

DOOR COUNTY, WISCONSIN BOARD OF ADJUSTMENT

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DOOR COUNTY
LAND USE SERVICES DEPARTMENT

Stephan B. Nordstrom, Graycliffe, LLC, Carl
M. Curry and Cynthia M. Curry,

Appellants.

SUPPLEMENTAL BRIEF OF APPELLANTS

Stephan B. Nordstrom, Graycliffe, LLC, Carl M. Curry and Cynthia M. Curry (“Appellants”), by and through their attorneys, Michael Best & Friedrich LLP, hereby submit their supplemental brief in support of Appellants’ October 24, 2019 Notice of Appeal pursuant to the Board of Adjustment’s January 28, 2020 request for supplemental authority.

INTRODUCTION

During the January 28, 2020 Door County Board of Adjustment Public Hearing, the Board asked Appellants and the Kanes for supplemental briefing on two issues: (1) whether or not the Cottage Row Condominium Declaration is legally effective because the declarant was not the owner of the property when the declaration was signed or recorded and the declarant listed in the condominium plat was not the owner of the property; and (2) whether Appellants have standing to bring this appeal. For the reasons stated below, the Declaration and Plat were never legally effective and therefore cannot be corrected through amendment and Appellants have standing to bring this Appeal.

LEGAL ANALYSIS

I. The Cottage Row Condominium Declaration and the Cottage Row Site Condominium Plat Were Never Legally Effective As a Matter of Law.

Door County Corporate Counsel Grant Thomas properly summarized the key issue of this appeal: “the crucial issue in this appeal is whether or not legally the Declaration of

Condominium was effective. If it wasn't effective, the house of cards falls." (January 28, 2020 Door County Board of Adjustment Public Hearing at 71: 9-12.) Under black letter Wisconsin law, neither the Cottage Row Condominium Declaration ("Condominium Declaration") nor the Cottage Row Site Condominium Plat ("Condominium Plat") was ever legally effective because both substantially fail to meet the statutory mandated requirements to be enforceable.

A. The Condominium Declaration Is Not Legally Effective As a Matter of Law.

Wisconsin Statute section 703.09(1) specifies the items that must be contained in a condominium declaration for it to be valid. Pursuant to Wis. Stat. §703.09(1)(c), "**A condominium declaration shall be signed by the owners of the property** and any first mortgagee of the property or the holder of an equivalent security interest in the property in the same manner as required in conveyances of real property." (emphasis added). This is consistent with section 703.03, which states, "[t]his chapter [703] applies only to property, **a sole owner or all of the owners of which submit the property to the provisions of this chapter by duly executing and recording a declaration** as provided in this chapter". (emphasis added).¹

Here, there is no dispute that the condominium declaration was not signed by the owners of the property. Wis. Stat. §703.09(1)(c). Cottage Row Properties LLC, the named Declarant on both the Cottage Row Condominium Declaration and the Cottage Row Site Condominium Plat, did not own the Property on the date the Cottage Row Site Condominium Declaration was signed

¹ Wis. Stat. § 703.30(2), related to rules of construction of this statute states that "[t]he provisions of any condominium instrument and bylaws filed under this chapter shall be liberally construed to facilitate the creation and operation of the condominium. **So long as the condominium instruments and bylaws substantially conform with the requirements of this chapter**, no variance from the requirements shall affect the condominium status of the property in question . . ." *Id.* (emphasis added). Here, the condominium instruments do not substantially conform with the requirements since the condominium declaration was not signed by the owner of the property and the named declarant of the Condominium Plat was not the owner of the property. See *Rock Lake Estates Unit Owners Ass'n v. Twp. of Lake Mills*, 195 Wis. 2d 348, 362-364, 536 N.W.2d 415 (Ct. App. 1995) (the court of appeals affirmed the trial court's determination that the party failed to "substantially" comply with the section 703.26 where the purported amendments were signed and filed by only one owner alone and lacked the consent of at least two-third of the unit owners in order to be effective).

(September 16, 2019), the date the Cottage Row Site Condominium Plat was approved (September 18, 2019), or the date that the Cottage Row Condominium Declaration and the Cottage Row Site Condominium Plat was recorded (September 18, 2019). Rather, the Kanes executed a Quit Claim Deed conveying the property to Cottage Row Properties on September 23, 2019, which was recorded on September 24, 2019.

Since a sole owner or all of the owners of the property did not sign the declaration, as a matter of law, the Property was not submitted to the provisions of Chapter 703 and thus is not a legally enforceable condominium. Since a legally enforceable condominium declaration does not exist and has never existed, it cannot be amended. Furthermore, all of the provisions in Chapter 703 that speak to amendment address amendment of a validly constituted condominium declaration, which this is not. If one does not have a valid contract, there is nothing to amend. So too here. Since there is no valid Declaration or Plat, there is none to amend.

B. The Condominium Plat Is Not Legally Effective As a Matter of Law.

Pursuant to Wis. Stat. § 703.11(1), “When any condominium instruments are recorded, **the declarant shall file a condominium plat** to be recorded in a separate plat book maintained for condominium plats or stored electronically in the register of deeds office.” (emphasis added). Pursuant to Wis. Stat. § 703.02(7), “‘Declarant’ means **any owner who subjects his or her property to a condominium declaration** established under this chapter. The term includes an assignee of the declarant under s. 703.09 (4)”. (emphasis added). “Declarant” is defined by Chapter 8 of the Door County Land Division Ordinance as “**Any owner** who subjects his or her property to a condominium declaration under Ch. 703, Wis. Stats.” (emphasis added). Pursuant to Section 4.02 of the Door County Land Division Ordinance, titled “Minor Site Condominium

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Plat,” “A minor site condominium plat shall be submitted to the Land Use Services Department. Such plat shall be prepared **according to s. 703.11**, Wis. Stats. . . .” (emphasis added).

As stated above, since the declarant was not an owner of the Property, the condominium plat was improperly filed and the property has not be subjected to a condominium. The failure to list the accurate owner of the property as the declarant on both the Declaration and Plat means that the condominium instruments fail to substantially conform with the requirements of Chapter 703 and no condominium exists.

II. Appellants Have Standing to Bring This Appeal and Enforce Zoning Decisions.

Appellants have standing to bring this appeal as a matter of law. Section 11.07 of the Door County Ordinances permits “any person aggrieved” to appeal “any order, requirement, or determination made by the Zoning Administrator, Land Use Services Director, or Resource Planning Committee” to the Board of Adjustment. Appellants here are “persons aggrieved” entitled to appeal the permit issued to the Kanes.

“A person aggrieved includes any individual . . . [or] limited liability company . . . whose rights, duties, or privileges are adversely affected by a determination of a municipal authority.” Wis. Stat. § 68.06. A person is aggrieved by an administrative decision under Wisconsin law “when that decision has a direct effect on his or her protected interests.” *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cty. Bd. of Adjustment*, 125 Wis. 2d 387, 390, 373 N.W.2d 450, 452 (Ct. App. 1985) citing *Kammes v. Min. Inv. & Local Impact Fund Bd.*, 115 Wis. 2d 144, 151, 340 N.W.2d 206, 210 (Ct. App. 1983).

In cases involving permits issued in violation of zoning ordinances, such as this, courts have determined that the issuance of the permit is illegal *per se*, constituting an injury to neighbors whose property interests are affected. *Milwaukee v. Leavitt*, 51 Wis. 2d 72, 78-79, 142

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N.W.2d 169, 172-73 (1966); *Jelinski v. Eggers*, 34 Wis. 2d 85, 93, 148 N.W.2d 750, 755 (1967);
see also Forest Cty. v. Goode, 215 Wis. 2d 218, 229, 572 N.W.2d 131, 135 (Ct. App. 1997)

(“We also determine that the trial court’s refusal to grant injunctive relief is a misuse of discretion because *it infringes on the public’s right to enforcement of zoning ordinances.*”

(emphasis added)). Indeed, as the Wisconsin Supreme Court explained in *Leavitt*:

Zoning ordinances are enacted for the benefit and welfare of the citizens of a municipality. Issuance of an occupancy or building permit which violates such an ordinance not only is illegal *per se*, but is injurious to the interests of property owners and residents of the neighborhood adversely affected by the violation.

Leavitt, 31 Wis. 2d at 78.

Here, issuance of the Door County Regular Zoning Permit for 9099 Cottage Row to the Kanes adversely affects the Appellants’ property interests in at least two ways. First, allowing the Kanes to build on their land in conformance with the issued permit would violate pre-existing, recorded restrictive covenants applicable to all lots on Cottage Row. Appellants have a vested interest in enforcing these restrictive covenants. *Crowley v. Knapp*, 94 Wis. 2d 421, 429, 288 N.W.2d 815 (1980) (“The restrictive covenants which were part of that plan could be equitably enforced by all of the grantees whose titles derived from the common grantor.”); *Zinda v. Krause*, 191 Wis. 2d 154, 165, N.W.2d 55, 58 (Ct. App. 1995).

Second, the Kanes’ proposed structures would materially affect the aesthetics and nature of Cottage Row. The Kanes’ proposed structure does not comply with the applicable setback requirements, meaning that the structure would intrude upon the Green Bay shoreline – and thus the aesthetic appearance of the neighborhood – in impermissible ways.

Moreover, the proximity of the Appellants’ property to the Kanes’ property is not dispositive of this question. Indeed, the case law makes clear that the question of whether one is aggrieved turns on whether a decision impacts any “legally protected interest”, not necessarily on

the distance between one's property and the property at issue. *See State ex rel. Brookside Poultry Farms, Inc.*, 125 Wis. 2d at 390 (residents who lived within general area of proposed facility were aggrieved persons with standing to challenge permit issued); *State ex rel. Home Ins. Co. v. Burt*, 23 Wis. 2d 231, 238, 127 N.W.2d 270, 273 (1964) (holding that an insurance company whose duty to pay under an insurance policy turned on permitting decision was an aggrieved person).

The Wisconsin Statutes and the Door County Code of Ordinances explicitly permit Appellants here to enforce the Door County Comprehensive Zoning Ordinance. The Door County Ordinances were enacted pursuant to the statutory authority granted by Wis. Stat. §§ 59.69, 59.692, and 59.694. Door County Zoning Ords. § 1.02. In turn, Wis. Stat. § 59.69(11), entitled "PROCEDURE FOR ENFORCEMENT OF COUNTY ZONING ORDINANCE", provides in relevant part that:

The board shall prescribe rules, regulations, and administrative procedures, and provide such administrative personnel as it considers necessary for the enforcement of this section. . . . Compliance with such ordinances may also be enforced by injunctive order at the suit of the county *or an owner of real estate within the district affected by the regulation.*

(emphasis added).

The case law interpreting Wis. Stat. § 59.69 bears this point out. In *Carlin Lake Ass'n v. Carlin Club Propls., LLC*, 2019 WI App 24, 387 Wis. 2d 640, 929 N.W.2d 228, the court held that simply owning land within the zoning district affected by the relevant ordinance was sufficient to allow the landowners to enforce the ordinances. There, the defendants attempted to carry on commercial activities on their land, allegedly in violation of a county ordinance. *Id.* at ¶¶ 5-9, 15. A group of landowners whose property fell within the same zoning district as the defendants sued to enforce the ordinance. *Id.* at ¶ 10. Defendants then argued that the plaintiffs

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lacked standing to enforce the ordinance because their properties were unaffected by the defendants' allegedly impermissible commercial activities. *Id.* at ¶ 24. The court, however, disagreed, holding that the plain language of Wis. Stat. § 59.69(11) granted the landowners the authority to enforce the ordinance because they owned property within the zoning district affected by the ordinance they sought to enforce. *Id.* at ¶ 30.

So too, here. Indeed, Appellants all own property within the same zoning district as the Kanes, and thus have standing to enforce the zoning ordinances and appeal the decision of the Zoning Administrator.

CONCLUSION

Based on the foregoing, Appellants respectfully request that the Board of Appeals grant Appellants' Appeal and revoke the Door County Regular Zoning Permit for 9099 Cottage Row and for any and all other relief that the Board of Appeals deems appropriate.

Dated: February 7, 2020.

MICHAEL BEST & FRIEDRICH LLP

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* Court Commissioner

February 7, 2020

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Door County Corporation Counsel
421 Nebraska Street
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Door County Board of Adjustment
421 Nebraska Street
Sturgeon Bay, WI 54235

Re: Appeal of Issuance of Door County Regular Zoning Permit for 9099 Cottage Row

Dear Attorney Thomas:

The undersigned, Pinkert Law Firm LLP, as the attorneys for Steven Kane, Jacqueline Kane (collectively "Kanes"), and Cottage Row Properties, LLC, submit this letter brief in opposition to the appeal filed by Stephan B. Nordstrom; Graycliffe, LLC; Carl M. Curry and Cynthia M. Curry ("Appellants") regarding the Zoning Permit issued to Steven Kane on September 25, 2019 by the Door County Land Services Department.

I. Only a person aggrieved has standing to Appeal

To appeal a decision of a zoning administrator, the Appellants, under Section 11.07(1) of the Door County Comprehensive Zoning Ordinance, must be "persons aggrieved". A person aggrieved is defined in Wisconsin Statutes Sec. 68.06 as follows:

A person aggrieved includes any individual, partnership, limited liability company, corporation, association, public or private organization, office, department, or

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commission or agency of the municipality, whose rights, duties, or privileges are adversely affected by a determination of a municipal authority.

The Door County Comprehensive Zoning Ordinance, Section 11.07 of the Ordinance, mimics Wisconsin Statutes Section 68. Wisconsin Statutes § 68.01 further clarifies who may request review of an administrative decision: “Any person having a substantial interest which is adversely affected by an administrative determination . . .”.

Per Rathkopf’s Law of Zoning, courts have used varied language in their attempts to define how standing is to be determined, but the concept remains the same. First, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the decision as distinguished from a general interest such as in the concern of all members of the community as a whole. Second, such party must successfully establish that the specific personal and legal interest which they claim to possess has been specifically and injuriously affected by the decision.

Therefore, the burden of proof is on the Appellants to demonstrate to the Board of Adjustment that their substantial “rights, duties or privileges” have been adversely affected by the determination of Richard Brauer, as Door County Zoning Administrator, to issue the Regular Zoning Permit to Kane.

A. Appellants have not shown specific personal rights, duties, or privileges being adversely affected.

Appellants’ attorney stated that a basis for Appellants’ standing is “because under both the Door County Zoning Code and the statutes, they have the right to enforce the Zoning Code.”¹ Appellants have not stated what specific rights, duties, or privileges are being infringed upon by

¹ This statement was made by Attorney Tom Gartner on Page 56 of the Door County Board of Adjustment Public Hearing transcript. Pages 54-57 of the transcript is attached as Exhibit A.

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Mr. Brauer issuing the regular zoning permit to Kanes. The nearest Appellant's property (measuring from the Kane Property) is fifteen (15) houses north from the Kane Property along the shore of Green Bay, which equates to a distance of almost three-quarters of a mile, or approximately 4,000 linear feet. The most distant Appellant's home is over one-mile away from the Kane Property.

The Kanes and their attorneys have found no case law which supports the proposition that a property owner three-quarters or more of a mile away has any specific right, duty, or privilege being affected by the issuance of a regular zoning permit.

Appellants essentially argue that since they have alleged a technical error in the condominium documents, they may proceed with an appeal. However, Appellants have failed to show how this technical error affects their specific rights, duties, or privileges. Appellants do not claim to be the owners of the Kane Property nor do they claim any ownership interest. Appellants only interest in the Kane Property appears to be from private deed restrictions which may affect the property.

B. Deed restrictions do not cause someone to become an aggrieved person or party.

Appellants argue the private restrictive covenants entered into between multiple owners of properties on the road known as Cottage Row give them standing as a person aggrieved.² However, case law has shown the exact opposite is true. The Wisconsin Court of Appeals affirmed the proposition that private restrictive covenants and public zoning ordinances operate in entirely

² Appellants' attorney initially states himself that the deed restriction is not germane to this appeal but later states that the deed restriction gives the Appellants standing to appeal. Page 18 of the transcript is attached as Exhibit B.

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separate spheres. In *Sills v. Walworth County Land Mgmt. Comm.*, the Court adopted Rathkopf's Law of Zoning which states:

Zoning is entirely divorced in concept, creation, enforcement, and administration from restrictions arising out of agreements between private parties who, in the exercise of their constitutional right of freedom to contract, can impose whatever lawful restrictions upon the use of their land that they deem advantageous or desirable. Zoning restrictions and restrictions imposed by private covenants are independent controls upon the use of land, the one imposed by the municipality for the public welfare, the other privately imposed for private benefit.

Both types of land use restrictions are held by courts to legally operate independently . . .

Sills v. Walworth County Land Mgmt. Comm., 254 Wis.2d 538, 558, 648 N.W.2d 878 (WI App 2002) quoting Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning, §§ 82:2, 82:3, 2001.

The Wisconsin Court of Appeals in *Sills* cites a Pennsylvania case with facts mirroring this case, “[i]t has been uniformly held that any consideration of building restrictions placed upon the property by private contract has no place in the proceedings under the zoning laws for a building permit or a variance.” *Sills v. Walworth County Land Mgmt. Comm.*, 254 Wis.2d 538, 558, citing *Appeal of McIhener*, 382 Pa. 401, 115 A.2d 367, 370 (Pa. 1955).

The case law is clear that private deed restrictions do not make one a person aggrieved with the ability to appeal a determination by the zoning administrator.

II. The condominium documents were effective on recording.

Appellants argue that the Condominium Declaration was not effective and, therefore, a regular zoning permit cannot be issued. However, this argument relates to a technical error of minimal effect to issuing a regular zoning permit; and the intent of the Kanes clearly shows that the error should not result in the denial or revocation of a regular zoning permit.

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Wis. Stat. §703.09(1)(b) requires a statement of the owner's intent to subject the property to the condominium declaration established under this chapter. The technical error alleged by Appellants is that the owner under the declaration, Cottage Row Properties, LLC, was not the owner of the property, that the owners at the time of the declaration were Steven and Jacqueline Kane individually as husband and wife. However, Steven and Jacqueline Kane are the sole members of Cottage Row Properties, LLC. The Kanes, as sole members of the LLC, directed the LLC in their capacity as sole members to execute and record the Declaration. The ownership of the property being the Kanes individually or as sole members of the LLC is a technical error that should not affect the County's decision in issuing a regular zoning permit.

Once discovering the technical error of ownership, the Kanes transferred the property to their LLC. An Amendment to the Cottage Row Condominium Declaration pursuant to Wis. Stats. §703.095 will be filed to correct this error. A copy of the proposed amendment is attached hereto as Exhibit C. This statute specifically allows for corrections to be made to recorded condominium instruments. The effect of the correction is not only to correct the Condominium Declaration moving forward, but also to correct the earlier mistake. The intent of the parties was clear by their actions; and pursuant to Wis. Stats. §703.095, they can correct errors in the Condominium Declaration.

Conclusion

Appellants have presented no evidence that they, or any of them individually, are persons aggrieved under the Door County Zoning Ordinance or the Wisconsin Statutes. The courts are clear that a private deed restriction does not give standing. Appellants' interest is at most a general interest that any member of the community could bring, and the statute does not purport to give

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any community member standing to appeal. Appellants' appeal must be dismissed. Even if the Appellants' appeal was to proceed, the error cited by the Appellants is a technical error. The Kanes have been the underlying party throughout the entire declaration and application.

Respectfully submitted,

PINKERT LAW FIRM LLP



Tyler D. Pluff

TDP:

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1 would be. That's what we're talking about here and
 2 what you're just referring to as setbacks. The
 3 setbacks from the residence they want to erect and
 4 the residence that is there, the setbacks have to be
 5 the same as if those were lots.
 6 MR. GARTNER: Correct.
 7 BOARD MEMBER MONICA NELSON: Okay.
 8 MR. GARTNER: But if it's not -- if
 9 Unit 3 is not a lot of record, then pursuant to
 10 Section 304(2) of your own code, they can't build a
 11 house there.
 12 BOARD MEMBER MONICA NELSON: It's a -- a
 13 condominium unit can be built though, correct, in a
 14 condominium lot --
 15 MR. GARTNER: It can.
 16 BOARD MEMBER MONICA NELSON: -- lot
 17 whatever?
 18 MR. GARTNER: It can. And, again, we're
 19 not saying that, you know, this approach by the
 20 County is incorrect, but -- and we're not saying that
 21 Mr. Brauer --
 22 BOARD MEMBER MONICA NELSON: I
 23 understand.
 24 MR. GARTNER: -- wouldn't have approved
 25 this anywhere else.

1 the appellants have standing is because of this deed
 2 restriction?
 3 MR. GARTNER: Both because of the deed
 4 restriction and because under both the Door County
 5 Zoning Code and the statutes, they have the right to
 6 enforce the Zoning Code.
 7 CHAIRMAN BOB RYAN: Okay. But the
 8 County is not required to enforce the deed
 9 restriction.
 10 MR. GARTNER: Correct.
 11 CHAIRMAN BOB RYAN: Who would normally
 12 enforce that?
 13 MR. GARTNER: The parties to the deed
 14 restriction --
 15 CHAIRMAN BOB RYAN: Okay.
 16 MR. GARTNER: -- need to go to court to
 17 enforce that, the rights under the deed restriction.
 18 That's the litigation that's presently pending
 19 between the Kanes and the appellants.
 20 CHAIRMAN BOB RYAN: Okay. And then you
 21 talked about Mr. Smith talking about an appeal. Is
 22 he really able to -- or, I'm sorry, an amendment. Is
 23 he really able to do anything in terms of an
 24 amendment with this appeal in process?
 25 MR. SMITH: I don't know that this

1 BOARD MEMBER MONICA NELSON: Right. I
 2 understand.
 3 MR. GARTNER: But we are saying in the
 4 litigation --
 5 BOARD MEMBER MONICA NELSON: Uh-huh.
 6 MR. GARTNER: -- that creation of this
 7 condominium would constitute a land division and
 8 would be permitted -- or prohibited, excuse me, by
 9 the deed restriction.
 10 So either the Kanes are doing a land
 11 division to create three lots of record so they've
 12 got three conforming now homes, which is prohibited
 13 by the deed restriction, or they comply with the deed
 14 restriction and they don't do a land division, but
 15 then they only have one lot of record and they can't
 16 build the new home. Technical, but tonight the only
 17 issue is when the Zoning Permit was issued on the
 18 25th, was it a valid issuance, and our contention is
 19 that it was not because there was no condominium in
 20 effect because the declarant was not the owner of the
 21 property.
 22 BOARD MEMBER MONICA NELSON: Okay.
 23 Thank you.
 24 CHAIRMAN BOB RYAN: Any other questions?
 25 I have a couple. Bob Ryan. So your contention that

1 appeal impacts an amendment to the Condominium
 2 Declaration and the condominium plat, but, again, I
 3 don't -- my opinion would be that as a matter of law,
 4 you cannot amend a declaration which was never
 5 effective in the first case. And, again, these are
 6 issues that you may want to ask corporation counsel
 7 to weigh in on.
 8 CHAIRMAN BOB RYAN: Okay. Any other
 9 questions?
 10 (No response.)
 11 CHAIRMAN BOB RYAN: Okay. Thank you.
 12 MR. GARTNER: Thank you.
 13 CHAIRMAN BOB RYAN: Okay. Rebuttal.
 14 Anyone else? No. There's only one qualifier for
 15 rebuttal for --
 16 BOARD MEMBER MONICA NELSON: There's
 17 two. There's Rick and --
 18 CHAIRMAN BOB RYAN: No, but there's --
 19 we're going to op --
 20 CLERK MARIAH GOODE: Bob, can you speak
 21 into the microphone?
 22 CHAIRMAN BOB RYAN: Sure. There was
 23 only one testimony for the appeal. Now we'll be
 24 looking for rebuttal from those in opposition of the
 25 appeal.

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1 BOARD MEMBER MONICA NELSON:
 2 Monica Nelson. It appears he signed off on
 3 September 18th.
 4 MR. GARTNER: Yes --
 5 BOARD MEMBER ARPS HORVATH: Uh-huh.
 6 MR. GARTNER: -- on the condominium plat.
 7 BOARD MEMBER MONICA NELSON: Yes. Yes.
 8 So I -- Monica Nelson again. I am looking for the
 9 condominium restriction, the -- or the deed
 10 restriction. Where do I find that?
 11 MR. GARTNER: That is not in the record,
 12 and because -- we have copies of that. It's been
 13 filed in the lawsuit, but it really is not germane to
 14 this appeal because pursuant to County ordinance, the
 15 County does not enforce deed restrictions to which
 16 the County is not a party. So even if Mr. Brauer
 17 were aware of the deed restriction, that would not be
 18 the basis -- an appropriate basis for him to deny
 19 issuance of a permit.
 20 BOARD MEMBER MONICA NELSON: Okay. But
 21 you reference the deed restriction, correct, in here?
 22 MR. GARTNER: Yes.
 23 BOARD MEMBER MONICA NELSON: Okay. And
 24 how does that affect this appeal?
 25 MR. GARTNER: The deed restriction

1 MR. GARTNER: We're taking the position
 2 that the deed restriction is not valid because it
 3 was -- on the date that it was recorded, the
 4 declarant -- and you can see it -- the declarant
 5 listed right here below the seal --
 6 BOARD MEMBER MONICA NELSON: Uh-huh.
 7 MR. GARTNER: -- was Cottage Row
 8 Properties, LLC. A declarant has to own property in
 9 order to approve a condominium plat. A person who is
 10 not an owner of the property can't be the declarant
 11 and record a plat. Just -- for example, I did not
 12 own this property, so I could not submit a
 13 condominium plat with myself as the declarant saying,
 14 "I'd like to divide this property."
 15 BOARD MEMBER MONICA NELSON: Okay.
 16 MR. GARTNER: Only the owner can do
 17 that, and on September 18th when it was approved by
 18 Mr. Brauer and when it was recorded, the owner was --
 19 the owners were Steven and Jacqueline Kane, not the
 20 LLC entity.
 21 BOARD MEMBER MONICA NELSON: Okay. So
 22 this is the land surveyor's plat, and that's dated
 23 9/12/19.
 24 MR. GARTNER: Correct.
 25 BOARD MEMBER MONICA NELSON: And you are

1 itself does not affect this appeal, but this appeal
 2 is significant in the context of the litigation
 3 between the appellants and the Kanes. The appellants
 4 are taking the position that the deed restriction
 5 which prohibits any division of this property into
 6 separate tracts prohibits creation of this
 7 condominium and, most importantly, construction of
 8 the third home on this parcel.
 9 BOARD MEMBER MONICA NELSON: So it does
 10 affect the appeal because you're telling us that
 11 because of the deed restriction, they could not have
 12 this lot as separate and recorded as their lot,
 13 et cetera, except we don't have a copy of what that
 14 deed restriction is and how it applies here.
 15 MR. GARTNER: And, again, it doesn't --
 16 it doesn't --
 17 BOARD MEMBER MONICA NELSON: Because you
 18 said it was -- this was illegal for them to divide --
 19 to do this minor land division because of -- am I
 20 correct in saying that you said this was an illegal
 21 plat because of the deed restriction, condominium
 22 deed restriction?
 23 MR. GARTNER: Excuse me. No, that's not
 24 quite right.
 25 BOARD MEMBER MONICA NELSON: Okay.

1 saying that Cottage Row, LLC did not own the property
 2 at that time of the survey?
 3 MR. GARTNER: Correct. And they did
 4 not -- they did not own the property on the date of
 5 the survey, on the date that it was approved by
 6 Mr. Brauer, which is September 18th, and on the date
 7 which is -- on which it was recorded, which is also
 8 September 18th.
 9 BOARD MEMBER MONICA NELSON: And that --
 10 Monica Nelson again. And that is because the
 11 Quit Deed Claim says September 23rd?
 12 MR. GARTNER: Correct.
 13 BOARD MEMBER MONICA NELSON: Okay.
 14 Thank you.
 15 CHAIRMAN BOB RYAN: Any other questions?
 16 (No response.)
 17 CHAIRMAN BOB RYAN: Okay. You can step
 18 down.
 19 MR. GARTNER: Thank you.
 20 CHAIRMAN BOB RYAN: The next person to
 21 testify is welcome to step forward. Anyone else in
 22 support of this? Is there anyone else in support of
 23 this appeal? Okay. We'll move on to in opposition.
 24 Oh, wait. Were there any letters of support?
 25 CLERK MARIAH GOODE: No.

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 Exhibit B

**FIRST AMENDMENT TO
COTTAGE ROW CONDOMINIUM DECLARATION**

This First Amendment to Condominium Declaration for Cottage Row Condominium ("Condominium") is made this ____ day of February, 2020 by Steven Kane and Jacqueline P. Kane, individually and in their capacity as sole members of Cottage Row Properties, LLC (collectively, "Kanes").

Recording Area

Name and Return Address

Attorney James R. Smith
Pinkert Law Firm LLP
454 Kentucky St., P.O. Box 89
Sturgeon Bay, WI 54235

014-67-0001, 014-67-0002,
014-67-0003
Parcel Identification Number (PIN)

RECITALS

A. On September 18, 2019, Kanes recorded a Condominium Declaration entitled "Cottage Row Condominium Declaration" in the Office of the Register of Deeds for Door County, Wisconsin as Document No. 824967 ("Declaration").

B. The Declaration states that the Declarant of the Condominium, at the time of recording the Declaration, was "Cottage Row Properties LLC" ("LLC").

C. The Declaration was executed by Steven Kane, in his capacity as a member of the LLC.

D. It was subsequently discovered that Kanes were the owners individually of the Condominium Parcel legally described in the Declaration ("Condominium Parcel") which was submitted to the condominium form of ownership under Wis. Stats. Chapter 703.

E. Kanes subsequently conveyed the Condominium Parcel to the LLC, said Condominium Parcel also being described in said deed as Units 1, 2, and 3 of the Condominium. The deed by which Kanes deeded the Condominium parcel to the LLC was recorded on September 24, 2019 as Document No. 825124, Door County Records ("Deed").

F. The Deed also recited that Kanes transferred and assigned to the LLC all of the duties and obligations as the Declarant.

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Exhibit C

This document drafted by:
Attorney James R. Smith
Pinkert Law Firm LLP
454 Kentucky St., P.O. Box 89
Sturgeon Bay, WI 54235-0089

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DOOR COUNTY, WISCONSIN BOARD OF ADJUSTMENT

Stephan B. Nordstrom, Graycliffe, LLC, Carl M. Curry and Cynthia M. Curry,
Appellants.

APPELLANTS' BRIEF IN OPPOSITION TO KANES' FEBRUARY 7, 2020 BRIEF

Stephan B. Nordstrom, Graycliffe, LLC, Carl M. Curry and Cynthia M. Curry ("Appellants"), by and through their attorneys, Michael Best & Friedrich LLP, hereby submit their brief in opposition to the Kanes' February 7, 2020 letter brief.

RESPONSE

I. The Kanes Admit Their Error When Recording the Condominium Instruments and Fail To Provide Legal Support That Their Error Can Be Corrected By Amendment. It Cannot.

The Kanes admit their error in filing the Condominium Declaration. The Kanes attempt to argue, without legal support, that Cottage Row Properties, LLC signing the Condominium Declaration as the Declarant while Cottage Row Properties, LLC did not own the Property is minor and can be amended. It cannot. As a result of the Kanes' undisputed error, the Condominium Declaration does not substantially conform with the requirements of Chapter 703 and is therefore void ab initio. See Wis. Stat. §§ 703.09(1)(c), 703.03, 703.02(7), 703.30(2); *Rock Lake Estates Unit Owners Ass'n v. Twp. of Lake Mills*, 195 Wis. 2d 348, 362-364, 536 N.W.2d 415 (Ct. App. 1995).

Even under the new argument raised in the Kanes' brief, the Condominium Declaration still cannot substantially conform with the requirements of Chapter 703. The Kanes argue in their letter brief that "[t]he Kanes, as sole members of the LLC, directed the LLC in their

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capacity as sole members to execute and record the Declaration.” This argument has no legal merit. Regardless of whether the Kanes “directed” the LLC to sign the Condominium Declaration, the LLC had no legal authority to sign it because under Wis. Stat. §703.09(1)(c) the LLC did not own the Property. Furthermore, only Steven Kane – not Jacqueline Kane – signed the Condominium Declaration. Thus, the Declaration was not even signed by all of the then owners of the Property. The Kanes cannot pick and choose when to act through Cottage Row Properties, LLC. Under Wisconsin law, the owners of the Property had to sign the declaration. Here, the then owners of the Property, Steven Kane *and* Jacqueline Kane did not sign the Declaration and were not the Declarants. Cottage Row Properties, LLC was. The Condominium Declaration therefore does not substantially conform with Chapter 703.

The Kanes simply fail to address that the Condominium Plat also does not substantially conform with Wisconsin law because it was also in Cottage Row Properties, LLC’s name and not the Kanes, the owners of the property. Wis. Stat. §§ 703.11(1), 703.09(4). Since the condominium instruments were never effective, they cannot be amended under section 703.095.

Notably, the Kanes are not without a remedy for their error. The Kanes or their counsel could have but did not file a new condominium declaration and begin the process anew.¹ In fact, they could have done this as early as September 2019, when the Door County Land Use Services Department brought the Kanes’ error to their attention. Any delay caused by the Board’s or Zoning Administrator’s revocation of their Zoning Permit, is thus the Kanes’ own fault.

II. Appellants Indisputably Have Standing Under Wisconsin Law to Bring this Appeal.

The Kanes disingenuously argue that Appellants, property owners on Cottage Row Road and in Door County, are not persons aggrieved when a Zoning Permit on their very street and within their district is issued in contravention of Wisconsin law and the Door County

¹ Any new filing would also be a land division that violates the 1993 Restrictions by improperly dividing Tract 54.

Ordinances. In cases involving permits issued in violation of zoning ordinances, such as this, courts have held that the issuance of the permit is illegal *per se*, constituting an injury to neighbors whose property interests are affected. *Milwaukee v. Leavitt*, 31 Wis. 2d 72, 78-79, 142 N.W.2d 169 (1966); *Jelinski v. Eggers*, 34 Wis. 2d 85, 93, 148 N.W.2d 750 (1967); see *Forest Cty. v. Goode*, 215 Wis. 2d 218, 229, 572 N.W.2d 131 (Ct. App. 1997) (“We also determine that the trial court’s refusal to grant injunctive relief is a misuse of discretion because *it infringes on the public’s right to enforcement of zoning ordinances.*” (emphasis added)). Appellants’ property interests are affected by both the pre-existing, recorded restrictive covenants applicable to all lots on Cottage Row, and the Kanes’ proposed structures would materially affect the aesthetics and nature of Cottage Row because of an improperly calculated setback.

Finally, even if the Board determines that Appellants lacked standing to bring this Appeal – which is legally incorrect – this Board and the Zoning Administrator has an obligation to rescind the Zoning Permit since they are aware that the Zoning Permit was issued in violation of Wisconsin law. Section 10.04(5) and 10.04(8) of the Door County Comprehensive Zoning Ordinance states that Mr. Brauer, as the Zoning Administrator, has the power and duty to suspend or revoke the Zoning Permit based on noncompliance and/or assist Corporation Counsel in initiating enforcement proceedings. The revocation of the Zoning Permit is required here.

Dated: February 10, 2020

MICHAEL BEST & FRIEDRICH LLP

By: Electronically signed by Thomas Gartner

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February 10, 2020

Attorney Grant Thomas
 Door County Corporation Counsel
 421 Nebraska Street
 Sturgeon Bay, WI 54235

Door County Board of Adjustment ✓
 421 Nebraska Street
 Sturgeon Bay, WI 54235

Re: Appeal of Issuance of Door County Regular Zoning Permit for 9099 Cottage Row

Dear Attorney Thomas:

The undersigned, Pinkert Law Firm LLP, as the attorneys for Steven Kane, Jacqueline Kane (collectively "Kanes"), and Cottage Row Properties, LLC, submits this brief in response to the supplemental brief filed by Stephan B. Nordstrom; Graycliffe, LLC; Carl M. Curry and Cynthia M. Curry ("Appellants") on February 7, 2020.

I. Standing must be established before examining the condominium declaration.

Appellants have mischaracterized the order of the requirements for an appeal. The Door County Corporation Counsel stated at the hearing on January 28, 2020, that the first step in considering an appeal by the Board of Adjustment is a determination as to whether the Appellants have standing.

"And if the appellants are not persons aggrieved and lack standing, that in and of itself is reason enough to dismiss the appeal." (Door County Board of Adjustment Hearing January 28, 2020, p. 71).

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Attorney Grant Thomas
Door County Board of Adjustment
February 10, 2020
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Therefore, it is required that one proceed to page 4 of Appellants' Supplemental Brief to examine standing before any analysis of the technical error claimed by the Appellants can be undertaken. If the Appellants have failed to establish that they have standing, there is no need to analyze the legal effect of the Condominium Declaration. Appellants have presented no evidence that they have standing to appeal the issuance of the regular zoning permit by Rick Brauer.

II. Appellants have failed to show how they, or even one of them, has standing to appeal.

The two ways Appellants argue their interests are adversely affected is (1) because of the Restrictive Covenants and (2) the proposed structures would materially affect the aesthetics and nature of Cottage Row. (Appellants' Supplemental Brief, p. 5). As shown in our previous brief, case law is clear; a private restrictive covenant cannot be the basis for standing in the appeal of a regular zoning permit. There are multiple properties on Cottage Row that are not subject to the restrictive covenants as disclosed in the "Agreement Creating Restrictive Covenants" recorded in Volume 534 of Records, Page 383, Document No. 526743.

Appellants cite *State, ex rel. Brookside Poultry Farms, Inc.*, for the proposition that residents who live within the general area of a proposed facility were aggrieved persons with standing to challenge the permit issued. When reading *State ex rel Brookside*, the sole line the court discusses about standing states, "the trial court, after taking evidence on the point, held that the residents were aggrieved because of the effect of a large egg laying facility would have on their property interest, and that conclusion is supported by the record." *State, ex rel. Brookside Poultry Farms, Inc.*, 125 Wis. 2d 387, 390, 373 N.W.2d 450 (Ct. App. 1985) The court does not discuss this issue further, and therefore, it cannot be used to support the conclusion that residents who live

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within the general area are persons aggrieved.

Appellants argue that the home under construction by the Kanes would affect the aesthetics and appearance of the neighborhood by intruding on the Green Bay shoreline. This is not a specific interest to the Appellants as the home may be seen by any recreational boater or passerby looking at the shoreline of Green Bay. When discussing a neighborhood, the question of distance must be accounted for, especially since none of the Appellants can see the Kane property from their homes on Cottage Row, nor would they even be required to pass by the Kanes' home when traveling to or from their respective properties.

Appellants cite Wis. Stats. §59.69 for the proposition they have standing to enforce the zoning ordinance because they are within the same zoning district. This is not an appeal under Wis. Stats. §59.69; it is an appeal under Section 11.07 (1) of the Door County Comprehensive Zoning Ordinance and Wis. Stats. §68 regarding the issuance of the regular zoning permit by Rick Brauer. This administrative review requires Appellants to show a specific right, duty or privilege being affected by the issuance of the regular zoning permit to the Kanes. If Appellants' argument was accepted, then any person owning property within the single-family residence zoning district in Door County could appeal any decision of the Zoning Administrator to issue a regular zoning permit, which is preposterous.

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CONCLUSION

Appellants have failed to show how they have acquired standing to appeal the issuance of the regular zoning permit to Kanes by Rick Brauer; and therefore, their appeal must be denied.

Respectfully submitted,

PINKERT LAW FIRM LLP



Tyler D. Pluff

TDP:mah

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