

## LEGAL MEMO

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**TO:** Village of Suttons Bay Planning Commission  
**FROM:** Jeffrey L. Jocks – Sondee, Racine & Doren, PLC  
**DATE:** July 11, 2022  
**RE:** Conditional Rezoning Request for Parcel 45-03-828-031-00

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Applicant has applied for a conditional rezoning per Suttons Bay Village Zoning Ordinance Section 18-4. Conditional rezoning is authorized by the Michigan Zoning Enabling Act at MCL 125.3405. It provides that a property owner may ask the Village to rezone a parcel with specific volunteered conditions proposed by the property owner. However, the Village may not negotiate any of the property owner's volunteered conditions and may not add additional conditions as part of its decision. Said another way, the Village has discretion to approve or deny an application for a conditional rezoning, but its decision on approval or denial is strictly limited to the application and volunteered conditions as proposed by the Applicant.

Here, Applicant is asking to rezone part of Parcel 45-03-828-031-00 which is currently zoned as Single Family Waterfront Residential (SFWR) and New Village Residential (NVR). The parcel's section of SFWR zoning is located between S. Shore Drive and Lake Michigan. The remainder of the parcel is zoned NVR. Applicant is asking that the entirety of the parcel be rezoned to NVR.

The Application came with six proposed conditions which are as follows:

### Proposal

We are asking that the portions of the Property currently zoned as SFWR be conditionally rezoned to NVR. In order to protect the best interests of the public and community, this rezoning would be subject to the following voluntarily offered conditions:

1. Limitation on the building footprint on resulting waterfront parcels to no more than 2400 square feet, which is less than the 30% coverage limitation in the NVR District.
2. Limitation on distance from the waterfront to no greater than adjacent developments or an average of the 2 adjacent developed setbacks. Recent remodeling at the nearby parcel 223 S. Shore Dr. may have resulted in a structure closer to the waterfront and will not be used in this calculation.
3. Front road set back of 15 feet per the NVR standards.
4. Side set back of 15 feet per the NVR standards.
5. The conditional rezoning would be abandoned if a land division is not completed within 7 (seven) years.

6. If the land division is completed, the resulting parcels would include deed restrictions establishing the above conditions.

### **Legal Concerns with Application**

The following are my concerns with the Application

#### ***a. NVR Waterfront Setback***

The SFWR district fronts on Lake Michigan and has a minimum setback of 50 feet from the lake. ZO, Table 4-3, p 4-4. The NVR district has no minimum setback from Lake Michigan. *Id.* Therefore, the NVR district does not contemplate that any parcels zoned NVR will touch the lakeshore. As a result, the Applicant has proposed condition 2 which reads: “Limitation on distance from the waterfront to no greater than adjacent developments or an average of the 2 adjacent developed setbacks. Recent remodeling at the nearby parcel 223 S. Shore Dr. may have resulted in a structure closer to the waterfront and will not be used in this calculation.”

Applicant’s proposed Lake Michigan setback is vague and offers two different options. The first option limits the distance from the waterfront to no greater than adjacent developments. Generally, setbacks are minimums and not limitations which would, as best I’m able to interpret, mean that under the proposal a structure can be no *greater* than the distance from the waterfront of the adjacent developments. Therefore, it could be closer to the waterfront than the adjacent developments. While my interpretation may be incorrect, the proposed condition is, in my opinion, too vague.

The second option limits the distance from the waterfront to an average of the 2 adjacent developed setbacks. Again, the “limit” language creates a significant problem because I interpret it to mean that the proposed setback can be no greater than the average adjacent setbacks, but may be closer to the waterfront. Again, this is too vague.

Furthermore, without knowing the actual setbacks of “adjacent developments” you have no ability to determine the actual distance of Applicant’s proposed setback. This is vague as well. Such vagueness is a red flag because this body must know the precise conditions upon which the Applicant will ultimately utilize. As my interpretation above demonstrates, the vagueness will likely result in disputes between the Village and the Applicant as to what the language means and what the proper setback should be under the language.

In addition to the vagueness of the proposal for a waterfront setback, approving the application would mean that the SFWR setback of 50 feet will be reduced. It is safe to presume that the Village determined that a 50-foot setback for all new construction in the district is important for protecting Lake Michigan. In fact, the 50-foot setback from Lake Michigan is the largest of the setbacks set out in the Village residential districts. The concern for water protection is found throughout the Suttons Bay Community Joint Master Plan. The 50-foot setback is also important because it provides space for the Zoning Ordinance’s minimum 25-foot Waterfront Greenbelt requirements in Section 2-6(H). Again, based on the vagueness of the

proposed condition it is not clear that the Applicant would have 25 feet for the required greenbelt.

Finally, there exists a question as to whether the Applicant's proposed setback from Lake Michigan is legal under the MCL 125.3405. A conditional rezoning cannot be approved if the conditions would permit something not allowed in the new district. The Zoning Ordinance sets the NVR's rear setback at 15 feet. ZO, Table 4-3, p 4-4. The NVR has no setback from Lake Michigan. The proposed Condition Number 2 creates a new procedure to determine the setback from Lake Michigan which is not found in the NVR. In addition, because there is no setback from Lake Michigan in the NVR the proposed condition does permit something that does not exist in the NVR.

Based on the issues set out in this subsection, I recommend that the Planning Commission recommend denial of the proposed conditional rezoning to the Village Council. The vagueness in the proposed setback, the likely significant reduction in the setback from Lake Michigan when compared with the SFWR's 50 feet is inconsistent with the Master Plan, and the proposed setback which modifies the NVR in a way that may reduce the standard NVR setback and which adds a new setback, all are material issues that warrant a recommendation of denial.

***b. Two New Waterfront Parcels***

The Applicant's narrative contemplates that if this conditional rezoning is approved it will be able to seek a land division and create two new waterfront parcels on the Applicant's property between S. Shore Drive and Lake Michigan. The Application appears to rely upon the creation of the two new waterfront parcels in order for the Applicant to achieve its goals. However, there are a number of issues concerning the Applicant's plan.

The Applicant proposes that the property between S. Shore Drive and Lake Michigan "be divided into two lots of 104 feet of road frontage each, resulting in 2 lots: 1 of approximately 8216 square feet and the other of 8112 square feet. Although the "Proposal" does not expressly propose two lots, Condition Number 1 very clearly contemplates that the Applicant will be able to create two new waterfront lots. It reads: "Limitation of the building footprint on resulting waterfront parcels to no more than 2400 square feet, which is less than the 30% coverage limitation in the NVR District."

The Applicant's reliance upon its desire to create two new waterfront parcels, and the language of Condition Number 1, positions Applicant in such a way to argue that it would have a vested right to create the two parcels if the Village approves the Application. Condition Number 1's reference to "resulting waterfront parcels" would become part of the approved conditions and at least imply that the Village approved the division into two parcels. However, the Village cannot, through the conditional rezoning process, require itself to approve a land division which is subject to the Village Land Division Ordinance and the Land Division Act (PA 3 of 1895, as amended). This possible circumstance is a critical flaw in the Application because it, at least arguably, would result in the Applicant claiming reliance upon the approval of two parcels through the conditional rezoning process.

In addition, a second and just as important issue is that the Applicant's proposed waterfront parcels would not meet the requirements of the NVR District. The NVR District requires a parcel to have a minimum depth of 100 feet and a minimum width of 80 feet. ZO, Table 4-3, p 4-4. Applicant's narrative says that proposed parcels would have a 104 foot width and a 78-79 foot depth. Therefore, Applicant's proposed new waterfront parcels would not comply with the NVR District. As set out above, a conditional rezoning cannot result in permitting something that would otherwise not be permitted in the new district. To do so goes well beyond the Village's authority under MCL 125.3405 by allowing parcels that are not allowed in the NVR District.

Based on the issues set out in this subsection, I recommend that the Planning Commission recommend denial of the proposed conditional rezoning to the Village Council. The proposed creation of two waterfront parcels that will not comply with the NVR District cannot be approved under the Village's Land Division Ordinance and cannot be approved under MCL 125.3405 because it would permit parcels that are not otherwise permitted in the district.

### **Conclusion**

The above sets out the legal concerns with part of the Application and Condition Numbers 1 and 2. These issues are significant and warrant a recommendation of denial to the Village Council. Simply put, much of what the Applicant would like to do is not legally allowed through the conditional rezoning process.