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BY THE COURT:

DATE SIGNED: March 7, 2025

Electronically signed by Jennifer Moeller
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 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,

DEFENDANT.

Case No. 24-CV-119

DECISION

DECISION

Plaintiffs filed an action for Declaratory Judgment (Document 3) against Defendants with eight causes of action on September 17, 2024. The Plaintiffs seek declaratory and injunctive relief from the Sister Bay Village ordinances limiting short-term rentals to four bedrooms in the home and limits on where guests can sleep in the home.

Defendants filed a Motion to Dismiss (Document 22) on October 21, 2024, that argues misjoinder of parties, lack of subject matter jurisdiction on a number of bases, and other arguments for dismissing claims. Plaintiffs' Response Brief in Opposition (Document 33) was filed November 22, 2024. Defendants' Reply Brief (Document 39) was filed December 6, 2024. Oral arguments on the Motion to Dismiss were February 7, 2025. The parties agreed that Defendant Julie Schmelzer should be dismissed as a party. The court dismissed Julie Schmelzer.

JOINDER OF PARTIES

Under Wisconsin Statutes Section 803.04(1), "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Plaintiffs are four pairs of Sister Bay property owners. Mark and Caley Swanson rented out a 5-bedroom property since 2021. Hunter and Jessica Clinton rented out a 5-bedroom property since 2023. Both couples rented out all bedrooms until 2024. Swansons also own two other 4-bedroom properties that they rent on a short-term basis. Nick and Tara Froemming and John and Erin Wilson completed building 6 and 5 bedroom houses respectively in 2023. At this time, all Plaintiffs have permits for short-term rentals with a 4-bedroom limit.

The permits that all of the Plaintiffs hold for short-term rentals within the Village could be considered a series of transactions. They all request the same relief from the Village's 4-bedroom limit and limit on where guests can sleep. Four claims are made by all Plaintiffs (counts 1, and 6-8). Swansons and Clintons both claim counts 2, 3, and 5. Wilsons and Froemmings both claim count 4.

The Court agrees with the Defendant that the number of parties and differences among them are confusing. Two pairs of Plaintiffs (Wilsons and Swansons) sought exception to the 4-bedroom limit before the Village Plan Commission. Two pairs of Plaintiffs (Swansons and Clintons) rented their homes on a short-term basis before the 4-bedroom limit went into effect. Two pairs of Plaintiffs (Wilsons and Froemmings) had building permits and began building their homes before the 4-bedroom limit was in place.

The potential for confusion exists in any case regardless of the number of parties and claims. Regularly, judges and juries handle litigation more complex than this case. The interest of judicial economy and efficiency for all involved supports joinder. The court finds joinder of the parties and of their claims is proper.

JUSTICIABILITY

"A controversy is justiciable when four conditions are met:

> (1) "A controversy in which a claim of right is asserted against one who has an interest in contesting it"; (2) "The controversy must be between persons whose interests are adverse"; (3) "The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest"; and (4) "The issue involved in the controversy must be ripe for judicial determination." *Fabick v. Evers*, 396 Wis. 2d 231, 238 (2021).

As to the first condition, Defendant argues it is not satisfied because the claims asserted are "hypothetical, abstract, or remote" and not "real, precise, and immediate" quoting *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶47, 255 Wis.2d 447, 649 N.W.2d 626. The Court disagrees. Plaintiffs assert a claim based on "present and fixed rights." *Tooley V.*

O'Connell, 77 Wis. 2d 422,434 (1977). The Village ordinance limits short-term rentals to 4-bedrooms. All Plaintiffs have permits for 4-bedroom short-term rentals. Some Plaintiffs have rented out 5 bedrooms prior to this limit. All Plaintiffs own homes that have more than 4 bedrooms that they would like to utilize.

Neither side comments on the second condition for a justiciable controversy. The interests of the parties are adverse to the specific bedroom limit for short-term rentals.

Neither side addresses the third condition for a justiciable controversy other than Defendant contesting Plaintiffs claims. Plaintiffs are property owners who have legally protected interests in the use of their properties.

Defendant's contention that this action is not justiciable is primarily based on lack of ripeness. Defendant offers cases in which Plaintiffs faced "active enforcement" stating that in the present case, any allegation of actual enforcement, are contingent on future events and are remote. Enforcement would seem to be contingent on Plaintiffs violating the ordinance in the future, which seems unlikely based on Plaintiffs retaining counsel and contacting the Village regarding interpretation and enforcement. But Plaintiffs have every reason to believe that the Village would enforce the 4-bedroom limit and rule regarding where people may sleep based on the emails with the Village Administrator. They should not defy the agency and await an enforcement action. See *County of Sauk v. Traeger*, 118, 213 Wis. 2d 204 (1984).

EXHAUSTION

Ripeness is connected to exhaustion. At the hearing on the Petition for Temporary Injunction and in briefs, counsel argued about exhaustion of remedies. Among the cases referenced are *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416 (1977) and *County of Sauk v.*

Traeger, 118 Wis. 2d 204 (1984). The *Nodell* case notes that while the exhaustion requirement has been expressed in terms of subject matter jurisdiction, the cases reflect numerous exceptions in which the court found reasons supporting the exhaustion rule are lacking, 78 Wis. 2d at 424-426. The *Traeger* court referred to the exhaustion rule as a rule of policy, convenience, and discretion, not a jurisdictional requirement, 118 Wis. 2d at 211-212. The *Traeger* analysis includes consideration of the adequacy of the other remedies as well as allowing for "exceptional cases" in which "good reason exists for making an exception." at 214.

Plaintiffs' Response Brief Opposing the Motion to Dismiss (Document 33) at page 35, erroneously claims that they exhausted all the remedies available to them. More persuasively, they argue against the adequacy of other remedies and their applicability to Plaintiffs. They also claim that they are exempt from exhaustion.

In the Village's Brief (Document 22) starting at page 17 and in oral arguments, Defendant described other relief available to the Plaintiffs:

1) Appeal under Village Ordinance Section 18.56(F);
2) Clintons and Froemmings did not request a review from the Village Plan Commission under Village Ordinance Section 66.2100 as the Swansons and Wilsons did;
3) None of the Plaintiffs pursued relief under Wisconsin Statutes Chapter 68.
4) Mandamus
5) Certiorari

Plaintiffs argue that 18.56(F) does not apply because by its language, it is an option when a property owner "has been denied a license, had a license suspended or revoked, or whose license application was not processed." The Court agrees that it is not clear that this review is

available to appeal a condition on a license. Moreover, the Village never suggested this despite the numerous contacts by Plaintiffs' counsel.

Plaintiffs Clintons and Froemmings apparently did not request a review from the Village Plan Commission under Section 66.2100 based on the comments and decisions of the Plan Commission at the hearings for Swansons and Wilsons. But in Plaintiffs counsel's letter to the Village (Document 3) dated August 14, 2024, Exhibit E to Plaintiffs Complaint, starting at page 44, they state, "We note that the Village has allowed at least one other short-term-rental to continue to operate with more than four bedrooms."

Plaintiffs correctly note that Chapter 68 relief is not exclusive. Wis. Stat. Sec. 68.01. Defendants point out Wis. Stat. Sec. 68.02(1), which contains broader language than Village Ordinance Section 18.56(F). A review of the grant or denial in whole or in part of their license was available to all Plaintiffs under Wis. Stat. Sec. 68.01 to address the license restriction they find disagreeable: the 4-bedroom limit.

Defendant's cite *Nodell* at 78 Wis. 2d 416, 427, "We do not believe the legislature intended to allow a property owner to accept a building permit, to submit to the conditions imposed therein, and then subsequently to attack the conditions in a judicial proceeding." The *Nodell* decision concludes with the court's belief that the legislature intended this type of dispute to be resolved initially by the local administrative agency and thereafter, if necessary in court by writ of certiorari.

Certiorari is not really possible for Clintons and Froemmings because of their failure to request review before the Plan Commission. Certiorari was an option for Swansons and Wilsons. Mandamus seems inappropriate for all Plaintiffs as their case seems to lack a clear legal right, a

plain and positive duty of the village. See *Voces de la Frontera, Inc. V. Clarke*, 2017 WI 16, 373 Wis. 2d 348.

Plaintiffs argue the *Nodell* exceptions to exhaustion apply to them in this case. In addition to the suitability of the agency remedies, Plaintiffs point to their constitutional claims which cannot be resolved administratively.

NOTICE OF CLAIM STATUTE

Defendant argues that Plaintiffs failed to comply with Wis. Stat. Sec. 893.80(1d) regarding required notice prior to filing an action against a governmental entity. Plaintiffs argue that they did not need to comply with the Notice of Claim statute, and in the alternative that they did comply.

E-Z Roll Off, LLC v. County of Oneida, 335 Wis. 2d 720, 732 (2011) instructs that the Plaintiff bears the burden of proving actual notice and proving lack of prejudice for any failure to follow the claim statute, referencing *Weiss v. City of Milwaukee*, 79 Wis. 2d 213 (1977). Plaintiffs contend that the letter to the Village dated August 14, 2024, meets the Notice of Claim requirements. The Court agrees that this letter could serve as notice. Defendant argues the letter does not meet the notice of claim requirements, but, if it does, the Village is prejudiced by the limited time the Village had to take any action before the suit was filed.

If notice is required, Plaintiffs suggest that their August 14, 2024, letter to the Village meets the written requirements for a notice under the statute. Plaintiffs did not wait 120 days for a denial. They argue that the Village was not prejudiced by filing this suit just over a month after their letter was submitted.

The three factors courts should consider when evaluating a possible exemption to the notice of claim requirements are set forth in *Town of Burke v. City of Madison*, 225 Wis. 2d 615 (Ct. App. 1999):

> (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of §893.80(1), STATS., would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which §893.80(1) was enacted would be furthered by requiring that a notice of claim be filed.

Temporary and permanent injunctions under Wis. Stat. Ch. 813 do not require the waiting periods in Section 893.80, but other claims are made. Plaintiffs argue that this makes all of the claims exempt.

Plaintiffs argue that their constitutional claims could not have been resolved by the Village or its Plan Commission who could not declare an ordinance unconstitutional.

The August 14, 2024, letter serves as a notice of claim. Plaintiffs did not wait 120 days before filing this action. We do not know what response the Village may have had in the three months after this action was filed.

The constitutionality of the claims could not have been promptly resolved by the Village because they cannot determine constitutionality. On the same basis, the purposes of the claim statute are not furthered by requiring a claim and subsequent waiting period after the claim. Plaintiffs' situation is not one in which a typical compromise and settlement could avoid litigation.

ZONING or POLICE POWERS

At the last two hearings, Defendant argued that the local ordinance was not a zoning ordinance but the Village's exercise of police power and their right to regulate and license. Both sides commented on *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362 (2012) which provides guidance on this question but not a bright-line rule. Plaintiffs note that the 4-bedroom limit is in the zoning code while Defendant argues that where it is found does not make it a zoning ordinance. "No single characteristic or consideration is dispositive of the question whether the Ordinance is a zoning ordinance." *Zwiefelhofer*, 338 Wis. 2d at 497. Complicating the analysis is that "the grant of zoning power overlaps with the police power statute." *Zwiefelhofer*, 338 Wis. 2d at 502. *Zwiefelhofer* considered several characteristics in identifying a zoning ordinance, noting they did not provide an exhaustive list. 338 Wis. 2d 506-510. At this point, this issue is not dispositive.

MOTION TO DISMISS

Defendant's Motion to Dismiss argues that the Complaint fails to state a legal claim. The Court has considered whether there are no conditions on which the Plaintiffs could recover.

Count one alleges violation of Wisconsin Statute 66.1014 which prohibits limits on rental of residential dwellings, specifically regarding number of days rented. But Wis. Stat. Sec. 66.1014 (2)(c) does not limit "the authority of a political subdivision to enact an ordinance regulating the rental of a residential dwelling in a manner that is not inconsistent with the provisions of pars. (a) and (d).

The parties disagree as to whether the actions of the Village of Sister Bay are inconsistent with the statute. All Plaintiffs can rent their homes. All have licenses to do so. The question is whether state law is violated by restricting the number of bedrooms to rent.

Count two alleges violation of Village Ordinances 66.0901 and 66.0911and Count three alleges violation Wisconsin Statute Section 62.23(7)(h), all based on nonconforming uses. Swansons and Clintons previously rented more than 4 bedrooms of their short term rental properties.

Count four alleges violation of the Building Permit Rule. Plaintiffs argue that since the 4-bedroom limit was not in effect when Wilsons and Froemmings obtained building permits for their 5 and 6 bedroom houses, that they should be permitted to use all bedrooms in the course of their rentals. Plaintiffs received building permits for residential dwellings that may be used as residential dwellings. They have licenses for short-term rentals of their homes.

Count five alleges violation of the Wisconsin Constitution, Article I, Section 1 based on retroactive zoning. Plaintiffs argue that Swansons and Clintons rented prior to 4-bedroom limit and should be permitted to continue.

Count six alleges violation of Village Ordinances based on the Zoning Administrator advising short-term rental owners that guests are prohibited from sleeping on a futon or couch. It does not appear that such a prohibition is contained in any Village ordinance.

Count seven alleges violation of the Wisconsin Constitution, Article I, Section 1 based on arbitrary and unreasonable regulation. “An ordinance will be held constitutional unless the contrary is shown beyond a reasonable doubt and the ordinance is entitled to every presumption in favor of its validity. *Highway 100 Auto Wreckers, Inc. v. City of West Allis*, 6 Wis. 2d 637,

646, 96 N.W.2d 85 (1959). *Town of Rhine v. Blizzell*, 311 Wis. 2d 1, provides a good discussion as well as the following:

> While the line between permissible and impermissible zoning may not always be readily ascertainable, the requisite standard that must be applied for a substantive due process challenge is clear: we must determine whether the ordinance is clearly arbitrary and unreasonable in the restricted sense that it has no substantial relation to the public health, safety, morals or general welfare.

Plaintiffs noted in oral arguments that this is a "high bar." Defendant points to Schmelzer's Affidavit for the Village's rational basis for the 4-bedroom regulation.

Count eight alleges violation of Wisconsin Constitution Article 1 Section 13, a taking claim. The Supreme Court has described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The first includes regulatory actions that bring about some form of physical invasion of private property. The second includes actions that deny the landowner all or substantially all practical uses of a property. See R.W. Docks & Slips V. State, 244 Wis. 2d 497 (2001). The second category does not apply to this case. Plaintiffs argue the first category applies based on factors recognized by *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104, 124 (1978): 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.

The bulk of the case law focuses on a physical invasion, something tangible. For example, *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U. S. 419 (1982) determined that

New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking. See also *United States* v. *Causby,* 328 U. S. 256, 265, (1946) (physical invasions of airspace); and *Kaiser Aetna* v. *United States,* 444 U. S. 164 (1979) (imposition of navigational servitude upon private marina). Plaintiffs reference *Heights Apartments, LLC v. Walz,* 30 F. 4th 720 – Court of Appeals, 8th Circuit 2022, regarding a *per se* taking when a regulation results in a physical appropriation of property and a non-categorical regulatory taking involving an eviction freeze during the COVID pandemic.

During oral arguments, Plaintiffs' takings argument included a statement that the Village was "telling people where to sleep in their home". The Court does not understand that to be the case in Sister Bay and is unaware of any such ordinance. It could be more accurately stated that the Village is telling licensees for short-term rentals where guests may sleep.

CONCLUSION

Despite arguments against ripeness, the Court finds this matter justiciable. The interests of all parties are served by resolution of Plaintiffs' claims. The claims cannot reasonably be resolved by pursuit of the many alternatives suggested by Defendant. And the purposes of the claims statute are not furthered by dismissing this case on the basis of failure to comply with the claims statue. Based on the Court's review of Plaintiffs' claims, liberally construing the pleadings, the Court does not find that there is no condition on which Plaintiffs could recover. The Court denies Defendant's Motion to Dismiss.