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STATE OF WISCONSIN CIRCUIT COURT DOOR COUNTY

HUNTER and JESSICA CLINTON, JOHN and ERIN WILSON, NICK and TARA FROEMMING, and MARK and CALEY SWANSON

Plaintiffs,

v.

VILLAGE OF SISTER BAY and JULIE SCHMELZER, as Village Administrator for the Village of Sister Bay

Defendants.

Declaratory Judgment
Case Code: 30701
Case No. 24-CV-119

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A TEMPORARY INJUNCTION

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INTRODUCTION

Under Wisconsin law, homeowners have the right to rent their homes on a short-term basis. Wis. Stat. § 66.1014. Homeowners 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); *Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, ¶ 21, 381 Wis. 2d 704, 913 N.W.2d 118. A similar rule applies to properties that are in the process of being built when the zoning code changes. This so-called "building permit rule" is 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*, 2018 WI 61, ¶ 18.

Despite these clear legal rights, the Village of Sister Bay ("the Village") has refused to confirm that its new zoning ordinance—limiting short-term rentals to using four or fewer bedrooms—will not retroactively apply to existing rental properties with more than four bedrooms. Instead, the Village has made clear that it will not grant any exceptions to the 4-bedroom limit, and Defendant Julie Schmelzer, the Village Administrator, has even told some of the Plaintiffs that they must "lock" their extra rooms such that their guests will be "prevented" from accessing them. Swanson Decl. ¶¶ 7–9.

Defendant Schmelzer has also attempted to unilaterally dictate where guests can and cannot sleep within the home—telling Plaintiffs their guests cannot use futons and pull-out couches—even though no Village ordinance addresses this.

Plaintiffs notified the Village that these limits cannot be enforced against them, in part because they are grandfathered. Plaintiffs spent multiple weeks going back and forth with the Village about this, but the Village refused to tell Plaintiffs whether it agreed with them or not and also refused to provide any assurances that the limits would not be enforced against them. The Village's fines for violating the 4-bedroom limit are ridiculously steep—up to $5,000 *per day*, plus the attorneys' fees and costs that the Village incurs for bringing an enforcement action. Village Ordinance § 18.59.

Plaintiffs cannot risk such a massive penalty, and, as a result, they seek a preliminary injunction to allow them to continue using their whole properties without the threat of enforcement while this litigation proceeds. They do not seek to exceed the separate, 12-person capacity limit, so an injunction will not affect anyone in the Village; it will simply allow their guests to spread out and use the whole home.

STATEMENT OF FACTS

The Parties

Plaintiffs Hunter and Jessica Clinton own a five-bedroom home in the Village at 10841 Birchwood Drive that they rent on a short-term basis. They market this property online as "Starkhaus."[1] Clinton Decl. ¶¶ 1–2.

Plaintiffs John and Erin Wilson own a five-bedroom home in the Village at 10547 Fieldcrest Road that they rent on a short-term basis. They market this property online as "The Sister Bay Haus."[2] Wilson Decl. ¶¶ 1–2.

Plaintiffs Nick and Tara Froemming own a six-bedroom home in the Village at 10541 Fieldcrest Road that they rent on a short-term basis. They market this property as "The Cherry Cabana."[3] Froemming Decl. ¶¶ 1–2.

Plaintiffs Mark and Caley Swanson own three homes in the Village that they rent on a short-term basis. Swanson Decl. ¶¶ 1–2. The first, at 2226 Scandia Rd., is a five-bedroom property called "Luna's Retreat."[4] Swanson Decl. ¶ 2. The second, at 2215 Scandia Rd., is "Scandia Retreat."[5] *Id.* And the third, at 10809 Cardinal Ct., is "Cardinal Retreat."[6] *Id.*

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[1] https://www.vrbo.com/3359595.

[2] https://www.thesisterbayhaus.com/.

[3] https://www.vrbo.com/3637752

[4] https://www.vrbo.com/2136950.

[5] https://www.vrbo.com/3110135.

[6] https://www.vrbo.com/3902154.

Defendant Julie Schmelzer is the Village Administrator. Compl. ¶ 18. The other defendant is the Village of Sister Bay itself.

Factual Background

All Plaintiffs own short-term-rental properties with more than four bedrooms in the Village of Sister Bay (and in the case of the Swansons, two additional properties that do not exceed the bedroom limit but are still under the threat of Administrator Schmelzer's ad-hoc restrictions on sleeping arrangements within the homes). Clinton Decl. ¶ 4; Wilson Decl. ¶¶ 7–9; Froemming Decl. ¶¶ 6–7; Swanson Decl. ¶¶ 3–6, 13–15.

Prior to the adoption of the Village's 4-bedroom limit in June of 2023, each of the Plaintiffs had already been renting their home(s) on a short-term basis or had begun building their home(s) for use as a short-term rental. Clinton Decl. ¶¶ 3–4; Wilson Decl. ¶¶ 3–5; Froemming Decl. ¶¶ 3–7; Swanson Decl. ¶¶ 3–6. Furthermore, three of the Plaintiffs expended significant resources to add additional bedrooms to their homes, with the intention of making their properties more attractive to short term guests. Wilson Decl. ¶¶ 7–9; Froemming Decl. ¶ 7; Swanson Decl. ¶¶ 5–6.

All Plaintiffs are personally invested in Sister Bay, and many of them are using their short-term-rental properties as a means of making retirement in the Village possible. Clinton Decl. ¶ 6; Wilson Decl. ¶¶ 16–18; Froemming Decl. ¶¶ 8–10; Swanson Decl. ¶¶ 16–17.

Multiple sources of law, including the Village's own ordinances, Wisconsin law, and the Wisconsin Constitution, establish that Plaintiffs can make all bedrooms and

sleeping spaces within their properties available to short-term guests, notwithstanding the Village's newly enacted 4-bedroom limit and Defendant Schmelzer's attempts to place ad-hoc restrictions on sleeping arrangements. *Infra* Part I.

Although the Village's ordinances appear to allow homeowners to seek an exception to the 4-bedroom limit from the planning commission, that body has made clear it will not grant any exceptions, at least in residential districts. As described in detail in the complaint, and as can be verified through publicly accessible videos, two of the Plaintiffs sought exemptions from the planning commission. Compl. ¶¶ 65–96; Swanson Decl. ¶¶ 10–12; Wilson Decl. ¶¶ 12–14. Both were denied, and the planning commission's discussion of the requests makes clear that body will not grant any exemptions in a residential district. *Id.*

Plaintiffs then sent the Village a letter, explaining that their properties were exempt under the various grandfathering rules discussed herein. They went back and forth with the Village for three-to-four weeks, trying to determine the Village's position on whether the 4-bedroom limit applies to their properties, as well as whether the Village intends to enforce the 4-bedroom limit and other ad-hoc sleeping restrictions against them. *See* Compl. ¶¶ 97–130. Despite repeated attempts to resolve the matter without litigation, the Village refused to take a position, but also would not provide any assurances that it would not enforce the 4-bedroom limit and other ad-hoc restrictions against the Plaintiffs' properties, subjecting Plaintiffs to the threat of enforcement action at any time. *Id.*

LEGAL STANDARD

Wisconsin courts will issue a temporary injunction if the movant "(1) ha[s] a reasonable probability of success on the merits, (2) lack[s] an adequate remedy at law, and (3) would suffer irreparable harm in the absence of an injunction." *E.g.*, *James v. Heinrich*, 2021 WI 58, ¶ 14, 397 Wis. 2d 517, 960 N.W.2d 350. Wisconsin courts will often—though not always, as explained in more detail below—add a fourth factor: whether "an injunction is necessary to preserve the status quo." *E.g. Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35.

Importantly, however, these factors "'are not prerequisites but rather are interrelated considerations that must be balanced together.'" *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263 (discussing the factors for both temporary injunctions and stays pending appeal). The Seventh Circuit has helpfully described this as a "sliding scale approach," where a greater showing on one factor requires less of a showing on the others. *E.g.*, *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014).

An injunction may be issued where the equities, on balance, favor the movant. *Pure Milk Products Coop. v. National Farmers Organization*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

ARGUMENT

All of the criteria for temporary relief are satisfied here. Plaintiffs have a very strong likelihood of success on all of their claims, any one of which would support an injunction. They will suffer and are currently suffering irreparable harm without an

injunction, and they have no other adequate remedy at law. This Court should grant a temporary injunction to allow Plaintiffs to use their whole properties, without the threat of enforcement, while this case proceeds.

I. Plaintiffs Are Highly Likely to Succeed on the Merits of Their Claims.

Plaintiffs' complaint raises eight separate claims. Plaintiffs are likely to succeed on *all* of their claims, but a likelihood of success on *any* of these claims is enough to warrant a preliminary injunction. The Village's 4-bedroom limit is unlawful, first and foremost, because it violates Wisconsin's right-to-rent law, Wis. Stat. § 66.1014 (claim 1). Even if it does not violate that law, Plaintiffs' properties are exempt from the Village's 4-bedroom limit under well-established doctrines. The Clinton and Swanson properties are exempt under the non-conforming-use doctrine, which applies via the Village's own ordinances (claim 2), state law (claim 3), and the Wisconsin Constitution (claim 4). The Wilson and Froemming properties are exempt under the building-permit rule (claim 5). The 4-bedroom limit is also unconstitutional as applied to all Plaintiffs because it is arbitrary and irrational, given that Plaintiffs do not seek to exceed the 12-person limit (claim 6). Finally, Defendant Schmelzer's ad hoc prohibition on guests sleeping on futons or pull-out couches has no basis in Village ordinances and is therefore unlawful (claim 7).[7]

[7] Plaintiffs' complaint also raises a takings claim under Article I, § 13 of the Wisconsin Constitution. This claim is in the alternative to the other claims. Plaintiffs primarily seek declaratory and injunctive relief to allow them to continue to use all of the bedrooms in their homes. If this Court rejects their first seven claims, however, they seek compensation,

A. The 4-bedroom Limit Violates Wis. Stat. § 66.1014.

Wisconsin has adopted a right-to-rent law in Wis. Stat. § 66.1014. That statute provides that municipalities, like the Village, "may not enact or enforce an ordinance that prohibits the rental of a residential dwelling." Wis. Stat. § 66.1014(1)(b) defines "residential dwelling" as "any building, structure, *or part of the building or structure*, that is used or intended to be used as a home, residence, or sleeping place." Any ordinance inconsistent with the right to rent "does not apply and may not be enforced." Wis. Stat. § 66.1014(2)(b). A village may "regulat[e]" short-term rentals, but not "in a manner that is [ ] inconsistent with" the right to rent a home. Wis. Stat. § 66.1014(2)(c).

The Village's 4-bedroom limit prohibits homeowners with 5 or more bedrooms from using "part of" their home for their short-term rental. Similarly, Defendant Schmelzer's ad-hoc limitations on where guests can sleep within the home, *see infra,* Part I.D, separately prohibit homeowners from using other parts of their home for sleeping arrangements (like a basement or pull-out couch in a living room). Each of these restrictions are "inconsistent with" the right-to-rent law and "may not be enforced." *Id.* at § 66.1014(2)(b)–(c). Plaintiffs are likely to succeed on the merits of this claim (claim 1).

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through a takings claim, for the lost economic value of their extra bedrooms. If Plaintiffs succeed on their other claims, the takings claim is moot. Accordingly, Plaintiffs do not address the takings claim in their preliminary injunction motion.

B. Regardless, Plaintiffs Are Exempt From the 4-bedroom Limit Under Well-Established Doctrines.

1. The Swanson and Clinton Properties Are Exempt Via the Non-Conforming Use Doctrine, Under the Village's Own Ordinances, State Law, and the Wisconsin Constitution.

The "nonconforming use doctrine" is a well-established rule of property law that applies "when lawful uses of land are made unlawful by a change in zoning regulations." *Golden Sand Dairy*, 2018 WI 61, ¶ 21. Under that doctrine, "the landowner is allowed to continue using the land in the now-nonconforming fashion." *Id*. Or, as a respected treatise on municipal law puts it: "A nonconforming use is one which lawfully existed prior to the effective date of a zoning restriction, and which is allowed to continue to exist in nonconformity with the restriction." 8A McQuillin Mun. Corp. § 25:248 (3d ed.). This rule is reflected in the Village's *own ordinances*, in state law, and in the Wisconsin Constitution (as interpreted by the Wisconsin Supreme Court). The Village has violated all three by refusing to respect Plaintiffs Swansons' and Clintons' rights to continue using all of their bedrooms after the 4-bedroom limit was adopted in the Village's zoning code.

Start with the Village's own ordinances. Ordinance § 66.0901 provides that "a lawful non-conforming use … 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."[8] Renting a single-family home on a short-term basis is

[8] Village Ordinance § 66.0911 is also relevant, although Section 66.0901 is more obviously applicable. Section 66.0911 provides that "[t]he use of a structure existing at the

and has been a lawful, permitted use under the Village's zoning code. *See* Village Ordinance § 66.0311(1)(a). Prior to the adoption of the 4-bedroom limit in June of 2023, the Clintons and the Swansons (with respect to 2226 Scandia Rd.) were both lawfully renting their properties on a short-term basis and advertising all of the bedrooms. Clinton Decl. ¶¶ 3–4; Swanson Decl. ¶¶ 3–4. Therefore, their use of their 5th bedrooms is now a "non-conforming use" that "may be continued" under the Village's own ordinances. The Village's refusal to acknowledge that the 4-bedroom limit does not apply to the Swansons' and Clintons' properties violates the Village's own ordinances. For that reason alone, Plaintiffs are highly likely to succeed on the merits of claim 2 in the complaint.

Even setting the Village's own ordinances aside, the Swansons and the Clintons have an independent right to continue using their 5th bedrooms under state law. It goes without saying that state law supersedes municipal ordinances. Wisconsin Statute § 62.23(7)(h) provides, in relevant part, 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." This statute applies to villages

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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." The 4-bedroom limit is an "access provision" and the additional bedrooms are the pre-existing "structure," the "use" of which "may be continued."

through Wis. Stat. § 61.35.[9] Again, the Swansons and Clintons were lawfully renting *all* of the bedrooms in their home on a short-term basis prior to June 2023 when the 4-bedroom limit was adopted. Swanson Decl. ¶¶ 3–4; Clinton Decl. ¶¶ 3–4. That use may "continue[ ]" and "may not be prohibited" by the Village. Wis. Stat. § 62.23(7)(h). Plaintiffs are highly likely to succeed on the merits of this claim as well (claim 3).

Finally, the Wisconsin Supreme Court has held that the non-conforming use doctrine is constitutionally required. The Wisconsin Supreme Court held in *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 47, 53 N.W.2d 784 (1952), 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."[10] The Court favorably quoted *McQuillin on Municipal Corporations* (3rd ed.), V. 8, sec. 25.181, for the proposition that "zoning regulations cannot be made retroactive and neither can prior nonconforming uses be removed nor existing conditions be affected thereby." *Des Jardin*, 262 Wis. at 48.

[9] There are only two exceptions to this right, neither of which apply here: if the nonconforming use is "discontinued for a period of 12 months," or if "[t]he total structural repairs or alterations … exceed 50 percent of the assessed value."

[10] Although the Court in *Des Jardin* did not specify which provision of the Wisconsin Constitution would be violated, cases generally frame this as a due process issue. *See generally*, 8A McQuillin Mun. Corp. § 25:249 (3d ed.). The Wisconsin Supreme Court has located "due process rights" in Article I, § 1 of the Wisconsin Constitution. *E.g.*, *Mayo v. Wisconsin Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678.

Wisconsin courts have continued to recognize that *Des Jardin* stands for this proposition. *E.g.*, *Golden Sands Dairy*, 2018 WI 61, ¶ 21 ("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.

Further, 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), *aff'd*, 118 Wis. 2d 204, 346 N.W.2d 756 (1984).

The Village's refusal to confirm that the 4-bedroom limit does not apply to Plaintiffs Swansons' and Clintons' properties violates their constitutional rights. There are highly likely to succeed on this claim as well (claim 4).

2. The Wilson and Froemming Properties Are Exempt Under the Building Permit Rule.

Closely related to the non-conforming use doctrine, the Wisconsin Supreme Court has also recognized "the Building Permit Rule," which is a "bright-line rule vesting the right to use property consistent with the current zoning at the time a building permit application that strictly conforms to all applicable zoning regulations is filed." *Golden Sands Dairy, LLC*, 2018 WI 61, ¶ 18 (citation omitted). 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 Wisconsin Supreme Court noted in *Golden Sands*, 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." *Id*. at ¶¶ 22, 24.

The building permits for the Wilson and Froemming properties were obtained in the late summer or fall of 2022 and construction began in late 2022/early 2023, all well before the 4-bedroom limit was adopted in June 2023. Wilson Decl. ¶¶ 3–5; Froemming Decl. ¶¶ 3–5. Both built their properties intending to use them as short-term rentals, and they expended significant resources adding a fifth and/or sixth bedroom, specifically to make the house more attractive to their guests. Wilson Decl. ¶ 6–9; Froemming Decl. ¶¶ 4, 6–7.

Per the Building Permit Rule, the Wilsons and Froemmings are entitled to "use [their] property consistent with the current zoning at the time," namely before the 4-

bedroom limit was put into place. *Golden Sands Dairy, LLC*, 2018 WI 61, ¶ 18. Therefore, the four-bedroom limit cannot be enforced against them. Plaintiffs are likely to succeed on the merits of this claim too (claim 5).

C. The 4-bedroom Limit Is Arbitrary and Irrational As Applied to Plaintiffs and Therefore Violates Due Process.

The 4-bedroom limit violates due process for a separate reason—it is arbitrary and irrational as applied to plaintiffs. The Wisconsin Supreme Court has recognized that due process protects individuals from "certain arbitrary, wrongful actions 'regardless of the fairness of the procedures used to implement them.'" *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997) (citations and quoted source omitted). On more than one occasion, the Wisconsin Supreme Court has concluded 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, 311 Wis. 2d 1, 751 N.W.2d 780 (holding that the Town of Rhine's zoning ordinance failed that test); *Cushman v. City of Racine*, 39 Wis. 2d 303, 311, 159 N.W.2d 67 (1968) (same with respect to a Racine zoning ordinance).

None of the Plaintiffs in this action seek to exceed the 12-person capacity limit—something they have communicated to the Village in no uncertain terms. *See* Compl. ¶¶ 76, 91, 97–130; Exs. E, G. As a result, there is no rational justification for the 4-bedroom limit as applied to Plaintiffs. 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. Therefore, the 4-bedroom limit is "arbitrary and unreasonable" as applied to Plaintiffs, and the Village's refusal to allow Plaintiffs' guests to sleep wherever they want within the home violates Plaintiffs' constitutional rights under Article I, Section 1 of the Wisconsin Constitution. Plaintiffs are likely to succeed on the merits of this claim too (claim 6).

D. Defendant Schmelzer's Ad Hoc Limits on Where Guests Sleep Have No Lawful Basis in Village Ordinances.

As noted above, Defendant Schmelzer, the Village Administrator, has been telling short-term rental owners that their guests are not allowed to sleep on couches or futons during their stay. *See* Swanson Decl. ¶ 15, Compl., Ex. C. But there is no Village ordinance that Plaintiffs are aware of that prohibits short-term-rental guests from sleeping on futons or pull-out couches within the home, if that is the best way for their family to spread out during their stay.

As with the state and federal government, legislative and executive powers are separated in municipalities. The elected village board, like the state legislature, has the power to legislate at the local level by adopting ordinances. *See* Wis. Stat. §§ 61.34; 62.23(7)(am) (authorizing *"the council"* to "regulate and restrict by ordinance") (for villages, this power is assigned to the "village board" through § 61.35). The Zoning Administrator, by contrast, is an executive official. Her role, under the Village's own ordinances, is solely to "interpret and administer" the Village's zoning

code, i.e., to execute the law. Village Ordinance § 66.1510. She does not have the authority to *create* new rules herself and then unilaterally enforce them.

Therefore, any attempt by Defendant Schmelzer or the Village to restrict the sleeping arrangements within Plaintiffs' properties is ultra vires and unlawful. Plaintiffs are likely to succeed on the merits of claim 7 as well.

* * *

For any the reasons described above, this Court should conclude that Plaintiffs are likely to succeed on the merits their claims.

II. Plaintiffs Will Suffer Irreparable Harm in the Absence of an Injunction and Have No Other Adequate Remedy at Law.

In general, the "irreparable injury" and "no adequate remedy at law" factors are met by an injury that is "not adequately compensable in damages." *E.g.*, *Pure Milk Products Coop*, 90 Wis. 2d 781, 800; *Halter v. Wisconsin Interscholastic Athletic Ass'n*, 2024 WI App 12, ¶ 39, 411 Wis. 2d 191, 4 N.W.3d 573; *Allen v. Wisconsin Pub. Serv. Corp.*, 2005 WI App 40, ¶ 30, 279 Wis. 2d 488, 694 N.W.2d 420; *Kohlbeck v. Reliance Const. Co.*, 2002 WI App 142, ¶ 13, 256 Wis. 2d 235, 647 N.W.2d 277. There are multiple irreparable injuries here.

The first irreparable injury is the loss of Plaintiffs' statutory rights, which, as described in detail above, allow them to rent their whole properties, including all of their bedrooms. *Supra* Parts I.A, I.B.1 (discussing claims under Wis. Stat. §§ 66.1014 and 62.23(7)(h)). The Wisconsin Supreme Court has said that "it is nearly tautological to observe that losing a statutorily-granted right is a harm. [And] [l]osing the right

with no means to recover it makes the harm irreparable." *State ex rel. Kormanik v. Brash*, 2022 WI 67, ¶ 26, 404 Wis. 2d 568, 980 N.W.2d 948.

Plaintiffs all have guests throughout the fall. Clinton Decl. ¶ 9; Wilson Decl. ¶ 21; Froemming Decl. ¶ 13; Swanson Decl. ¶ 20. Plaintiffs also would like to advertise their properties as having five and/or six bedrooms, but they are currently unable to do so. Clinton Decl. ¶ 11; Wilson Decl. ¶ 23; Froemming Decl. ¶ 15; Swanson Decl. ¶ 22. Vacationers often book travel a year in advance, so Plaintiffs may presently be missing out on future reservations because their properties are currently listed as having only four bedrooms. Clinton Decl. ¶ 10, 12–13; Wilson Decl. ¶¶ 22, 24–25; Froemming Decl. ¶ 14, 16–17; Swanson Decl. ¶¶ 21, 23–24. A prospective renter who chooses a different property in Door County instead of Plaintiffs' properties because it has more bedrooms available is a lost opportunity that is obviously unrecoverable. Every day that goes by without an injunction is a loss of their statutory rights to use their whole properties, rights that cannot be recovered.

Plaintiffs have lost their statutory rights as a result of the Village's exorbitant fines and refusal to provide any assurances that it will not enforce the 4-bedroom limit against them. *See* Compl. ¶¶ 97–130, Exs. E–H. The Village's fines for short-term-rental violations are up to $1,000 for the first violation, up to $2,000 for the second, and up to $5,000 for the third and subsequent violations. Village Ordinance § 18.59. And these are *per day*, for every single day that a violation exists. Not only that, the Village also charges the property owner for the "applicable surcharges, assessments, and costs *including legal fees and costs of prosecution for each*

violation." *Id*. Plaintiffs cannot risk an enforcement action given how absurdly steep these fines are. As described in detail in the complaint, despite Plaintiffs' repeated attempts, the Village refused to provide any assurances that it would not enforce the 4-bedroom limit or ad hoc prohibition on using futons and pull-out couches against Plaintiffs. *See* Compl. ¶¶ 97–130. In the meantime, they have lost their statutory rights.

The second irreparable injury is the loss of Plaintiffs' *constitutional* rights. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Charles Alan Wright et al., Federal Practice & Procedure, § 2948.1 (2d ed. 1995); *e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011); *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) ("[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed"); *see also Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶ 93, 403 Wis. 2d 369, 976 N.W.2d 584 ("Many courts consider the on-going infringement of a constitutional right enough and require no further showing of irreparable injury.") (Roggensack, J., dissenting) (the majority did not disagree with this principle; it just did not reach the injunction question). As explained above, enforcement of the 4-bedroom limit and ad-hoc sleeping restrictions violates Plaintiffs' constitutional rights under the Wisconsin Constitution, in multiple ways. *Supra* Parts I.B.1, I.C. That alone warrants an injunction.

The third irreparable injury is the loss of business income due to Plaintiffs' inability to advertise that their properties have five and/or six bedrooms, preventing

them from attracting guests—like extended families—who want more space to spread out. As noted above, many vacationers make plans a year or more in advance. Plaintiffs are already receiving some reservations for next summer and are likely missing out on others because they have to list their properties as having only four bedrooms. Clinton Decl. ¶ 9–13; Wilson Decl. ¶¶ 22–25; Froemming Decl. ¶¶ 14–17; Swanson Decl. ¶¶ 21–24.

Ordinarily, the loss of business income is not an irreparable injury, but when the *government* violates rights, as here, sovereign immunity makes monetary damages irreparable. Indeed, "numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Constr., Inc. v. Secretary, Fla. Dep't of Transp*., 715 F.3d 1268, 1289 (11th Cir. 2013) (citing cases). The Wisconsin Court of Appeals has cited *Odebrecht* for this very proposition. *Tavern League of Wisconsin, Inc. v. Palm*, No. 2020AP1742, 2020 WL 13368243, at *4 (Wis. Ct. App. Nov. 6, 2020) (unpublished), *aff'd*, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261. Wis. Stat. § 893.80(4) provides immunity to local government officials "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions," and the Wisconsin Supreme Court has interpreted that provision extremely broadly. *Pinter v. Vill. of Stetsonville*, 2019 WI 74, ¶ 31, 387 Wis. 2d 475, 929 N.W.2d 547 (holding that this section "include[s] any acts that involve the exercise of discretion"); *see id*. ¶¶ 72–89 (Justices Dallet, Bradley, and Kelly dissenting, criticizing this broad interpretation for going

far beyond the text of the statute). Thus, Plaintiffs will not be able to recover damages against the Village for their lost income.[11]

Even setting the immunity statute aside, courts have also recognized that a monetary injury may be irreparable "if there is no accurate pecuniary standard for measuring damages with certainty, or if the damages can be estimated only by conjecture." 43A C.J.S. Injunctions § 69 (listing cases). The monetary loss here comes from potential renters who would have rented Plaintiffs' properties had they known that they had five or six bedrooms but chose to rent some other property instead because Plaintiffs' properties are listed as having only four bedrooms. Obviously, identifying such renters and quantifying these losses is impossible.

Finally, and relatedly, courts have recognized that "[i]t is appropriate to use a preliminary injunction to avoid harms to goodwill and competitive position," because these are "hard to compensate." *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 279 (6th Cir. 2015). Every day that goes by, Plaintiffs are losing "competitive position" in the short-term rental market in Door County, since they must advertise their properties as smaller than they actually are. And many customers of short-term rentals are repeat customers; once they find another place they like, Plaintiffs may

[11] Defendants are likely to argue that Plaintiffs' takings claim makes the monetary losses not irreparable. But there is no guarantee that the takings claim will be successful. Defendants will undoubtedly argue against that claim, and it is not clear, at this stage, how this Court will rule. The point of a preliminary injunction is to mitigate the harm to Plaintiffs, which may or may not be recoverable. Moreover, even if the takings claim is successful, it will be very hard to quantify the lost economic value. As noted below, many courts have found that monetary damages are irreparable when they cannot easily be determined.

be missing out on their business for years to come. Clinton Decl. ¶ 13; Wilson Decl. ¶ 25; Froemming Decl. ¶ 17; Swanson Decl. ¶ 24.

For all of these reasons, a preliminary injunction is well warranted. Plaintiffs simply want to advertise their homes as five- and six-bedroom homes and allow their guests to use their entire home while this case proceeds, without the threat of an enforcement action.

III. An Injunction Will Not Harm the Village or Affect Anyone, So the Equities Strongly Favor an Injunction.

As noted above, Plaintiffs do not seek to exceed the 12-person limit. They simply want to be able to advertise their properties as having five or six bedrooms, and to allow their guests to spread out in the home and sleep wherever is most convenient for them, without the threat of an enforcement action. Neither the Village, the neighbors, nor anyone else is affected by where Plaintiffs' guests happen to sleep within their homes at night. Thus, an injunction will not do any harm to the Village or anyone else, and the balance of equities weighs heavily in favor of an injunction.

IV. A Temporary Injunction Will Preserve the Status Quo.

As a preliminary matter, whether a temporary injunction will preserve the status quo is the least important factor. Indeed, the Wisconsin Supreme Court has trended away from considering it at all. *Serv. Emps. Int'l Union*, 2020 WI 67, ¶117, (Kelly, J., majority opinion) ("If the status quo would not change without a temporary injunction, would that mean the unconstitutional law could remain in effect? Obviously not."); *James*, 2021 WI 58, ¶ 14 (noting that the Court granted an

injunction based on the other factors, without mentioning the status quo); *Wis. Legislature v. Evers*, No. 2020AP608, unpublished order, at 4 (Wis. Apr. 6, 2020) (issuing a temporary injunction without mentioning the status quo)[12]; *Jefferson v. Dane County*, No. 2020AP557, unpublished order, at 1 (Wis. Mar. 31, 2020) (same)[13]; *see also Browne v. Milwaukee Bd. of Sch. Dirs.*, 83 Wis. 2d 316, 337, 265 N.W.2d 559 (1978) (*quoting Rust v. State Bd. of Dental Exam'rs*, 216 Wis. 127, 132, 256 N.W. 919 (Wis. 1934)) (explaining that "usually," but not always, a temporary injunction should "preserve the status quo"). Notably, the text of Wis. Stat. § 813.02(1)(a) does not mention the status quo at all, and federal courts have explained that the "status quo" is an unhelpful and often incoherent consideration. *Praefke Auto Elec. & Battery Co. v. Tecumseh Prods. Co.*, 255 F.3d 460, 464 (7th Cir. 2001) ("preliminary injunctions are often issued to enjoin the enforcement of a statute or contract and thus interfere with existing practices"). In any event, it is not a "prerequisite," but at most a factor to be considered in the "balanc[ing]" test. *Waity*, 2022 WI 6, ¶ 49.

Even setting that initial point aside, an injunction *will* preserve the status quo. The status quo is the state of affairs that existed before the Village adopted and asserted its unlawful limits against the Plaintiffs' properties—not the Village's illegal actions that existed immediately before litigation. *See Serv. Emps. Int'l Union*, 2020 WI 67, ¶ 117. Otherwise, no plaintiff would ever get a temporary injunction.

[12] https://www.wicourts.gov/news/docs/2020AP608_2.pdf

[13] https://www.wicourts.gov/sc/order/DisplayDocImage.pdf?docId=719649

Alternatively, the status quo is Plaintiffs' law-abiding record: they have not had any enforcement actions against them and would very much like the circumstances to remain that way. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 n.1 (7th Cir. 2012) (*quoting Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004)) (explaining a temporary injunction was appropriate in a pre-enforcement action to safeguard the freedom of speech—regardless of concerns about the status quo—because "speakers may self-censor rather than risk the perils of trial").

Additionally, in *Shearer v. Congdon*, the Wisconsin Supreme Court explained that preserving the status quo can mean preserving a meaningful remedy. 25 Wis. 2d 663, 667–68, 131 N.W2d 377 (1964). A county court temporarily enjoined a party from "obstructing" a road while the court was determining whether the other party had a prescriptive easement. *Id.* The Wisconsin Supreme Court held that the county court correctly preserved the status quo because alterations to the road while litigation was pending could "render futile in considerable degree" the ultimate relief sought. *Id.* at 668 (citations omitted). So too here. In the absence of temporary relief, the ultimate relief Plaintiffs seek will be hollow. The whole goal of this action is to prevent Defendants from enforcing their unlawful 4-bedroom limit, and ad hoc limits on where guests can sleep, against Plaintiffs.

CONCLUSION

For all of the reasons stated herein, Plaintiffs respectfully request that this Court grant their motion for a temporary injunction, prohibiting Defendants from

enforcing the four-bedroom limit and other ad-hoc sleeping arrangement restrictions against them for the duration of this litigation.

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Respectfully Submitted,

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