup>26</sup> are both facially unconstitutional and would be unconstitutionally applied to my Clients in violation of the Wisconsin Constitution<sup>27</sup> and the U.S. Constitution.<sup>28</sup> All of these constitutional issues are now ripe causes of action for litigation.

### C. Procedural Constitutional Action.

In addition to all of the above substantive causes of action, the Village's abuse of its own appeal process has now unconstitutionally deprived my Clients of procedural due process of law in violation of the Wisconsin Constitution<sup>29</sup> and U.S. Constitution.<sup>30</sup> On 04-29-24, my Clients requested an appeal form for an STR license appeal to the Village Board after they were initially denied. This was never provided to my Clients, presumably because such a form does not exist. On 05-06-24, my Clients provided Village staff with an appeal notice to the Village Board and intent to pay any lawfully required appeal fee pursuant to ¶ 22 of my Clients' request for review of determination for the initial license denial, stating:

To the extent the Village may have opted out of any Chapter 68 provisions pursuant to Wis. Stat. § 68.16 via Village Ord. § 18.56 F., Appellant then provides such appeal notice and requests the independent review be conducted by a hearing of the Village Board of Trustees in strict compliance with Wis. Stat. § 68.11. Appellant will pay any lawfully required appeal fee upon notice of such hearing and reference of such Village resolution or ordinance establishing such appeal fee for appeals to the Village Board of Trustees.

On 05-08-24, my Clients then received notice that no hearing would be scheduled, allegedly because no appeal fee had been received by the Village. However, as of this date, the Village has never provided for the requirement of such an appeal fee for this type of appeal to the Village Board. No ordinance, resolution, or change to the Village's fee schedule has ever done so. And ever since the Village provided for this appeal process last year under Ord. No. 2023-006, the Village has revisited the fee schedule *twice* via Res. 2023-007 & Res. 2023-024. The Village could have provided for the requirement of such an appeal fee at any time—but it consciously chose not to. The Board is even revisiting the fee schedule again at its May meeting, and a fee is still not being provided for or even discussed. As such, this appeal fee either does not exist or the costs for such appeals are already covered within the \$1500 license fee for the STR applications, which my Clients have already paid.<sup>31</sup>

All of this only points to one conclusion: the Village has tried to internally insulate itself from reviewing such STR license denial appeals, all in the pursuit of eliminating this STR and depriving my clients of a constitutionally protected property interest. My Clients have a

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<sup>24</sup> WI Const. Art. I, § 13.

<sup>25</sup> U.S. Const. Amend. V.

<sup>26</sup> § 18.58 J.

<sup>27</sup> WI Const. Art. I, § 25.

<sup>28</sup> U.S. Const. Amend. II; *see generally* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>29</sup> WI Const. Art I, § 1.

<sup>30</sup> U.S. Const. Amend. XIV, § 1.

<sup>31</sup> § 18.60, Res. No. 2023-024 ("Short-Term Rental License \$1500").

constitutional right to be heard before their property rights are deprived. The Village's own insulation from refusing to hear my Clients' case is therefore one of the classic examples of this type of constitutional violation: these procedural actions by the Village have deprived my Clients of property without due process of law. The Village cannot constitutionally refuse to hear my Clients' case on the basis of failing to pay an appeal fee that has not been legally required to be paid.

#### **IV. Available Judicial Remedies.**

These various legal causes of action have now given rise to several available judicial remedies. My Clients are prepared to pursue each of these and do not waive any additional remedies that may be available:

1. Declaratory Judgment declaring the following:
  - (a) Any nonconforming aspects of 10775 North Bay Shore Drive are legal nonconformities and may be continued, primarily in-part, because: (1) applying for and renewing an STR license does not constitute a change of use, and (2) to the extent § 66.0923 operates to eliminate any legal nonconforming status, § 66.0923 is unlawful for the reasons stated herein; and
  - (b) Primarily in-part due to the legal nonconforming status of 10775 North Bay Shore Drive, said property is in full compliance with the Sister Bay Municipal Code, and, therefore, the STR license for the cycle beginning July 1<sup>st</sup>, 2024 was unlawfully denied and shall be renewed and issued.
2. Permanent Injunction to prevent enforcement of, among other things, the penalties under § 18.59 of the Municipal Code for the reasons stated herein.
3. Compensatory Damages pursuant to 42 U.S.C. § 1983 to recover all lost rental revenue for every night of potential occupancy during the cycle beginning July 1<sup>st</sup>, 2024 due to the constitutional violations stated herein, plus damages associated with loss of development of consumer good-will.
4. Attorney Fee's pursuant to 42 U.S.C. § 1988(b) to recover all reasonable attorney's fees as part of the costs of enforcing 42 U.S.C. § 1983.

My Clients will aggressively pursue each of these remedies against the Village.

#### **V. Conditions to Avoid a Lawsuit.**

In the spirit of resolving this before initiating any litigation, my Clients are offering one final attempt to fix this situation if the following conditions are met:

1. Village Board Resolution or Order overturning the denial of the STR license, and renewing and issuing the STR license for the cycle beginning July 1<sup>st</sup>, 2024.
2. Village Board Resolution or Order confirming and establishing the legal nonconforming status of the relevant aspects of 10775 North Bay Shore Drive at issue here.
3. To the extent § 66.0923 would purportedly prevent such Village Board Resolutions or Orders, then the passage of an Ordinance repealing § 66.0923 in its entirety to allow for such Village Board Resolutions or Orders.
4. Damages for lost rental revenue for the rental cancellations incurred as of the date of this letter, totaling \$52,500.00.
5. Reasonable Attorney fee's incurred as of the date of this letter.

If these conditions are not met or agreed to by the Board meeting on June 18<sup>th</sup>, 2024, then we will begin the process of filing a lawsuit against the Village. The failure of the Village to have an agenda item, or at least hold a closed session with legal counsel, at its May 21<sup>st</sup> meeting concerning STR issues in Sister Bay is shocking and unfortunate. In the interests of timeliness, the May 21<sup>st</sup> agenda should be amended to provide for such discussion.

The phrase “grandfathered” is not a synonym for things you like apart from things you do not like, such as this STR. My Clients ask for a majority of the Board who genuinely supports grandfathering—at least four (4) of the Trustees—to help fix this problem not only for this particular situation, but for all of Sister Bay.

Please have your attorney reach out to me to discuss this matter if needed.

Sincerely,

***Electronically signed by Bjorn Johnson***

Attorney Bjorn Johnson  
Attorney Bjorn Johnson LLC  
*Local Counsel* for Captain's Cottage LLC