



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.  
330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141  
414-727-WILL (9455) | Fax 414-727-6385 | www.will-law.org  
Luke@will-law.org | Direct: 414-727-7361

August 14, 2024

**VIA email to:**

Julie Schmelzer, Village Administrator

Randy Nesbitt, Village Attorney

Nate Bell, Denise Bhirdo, Kurt Harff, Louise Howson, Patrice Champeau, Lilly Orozco, and Alison Werner, members of the Village Board

**Re: 5+ Bedroom Short-Term Rentals**

Village of Sister Bay Board, Administrator, and Attorney,

We represent four owners of short-term rentals in Sister Bay with more than four bedrooms. Their names and property addresses are listed below. As you know, in June 2023, the Village amended its zoning ordinances to limit short-term-rentals to four bedrooms. We write to notify you that the four-bedroom limit is unlawful as applied to our clients, for multiple reasons, as explained in more detail below. We ask that, within two weeks of this letter, **by August 28**, you confirm in writing that you will not enforce the 4-bedroom limit against any of the properties listed below. If you are unwilling to do so, we will take further legal action against the Village to protect our clients' rights.

Village Administrator Julie Schmelzer has also been communicating to short-term-rental owners that their guests may not sleep anywhere in their home other than in the four approved bedrooms. According to Ms. Schmelzer, guests may not use pull-out couches, futons, etc., during their stay, even though they are at or under the occupancy limit. An example email from Ms. Schmelzer stating this restriction is attached to this letter. This requirement is not clearly stated anywhere in the Village's ordinances. Regardless, it is also unlawful for all of the reasons described below. We ask that you confirm in writing that, in addition to the 4-bedroom limit, you will not enforce this restriction against any of our clients either.

To be clear, none of our clients seek to exceed the Village's 12-person capacity limit on short-term rentals. They simply want to allow their guests—often families with young kids—to spread out in the home and use all of the bedrooms and sleeping options. To the extent the Village is concerned about overcrowding, the 12-person limit (or 3 per bedroom for fewer than 4 bedrooms) fully addresses that concern. Going further and preventing property owners from using the available rooms and sleeping arrangements in the house is arbitrary and irrational.

Our hope, and our clients' hope, is that the Village will be reasonable and that we will be able to resolve this issue without litigation. But if not, we are prepared to file a lawsuit.

### **Wisconsin's Right-to-Rent Law**

As you are well aware, Wisconsin law gives homeowners a right to rent their home on a short-term basis. Wis. Stat. § 66.1014. Political subdivisions, like the Village, “may not enact or enforce an ordinance that prohibits the rental of a residential dwelling.” Any ordinance inconsistent with the right to rent “does not apply and may not be enforced.” The Village may “regulat[e]” short-term rentals, but not “in a manner that is [ ] inconsistent with” the right to rent a home. The Village’s 4-bedroom limit effectively prohibits homeowners with 5 or more bedrooms from using part of their home for their short-term rental. The 4-bedroom limit is therefore “inconsistent with” the right-to-rent law and “may not be enforced.”

### **Vested Property Rights**

Even setting § 66.1014 aside, our clients have a right to use all of the bedrooms in their properties as a matter of vested property rights. The non-conforming use doctrine, a well-established rule of property law, is that “zoning regulations cannot be made retroactive and neither can prior nonconforming uses be removed nor existing conditions be affected thereby.” *Des Jardin v. Town of Greenfield*, 262 Wis. 43 (1952).<sup>1</sup> This principle is not only mandated by the Wisconsin Constitution, as the cases cited above explain, it is also reflected in state law and *in the Village’s own ordinances*. Wis. Stat. § 62.23(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.” Likewise, 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.” *See also* Village Ordinance § 66.0911.

A related rule is the “building permit rule,” a “bright line rule” that gives property owners a “vest[ed] [ ] right to use property consistent with current zoning at the time a building permit application that strictly conforms to all applicable zoning regulations is filed.” *Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, ¶ 18.

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<sup>1</sup> For other articulations of the general rule, *see Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, ¶ 21; *Adams Outdoor Advert. Ltd. P’ship v. City of Madison*, 2017 WI App 56, ¶ 13; *Hussein v. Vill. of Germantown Bd. of Zoning Appeals*, 2011 WI App 96, ¶ 12; *State ex rel. Covenant Harbor Bible Camp of Cent. Conf. of Evangelical Mission Covenant Church of Am. v. Steinke*, 7 Wis. 2d 275, 283 (1959); *Sauk Cnty. v. Trager*, 113 Wis. 2d 48, 56, (Ct. App. 1983), *aff’d*, 118 Wis. 2d 204 (1984).

As you know, the Village’s 4-bedroom limit was adopted in June 2023. Village Ordinance 2023-004. While the Ordinance indicates that property owners can seek an exemption to the 4-bedroom limit from the Planning Commission, the Village has made clear that it will not grant any exceptions. Two of our clients attempted to follow that process, both were denied, and during the hearings, Planning Commission members stated that they would not grant any exception request “in an R district.”<sup>2</sup> Moreover, Ms. Schmelzer’s emails to our clients have asked them to specify how any extra rooms will be “locked” and how guests will be “prevented” from accessing the additional bedrooms in their homes.

Two of the four property owners listed below (the first two) were renting their homes on a short-term basis before the 4-bedroom limit went into effect, and thus they fall squarely into the non-conforming use doctrine and have a vested right to continue renting their properties and use all of the bedrooms.

The remaining two had a building permit and began building their homes well before the 4-bedroom limit was in place, and each of them invested substantial financial resources to add a fifth (and/or sixth) bedroom that they designed and built specifically for use in a short-term rental. Had they known the bedroom limit was about to change, they would have built their homes differently—precisely what the building permit rule is meant to protect against. The Wisconsin Supreme Court made clear in *Golden Sands* that the building-permit rule applies not only to the *structures* covered by the permit, but also to the “use” of the property, per the zoning code in place at the time of the permit. *E.g.*, 2018 WI 61, ¶¶ 2–4, 13, 18, 24–26. As the Court noted, the rationale of the rule is to provide “predictability for land owners, purchasers, developers, municipalities[,] and the courts,” and to allow “developer[s] [to] make expenditures in reliance on a zoning classification,” as our clients did here. *Id.* Thus, these homeowners are covered by the building-permit rule and also have a vested right to use all of the bedrooms in their homes when renting their properties on a short-term basis.

We note that the Village has allowed at least one other short-term-rental to continue to operate with more than four bedrooms. It should also allow our clients, who were renting or began building their homes before the change, to continue to use all of their bedrooms.

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<sup>2</sup> See Video of January 23, 2024, Planning Commission Meeting at 1:42:17, available at <https://www.youtube.com/watch?v=X9zCnU5axrw>. At 1:39:20, Julie Schmelzer states “As of July 1, there should not be any five bedroom rentals any more in Sister Bay.” At 1:41:07, Nate Bell asks, “The question I would have is, what circumstances do we want to say ok to beyond four bedrooms? Is there a circumstance we want to? ... I’m hard pressed to think how we would want to do that.” At 1:41:28, Denise Bhirdo responds, “I might be inclined ... in countryside where you ... have a 10-acre lot ... [but] not in an R district.” Notably, the Planning Commission has removed the link to this video from their website (<https://www.sisterbaywi.gov/meetings/>) but has not done so for any other Planning Commission meeting.

## **Due Process**

The Wisconsin Supreme Court has also held, on more than one occasion, that zoning ordinances are unconstitutional and violate due process if they are “arbitrary and unreasonable,” having “no substantial relation to the public health, safety, morals or general welfare.” *E.g.*, *Town of Rhine v. Bizzell*, 2008 WI 76, ¶ 37 (holding that the Town of Rhine’s zoning ordinance failed that test); *Cushman v. City of Racine*, 39 Wis. 2d 303, 311 (1968) (same with respect to a Racine zoning ordinance).

Given that our clients do not seek to exceed the 12-person capacity limit, prohibiting their guests from using the extra bedrooms in their home is clearly arbitrary and unreasonable. Where guests happen to sleep at night in a private home does not affect anyone else in the neighborhood or the Village, or have any relationship whatsoever to “public health, safety, morals or general welfare.” If anything, forcing guests to crowd into fewer bedrooms than the home has available is *detrimental* to public health and safety. There is simply no rational justification for the 4-bedroom limit as applied to our clients. The same goes with Ms. Schmelzer’s prohibition on using pull-out couches or futons in the house.

## **Taking Without Just Compensation**

Finally, to the extent the Village persists in enforcing the 4-bedroom limit against our clients, that limit operates as a taking of our clients’ property without just compensation. As you know, both the U.S. and Wisconsin Constitutions require compensation when government takes private property. *E.g.*, Wis. Const. art. I, § 13 (“The property of no person shall be taken for public use without just compensation therefor.”).

Both the United States Supreme Court and the Wisconsin Supreme Court have recognized that a regulation that goes too far can amount to what courts have called a “regulatory taking.” The Supreme Court has set forth an “ad hoc” balancing test for such claims that considers the “nature and character of the governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner’s distinct investment-backed expectations in the property.” *See R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 17; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

These factors cut in favor of a compensable taking here. Our clients invested substantial resources to add the additional rooms to their homes, and the Village has effectively denied all economically beneficial use of the extra bedrooms. The Village’s restriction is also akin to a physical taking; indeed, as noted above, Ms. Schmelzer has even suggested that our clients must lock up their extra rooms to prevent their guests from using them. Finally, as already noted, the Village has no rational justification for deciding where the guests of a short-term-rental can sleep while they

are inside a private home. Given that the Village has “taken” a portion of our clients’ properties, our clients are entitled to just compensation from the Village—if the Village persists in enforcing that limit against them.

### **Our Clients**

Our clients include the following homeowners and properties:

1. Mark and Caley Swanson – [Luna’s Retreat](#) (2226 Scandia Rd.), [Scandia Retreat](#) (2215 Scandia Road), and [Cardinal Retreat](#) (10809 Cardinal Ct.)
2. Hunter and Jessica Clinton – [Starkhaus](#) (10841 Birchwood Drive)
3. John and Erin Wilson – [The Sister Bay Haus](#) (10547 Fieldcrest Road)
4. Nick and Tara Froemming – [The Cherry Cabana](#) (10541 Fieldcrest Road)

### **Conclusion**

As noted above, we respectfully ask for a written determination, within two weeks, that the Village will not enforce its 4-bedroom limit, or its restrictions on where guests sleep, against our clients.

We look forward to the Village’s response.

Sincerely,



Luke N. Berg



Lucas T. Vebber



Nathalie E. Burmeister

On Tue, Apr 23, 2024 at 8:56 AM Julie Schmelzer <[julie.schmelzer@sisterbaywi.gov](mailto:julie.schmelzer@sisterbaywi.gov)> wrote:

Erin and John,

I'm reviewing your application for a STR license. Before we can issue a license I need the following from you:

1. How will the fifth bedroom be restricted from use? I need a statement indicating how it will be prevented access, e.g. will it be locked at all times?
2. We need an email address for your Agent.
3. Your DATCP license is going to expire. Will you have a new license by the time you rent under this new license?
4. Your garbage contract is from May 2023. I need one for 2024.

Please submit the required items to the Village clerk at [heidi.teich@sisterbaywi.gov](mailto:heidi.teich@sisterbaywi.gov)

Julie Schmelzer, Village Administrator

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

Date: Tue, Oct 10, 2023 at 9:31 AM

Subject: RE: Clarification on recent letter

To: Door County Rentals Swanson <[REDACTED]>

Hi Mark and Caley, please see my responses below in red.

...

3) When looking at the ordinance online it calls out that a property can have 4 bedrooms and sleep 12 maximum before needing a special permit. I do not see this called out in your letter, so wanted to make sure this is in fact a rule for next year? If so, my property at 2226 scandia has 5 bedrooms and sleeps 12. Given that I am at the 12 limit before needing to get a special use permit, I would assume that I do not need to get a special use permit? I am assuming this concern is less about the # of bedrooms and more about the total number of people in a house, but wanted to check. **No, it's a max of 4 legal rooms, so one would have to be locked/not accessible to guests.**

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

Date: Tue, Jul 16, 2024 at 2:20 PM

Subject: STR License - 10809 Cardinal Ct.

To: Mark Swanson <[REDACTED]>

Hi Mark, I am writing in regard to the Short-Term Rental License application submitted authorizing your rental for the upcoming season (2024-2025). The license has been approved.

In order to ensure compliance with the code, be advised the following are restrictions applicable to your unit:

1. There can be no signage on the property visible from the road (e.g. a nameplate advertising the name of the rental);
2. You can only allow sleeping in the 4 bedrooms (no pull out couches, etc.);
3. There shall be no more than 12 guests onsite at a time;
4. There shall be no more than 4 vehicles parked onsite, including any garage stalls.

A license will be mailed to you and copies of the approved property rules sent to your neighbors (our code requires we send them a copy).

Julie Schmelzer, Village Administrator