STATE OF WISCONSIN
CIRCUIT COURT
WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT,

Plaintiff,

v. Case No. 25-CV-585

WALWORTH COUNTY,

and

WALWORTH COUNTY ZONING AGENCY,

Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF CERTIORARI AND DECLARATORY JUDGMENT

Plaintiff Lake Beulah Management District (the "Lake District"), by its attorneys, Reinhart Boerner Van Deuren s.c., hereby submits the following brief in support of its Complaint seeking Certiorari and a Declaratory Judgment regarding Defendants Walworth County's and Walworth County Zoning Agency's (WCZA) (collectively "Defendants") grant of a conditional use permit (CUP) to West Rod Cottage Industries, LLC ("West Rod Cottage").

INTRODUCTION

In granting a CUP to West Rod Cottage, the WCZA made an arbitrary and unreasonable decision that contravenes both state statute and local ordinance, and will damage the health of an environmentally sensitive area. For years, West Rod Cottage has operated a for-profit, commercial marina on its property on Lake Beulah. The Wisconsin Court of Appeals found this marina to be unlawful in 2012. But West Rod Cottage continued to operate it, and in 2024

sought to legitimize this unlawful use by applying for rezoning and a CUP. The Lake District—a governmental entity tasked with improving and protecting the quality of Lake Beulah—opposed West Rod Cottage's marina and the grant of the CUP. To support this opposition, the Lake District presented expert assessments finding that the marina presents a significant threat to the environmental quality, water quality, and habitat of Lake Beulah, in direct violation of the Walworth County Shoreland Zoning Ordinance that governs shoreland property. The Lake District further explained that the CUP would violate zoning restrictions on marinas, as well as statutory limits on structures placed alongside navigable waters. The WCZA ignored this information, and granted the CUP with no apparent consideration of its environmental impact or noncompliance with Wisconsin law. The Court should grant review of the WCZA's unsupported decision, and issue a declaratory judgment that the CUP application must be denied.

RELEVANT BACKGROUND

A. West Rod Cottage Operates an Unlawful Marina on the Property.

West Rod Cottage has long used its Property on N8828 Stringers Bridge Road, in East Troy, Wisconsin (the "Property") to operate a commercial, for-profit marina that the Walworth County Shoreland Zoning Ordinance does not permit. The Property is located on Lake Beulah, in an area the Wisconsin Department of Natural Resources (WDNR) has designated an Area of Special Natural Resource Interest (ASNRI). (WCZA Record, Part 5, p. 37, Doc. 40.) Until 2024, the Property was zoned as a C-4 Shoreland Wetland district under the Walworth County Code of Ordinances, Shoreland Zoning Ordinance, Section 74-179. (WCZA Record, Part 4, pp. 68-69, Doc. 39.) Under Section 74-179 of the Shoreland Zoning Ordinance, the C-4 district designation was "created to maintain safe and healthful conditions, to prevent water pollution, to protect fish spawning grounds and wildlife habitat." (WCZA Record,

Part 5, p. 108, Doc. 40.) The ordinance's primary purpose is to "preserve, protect, and enhance the lakes, streams, and wetland areas in Walworth County in a manner that minimizes adverse impacts on the wetlands." *Id.* The ordinance lists the permitted uses consistent with that purpose, and states that any use not listed is a "prohibited use." A marina is not among the listed uses for C-4 districts under Section 74-179, and is therefore expressly prohibited. *Id*.

In 2012, Walworth County issued a citation to West Rod Cottage, for "[o]perating a boat marina/access site in the C-4 zone district" in violation of Section 74-179. *County of Walworth v. West Rod Cottage Industries, LLC*, 2015 WI App 20, ¶ 4, 360 Wis. 2d 491, 864 N.W.2d 121. (WCZA Record, Part 4, p. 25, Doc. 39.) Mr. John Stoss, representing West Rod Cottage as the owner, contested the citation, and the matter was brought before the circuit court, which determined following a three-day trial that West Rod Cottage had failed to show that the marina constituted a legal, non-conforming use. *Id*. at ¶¶ 4-5. (WCZA Record, Part 4, p. 25, Doc. 39.) The Wisconsin Court of Appeals affirmed the circuit court, confirming in its decision that "[m]arinas and boat liveries are prohibited in a C-4 district as they are not listed as a permitted use." *Id.* at ¶ 3. (WCZA Record, Part 4, p. 25, Doc. 39.) Despite this outcome, West Rod Cottage continued operating a commercial marina on his Property, which remained exclusively C-4 zoned for more than a decade following the Court of Appeals' decision. (WCZA Record, Part 4, p. 23, Doc. 39; *also see* WCZA Record, Part 5, p. 100, Doc. 40 ("applicant's admitted use of the property as a commercial marina since 2012"); *also see* WCZA Hr'g Tr. pp. 14:23-25, Doc. 34, May 15, 2025 (WCZA board member comment stating West Rod Cottage has been operating a marina).)

B. Defendants Grant West Rod Cottage's Request to Rezone the Property.

On May 6, 2024, West Rod Cottage, through Mr. Stoss, submitted an application to the Town of East Troy Planning Commission (the "Town Planning Commission"), seeking rezoning and a CUP for the operation of a marina on the Property. (WCZA Record, Part 4, pp. 68-71, Doc. 39.) The Town Planning Commission split up the rezoning and CUP requests, addressing the rezoning matter first. (WCZA Record, Part 5, p. 28, Doc. 40.)

In its rezoning request, West Rod Cottage asked that the Property be changed from C-4 Shoreland Wetland District to a combination of C-4 and C-2 Upland Resource Conservation District. (WCZA Record, Part 4, pp. 68-69, Doc. 39.) C-2 districts, like C-4 districts, are governed by Section 74-179. Their primary purpose under that ordinance is to "preserve, protect, enhance, and restore all significant woodlands, related scenic areas, submarginal farm lands," and to "assure the preservation and protection of areas of significant topography, natural watersheds, ground and surface water, potential recreation sites, wildlife habitat, and other natural resource characteristics that contribute to the environmental quality of the County." (WCZA Record, Part 5, p. 101, Doc. 40.)

In considering the application, the Town Planning Commission repeatedly requested that West Rod Cottage provide additional information about the Property, including an updated wetland delineation. (WCZA Record, Part 5, pp. 28-29, Doc. 40.) West Rod Cottage failed to provide the requested information. The Town Planning Commission voted to recommend denial of the rezoning request. *Id.* at 29. Despite this recommendation, the East Troy Town Board ultimately gave its approval. *Id.* West Rod Cottage then presented the request to the Walworth County Zoning Agency, which recommended approval to the Walworth County Board of Supervisors (the "County Board"). (WCZA Record, Part 5, pp. 1-3, Doc. 40.) The County

Board approved the rezone request at a meeting in January 2025. (WCZA Record, Part 5, p. 29, Doc. 40.)

The approval of the rezoning request resulted in a "split zoning" status, with the wetland portion zoned C-4 and the upland portion zoned C-2. Approximately 0.3773 acres of the Property was zoned C-2, with the intended purpose to "match the wetland boundary to delineated field conditions based on a wetland delineation report." (WCZA Record, Part 5, p. 26, Doc. 40.) Approximately 0.0463 acres remained as C-4. (WCZA Record, Part 4, p. 9, Doc. 39;

C. The Town Board Approves the CUP Despite Town Planning Commission's Recommendation for Denial.

Following the grant of the rezoning request, the Town of East Troy's Town Board and Town Planning Commission took up West Rod Cottage's CUP petition. The requested CUP would allow "8 parking stalls for commercial use [and] 8 commercial use mooring spaces along with 2 personal use mooring spaces for a total of 10 mooring spaces" under the description of a marina. (WCZA Record, Part 5, p. 50, Doc. 40.) In advance of the meeting, the Lake District, which is tasked with improving and protecting the quality of Lake Beulah (*see* Wis. Stat. § 33.21) sent a letter to the Town of East Troy explaining the "negative and detrimental impact" that the CUP would have on the lake. (WCZA Record, Part 4, pp. 29-33, Doc. 39.) In that letter, the Lake District explained that the marina was on a property still partially zoned C-4, and must therefore be governed in part by C-4 zoning requirements. Because marinas are prohibited in C-4 zoned districts, the letter explained, "there is no CUP applicable to the operation of a commercial, for-profit marina applicable to lands zoned C-4." *Id*. at 31. The letter further noted that the improvements that West Rod Cottage had proposed for the C-2 portion of the Property were not a permissible use under C-2 zoning either. *Id*. at 33.

On March 20, 2025, the Town Planning Commission voted to deny West Rod Cottage's petition for a CUP. (WCZA Record, Part 5, p. 100, Doc. 40.) The Town Planning Commission rejected the idea of granting the CUP with conditions imposed, expressing concern about a lack of enforcement if the conditions were not upheld, in light of West Rod Cottage's "admitted use of the property as a commercial marina since 2012 despite the court and appellate decision stating that the use was in violation of the Walworth County Shoreland Zoning Ordinance." *Id*. In a resolution, the Town Planning Commission stated the following grounds for denying the CUP: (1) a marina is not a permitted use or allowed conditional use in a C-4 district, (2) a marina development in a C-2 district is still subject to minimum lot area and width requirements that the C-2 portion of the property did not come close to meeting, (3) West Rod Cottage had provided no evidence that it had secured the necessary WDNR approval for its proposed use, as required for any project within a designated ASNRI.[1] *Id*.

Despite the Town Planning Commission's recommendation, the Town Board voted to approve the CUP,[2] and West Rod Cottage's petition was sent to the WCZA for review. (WCZA Record, Part 1, pp. 13-17, Doc. 36.) A preliminary staff planning report to the WCZA identified 23 conditions, and the matter was set for a hearing on May 15, 2025. (WCZA Record, Part 2, pp. 3-14, Doc. 37.)

[1] West Rod Cottage relies on a chain of emails purportedly establishing the WDNR's approval for a marina. However, a marina is not mentioned in the email from the WDNR. Instead, the email from the WDNR only addresses the piers being grandfathered. Nothing in the email from the WDNR confirms its approval for the operation of a marina within the ASNRI. (WCZA Record, Part 7, p. 10, Doc. 42.) A*lso see See Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶¶ 43-45, 362 Wis. 2d 290, 865 N.W.2d 162 ("mere uncorroborated hearsay . . . does not constitute substantial evidence" (alteration in original) (citation omitted)).

[2] The Lake District has separately challenged the East Troy Town Board's decision in Walworth County Circuit Court, Case No. 25-CV-298.

D. Defendants Grant West Rod Cottage's CUP Despite Evidence of Environmental Harm and Unlawfulness.

The Lake District submitted a letter to the WCZA in advance of the May 15 hearing, again opposing the grant of the CUP ("the May 14, 2025 Letter.") (WCZA Record, Part 4, pp. 3-12, Doc. 39.) In the letter, the Lake District stated that the CUP did not meet the requirements of the Walworth County Shoreland Zoning Ordinance because it would be harmful to the environmental quality and water quality of the lake, that a marina is not a permitted use of a C-4 zoned property, that operating the proposed commercial marina would require variances that Wisconsin case law, statutes, and other guidance did not permit, and that Wisconsin statutes prohibit the proposed number of boat slips or mooring spaces that the CUP would provide. *Id*. The Lake District submitted substantial evidence in support of its letter, including letters from a hydrogeologist, Robert Nauta, and an expert in plant sciences and biodiversity, Dr. Jennifer Thorsch, explaining the environmental importance of the area and the harmful impact of the proposed marina to the water quality, habitat preservation, and overall health of the lake. (WCZA Record, Part 5, pp. 217-219, Doc. 40; Part 6, pp. 5-6, Doc. 41.) The Lake District also submitted extensive background materials providing support and context for the experts' conclusions, including water quality tests and information from the WDNR reflecting the lake's status as a critical habitat and sensitive area. (WCZA Record, Part 5, p. 217, Doc. 40 to Part 6, p. 10, Doc. 41.)

The WCZA reviewed the Town Board's decision at a meeting on May 15, 2025, during which representatives of both the Lake District and West Rod Cottage presented testimony and answered questions from the WCZA. (WCZA Hr'g Tr., Doc. 34, May 15, 2025.) The Lake District provided testimony and evidence consistent with the May 14, 2025 Letter. (*Id.*) At the time of the meeting, at least one board member was aware, and acknowledged, that West Rod

Cottage had been operating a marina in the years since the Wisconsin Court of Appeals found it to be an unlawful use of the Property. One board member, when questioning a member of the Protect Lake Beaulah organization, expressly acknowledged that West Rod Cottage had "been doing it." (WCZA Hr'g Tr. pp. 14:23-25, Doc. 34, May 15, 2025. ("So the statement was made if he operated his Marina there . . . that it would kill the fish and the plants, **but he's been doing it**, so has it killed the fish and plants?" (emphasis added).) *See also* WCZA Record, Part 5, p. 100, Doc. 40 (referring to "applicants admitted use of the property as a commercial marina since 2012 despite the court and appellant decision stating that the use was in violation of the Walworth County Shoreland Zoning Ordinance.")

At a meeting on June 19, 2025, the County Zoning Agency voted to grant the CUP application. (WCZA Record, Part 8, pp. 6-9, Doc. 43.) In granting the CUP, the WCZA did not discuss or even mention the contemplated negative environmental impact of the CUP or conclusions of the experts presented by the Lake District, and did not substantively address how the use of the marina would conflict with all the ordinances, statutes, and case law the Lake District identified, or with applicable statutes and case law. (WCZA Hr'g Tr. pp. 3-12, Doc. 35, Jun. 19, 2025.)

LEGAL STANDARD

A person may commence an action seeking certiorari review of a municipal decision under Wis. Stat. § 59.694(10). Common law certiorari is also available when there is no express statutory method of review. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 35, 332 Wis. 2d 3, 796 N.W.2d 411. When performing a statutory or common law certiorari review, a court will conduct the following inquiry:

> (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its

> actions was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

Id. Courts will review questions of law "independently from the determinations rendered by the municipality." *Id.* ¶ 54. A court may also overturn a municipality's discretionary determination that is "arbitrary, oppressive, or unreasonable." *Id.* ¶ 52. Under Wis. Stat. § 59.69(5e)(b)2, the "decision to approve or deny the permit must be supported by substantial evidence." And courts "may reverse or affirm, wholly or partly, or may modify, the decision brought up for review." Wis. Stat. § 59.694(10).

A circuit court also has the power, under Wis. Stat. § 806.04, to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Whether to grant declaratory relief is within the court's discretion. *Olson v. Town of Cottage Grove,* 2008 WI 51, ¶ 35, 309 Wis.2d 365, 749 N.W.2d 211. Declaratory judgment is appropriate when (1) there is a controversy in which a claim is asserted against a party with an interest in contesting it; (2) the controversy is between parties whose interests are adverse; (3) the party seeking relief has a legally protectible interest, and (4) the issue in controversy is ripe for determination. *Id.* ¶ 29.

ARGUMENT

I. Defendants Improperly Granted a CUP that Cannot Meet the Requirements of the Ordinance.

A. Act 67 requires compliance with county ordinances.

2017 Wisconsin Act 67 imposed new requirements for local governments' issuance of CUPs. Arguing in favor of its application, West Rod Cottage's representatives took the position that Act 67 (codified for counties as Wis. Stat. § 59.69(5e)), required WCZA to grant the CUP so long as West Rode Cottage agreed to comply with the Town Board's conditions. This is an

incorrect reading of the statute. In fact, Act 67 requires the grant of a CUP *only* when it will comply with applicable ordinances and conditions, and allows local governments to deny a CUP when it does not. Under Wis. Stat. § 59.69(5e)(b)1, a county shall grant a CUP when an applicant "meets or agrees to meet **all of the requirements and conditions specified in the county ordinance** or those imposed by the county zoning board." (Emphasis added.) Further, "[a]ny condition imposed must be related to the purpose of the ordinance and be based on substantial evidence." The statute further establishes that someone may appeal a county's denial of a CUP application, thus acknowledging that the county may deny a CUP when appropriate. The statute puts the burden on an applicant to "demonstrate that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, **both** of which **must be supported by substantial evidence**." Wis. Stat. § 59.69(5e)(b)2 (emphasis added).

A fact sheet on Act 67 that West Rod Cottage produced (WCZA Record, Part 1, pp. 31-34, Doc. 3) affirms that "[l]ocal governments . . . have the authority to deny a permit if the applicant cannot meet the requirements of the ordinance or the conditions imposed," and that "[t]he fact that Act 67 talks about denial of a permit and the right to challenge a denial in court shows the legislature did not take away all authority to deny an application for a conditional use permit." (WCZA Record, Part 1, p. 32, Doc. 36.) The article further acknowledged that Act 67 "reflects the sentiment articulated by the dissent" in *AllEnergy Corp. v. Trempealeau County Environment & Land Use Committee*, which described an application for a CUP as "an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance." 2017 WI 2, ¶ 161, 375 Wis. 2d 329, 895 N.W.2d 368. As West Rod Cottage's own cited authority shows, local

governments can and should still deny a petition for a CUP when the conditional use does not align with the standards and purpose of the applicable ordinance.

West Rod Cottage did not adequately address[3] the Act 67 compliance requirement when arguing in support of its application. The statute requires that an applicant comply not only with the local government's conditions, but also with all the conditions and requirements of the county ordinance. At the May 15, 2025, meeting of the WCZA, representatives of West Rod Cottage conflated these requirements, arguing that because they would comply with the Town Board's conditions, the CUP must be granted under Act 67. (WCZA Hr'g Tr. pp. 4-8, Doc. 34, May 15, 2025.) West Rod Cottage did not demonstrate that its application met "all requirements and conditions established by the county." Wis. Stat. § 59.69(5e)(b). The WCZA, in turn, granted the CUP without determining through "substantial evidence" that it met the requirements of Wis. Stat. § 59.69(5e)(b).

Act 67 does not require the grant of the CUP to West Rod Cottage, and in fact militates against it. In seeking the CUP, representatives of West Rod Cottage did not provide "substantial evidence" that it would meet the conditions imposed, as required under Wis. Stat. § 59.69(5e)(b). West Rod Cottage's "substantial evidence" was essentially asking the WCZA to take its word for it that the conditions would be met. (WCZA Hr'g Tr. p. 7:18-20, Doc. 34, May 15, 2025 ("We believe that staff has done a great job of putting together the conditions. We agree to meet them and we ask that you vote in favor of this.").) While such a statement may be *some* evidence, it is

[3] Arguing in favor of West Rod Cottage's application, Attorney Chris Trebatoski stated that "the limitations imposed by the local shoreland zoning ordinance to the extent that they conflict with Act 67 are superseded by Act 67." (WCZA Hr'g Tr. p. 15:36-38, Doc. 34, May 15, 2025.) But there is no "conflict" here between the shoreland zoning ordinance and Wis. Stat. § 59.69(5e)(b)1. The statute requires granting a CUP when an applicant "meets or agrees to meet all of the requirements and conditions specified in the county ordinance." Where, as here, an applicant fails to demonstrate that it meets the requirements of the applicable ordinance, a local government may find that the use is not in compliance with the statute, and deny the CUP.

far from the requirement for "substantial evidence." It is also contradicted by facts in the record that West Rod Cottage has a history of violating zoning ordinances. (*See* WCZA Record, Part 4, p. 25, Doc. 39 (Wisconsin Court of Appeals decision affirming ordinance violation by West Rod Cottage); *also see* WCZA Record, Part 5, p. 100, Doc. 40 ("applicant's admitted use of the property as a commercial marina since 2012").) The evidence in the record directly contradicts West Rod Cottage's affirmation that it will comply with the requirements of the ordinance when it has a long history of violating those same ordinances.

Defendants also ignored substantial evidence in the record that, far from "meet[ing] all the requirements specified in the county ordinance," the CUP would violate the ordinance that governs shoreland zoning in Walworth County.

B. The CUP does not comply with the shoreland zoning ordinance.

Defendants granted West Rod Cottage's CUP despite clear evidence that it did not comply with the county ordinance. Walworth County Ordinance Section 74-186, which governs the review and approval of conditional uses, allows for issuance of a CUP only where the conditional use is "in accordance with the purpose and intent of this ordinance as outlined in Sections 74-153 and 74-154" and is "found to be not hazardous, harmful, offensive, or otherwise adverse to the environmental quality, water quality, shoreland cover, or property values in the County and its communities."

Section 74-153 states that the purpose of the ordinance is to "protect the shoreland, natural and agricultural resources and environment corridors," and to maintain "safe and healthful conditions, prevent and control water pollution, protecting spawning grounds, fish and aquatic life . . . and to preserve shore cover and natural beauty." Section 74-154 describes the ordinance's intent to "further conservation of natural resources, stabilize and protect the natural beauty of the County, preserve open spaces and sensitive natural resources," and "protect and

restore environmentally sensitive areas, biological diversity, minimize disturbances to existing vegetation and maintain environmental corridors."

The commercial marina sought in the CUP cannot be reconciled with the purpose of protecting the environment and habitats, and preserving sensitive natural resources. The Wisconsin DNR has designated the area encompassing the Property as an ASNRI and part of the Critical Habitat Designation. (WCZA Record, Part 6, pp. 7-10.) Operating a commercial marina would cause damage to this sensitive area and critical habitat, even if West Rod Cottage did comply with the Town Board's conditions.

In opposing the CUP, the Lake District submitted to the WCZA a memorandum from Robert Nauta, P.G., a hydrogeologist with 37 years of experience. (WCZA Record, Part 5, pp. 217-219, Doc. 40 to Part 6, pp. 1-4, Doc. 41.) His work over the last 24 years has involved the study of lakes and rivers, with a focus on impacts to sensitive environments and habitats. (WCZA Record, Part 5, p. 217, Doc. 40.) In his memorandum, Mr. Nauta described a report from the WDNR finding that the area of the Property contains "healthy, native plant communities," and "provides quality spawning habitat for northern pike, largemouth bass, bluegills, crappies and native perch." (WCZA Record, Part 5, p. 217, Doc. 40.) The WDNR's report further found that the area benefitted the lake by protecting the shoreline from erosion and stabilizing bottom sediments. (*Id.*) In light of WDNR's findings, Mr. Nauta concluded that West Rod Cottage's marina would cause "irreparable damage to fish and other wildlife habitats, as well as the diverse native plant community in that area of the lake," and would "result in the degradation of the overall health of Lake Beulah, as well as enhanced shoreline erosion." (*Id.*) He also noted that the entire purpose of the WDNR's ANSRI designation would be "undermined" by the presence of a marina. (WCZA Record, Part 5, p. 218, Doc. 40.)

Mr. Nauta also cited the findings of Dr. Tim Ehlinger, an aquatic geologist who had studied Lake Beulah for many years, and described its habitat decline as "death by a thousand cuts." (*Id.*) The damage caused by the marina's boat traffic, Mr. Nauta found, would further contribute to this habitat decline, and damage to the area's environmental quality. (*Id.*)

The Lake District also submitted findings from Dr. Jennifer Thorsch, the director of the Cheadle Center for Biodiversity and Ecological Restoration at University of California Santa Barbara. (WCZA Record, Part 6, pp. 5-6, Doc. 41.) Dr. Thorsch owns property on Lake Beulah that has been in her family since 1936. (WCZA Record, Part 6, p. 5, Doc. 41.) In a letter, she described the area's "critical importance to the environmental health and preservation of this sensitive habitat on Lake Beulah." (*Id.*) She explained that the area around the Property comprised aquatic vegetation that the WDNR had recognized as "offering critical or unique fish and wildlife habitat . . . or offering water quality or erosion control benefits to the body of water," and that Wisconsin law mandated special protections for such habitats. (*Id.*) She further noted that structures like the parking stalls permitted by the CUP would create runoff into the lake, causing "irreparable damage." (*Id.*) Based on this assessment, Dr. Thorsch concluded that the mooring spaces and marina would compromise the shoreline and have "adverse effects on the environment, water quality, and sensitive aquatic vegetation." (WCZA Record, Part 6, pp. 5-6, Doc. 41.) She also concluded that allowing the marina would set a precedent for misuse of the lake that would diminish its quality and lower property values. (WCZA Record, Part 6, p. 6, Doc. 41.)

There is no indication in the record that the WCZA took the environmental threat of West Rod Cottage's marina, or any of the evidence thereof, into consideration when deciding to grant the CUP. (WCZA Hr'g Tr., Doc. 35, Jun. 19, 2025.) WCZA did not have discretion to

simply disregard this information directly related to the purpose of the ordinance. Wis. Stat. § 59.69(5e) requires that conditional uses comply with the purpose of the county ordinance. The purpose of Section 74-186 is to prevent conditional uses that are "hazardous, harmful, offensive, or otherwise adverse to the environmental quality, water quality, shoreland cover, or property values in the County and its communities."[4] By granting a CUP despite uncontroverted evidence that it violated the county ordinance, the WCZA failed to comply with Act 67. Given the substantial evidence in the record of the environmental harm resulting from operating a marina on the Property, Defendants ignored the evidence and used their will rather than their judgment to improperly approve the CUP.

II. Defendants Did Not Consider that the Commercial Marina Is an Unlawful Use of the Property.

Following the County Board's grant of West Rod Cottage's rezoning petition, the Property was split into two zoning districts: C-4 Shoreland zoning and C-2 Upland zoning. The commercial marina is not permitted as a conditional use for C-4 districts. And although "yachting and marinas" are listed as a permitted conditional use for C-2 zoned districts, West Rod Cottage is still subject to requirements that the Property does not meet. The WCZA did not appropriately address these restrictions when it granted West Rod Cottage's CUP.

A. Operating a marina in the C-4 zoned part of the Property is prohibited.

As a result of the rezoning, approximately 0.0463 acres remains C-4 Shoreland Wetland District. (Doc. 3, ¶ 17.) A marina is prohibited on this part of the Property. Section 74-179 of the zoning ordinance lists the permitted uses for a C-4 district, and defines "prohibited uses" as

[4] Section 74-186 also requires that "[w]ritten notice of the proposed conditional use shall be submitted to the Department of Natural Resources ten days prior to said hearing." However, the record remains unclear whether Defendants complied which such requirement. (WCZA Record, Part 4, p. 6, Doc. 39.)

all that are not listed as permissible. A marina is not one of the permitted uses, and is therefore prohibited under Section 74-179. *West Rod Cottage Industries*, 2015 WI App 20, ¶ 3 ("Marinas and boat liveries are prohibited in a C-4 district as they are not listed as a permitted use.")

Wisconsin courts have already determined that West Rod Cottage's marina is not a legal nonconforming use under the ordinance. *West Rod Cottage Industries*, 2015 WI App 20. In 2012, West Rod Cottage received a citation from Walworth County for operating a marina in violation of Section 74-179. The circuit court, after a three-day trial, held that the marina was not a legal nonconforming use and imposed a forfeiture. *Id*. ¶ 4. West Rod Cottage appealed, and the Wisconsin Court of Appeals affirmed the circuit court's decision, finding that the County had shown that West Rod Cottage had been using its property in 2011 to "operat[e] a marina, in violation of the Walworth County Code." *Id*. ¶ 14. The Court of Appeals further concluded that West Rod Cottage had not met its burden to show that the rental of boat slips constituted a valid nonconforming use of the C-4 zoned Property. *Id.*

Section 74-131 of the Walworth County Ordinance defines "marina" as a "building, structure or place for the rental of watercraft or the rental of mooring space that **consists of pier, pier slips**, wharfs, mooring structures, or a combination of the same for securing watercraft." (WCZA Record, Part 4, p. 75, Doc. 39 (emphasis added).) The piers on the Property, which are, by definition, part of the marina, are located on the portion that is still zoned C-4. This means that the marina activities permitted by the CUP will necessarily take place, in part, in a C-4 zoned area. (WCZA Hr'g Tr. p. 3:26-30, Doc. 35, Jun. 19, 2025 (observing that there is not "really any way to avoid 100% C-4 . . . by virtue of a marine you're going to extend out into the C-4 zoned area.").) In granting the CUP, Defendants have effectively authorized the operation of a marina in a C-4 zoned area—a use that Wisconsin courts have already found to be illegal.

B. Operating a marina requires a variance that West Rod Cottage did not obtain and the law does not permit.

To lawfully operate a marina on the Property, West Rod Cottage would need to obtain a variance. This requirement applies to the C-4 zoned portion of the Property, where a marina is prohibited, and also to the C-2 zoned portion. Although the ordinance lists "yachting clubs and marinas" as a permitted conditional use for C-2 districts, the use must still comply with all other provisions of the ordinance, including lot width and area, yard, site regulations, height, parking, loading, traffic, highway access, and performance standards. (County Shoreland Zoning Ordinance, Section 74-186.) Section 74-179, which governs C-2 Upland Resource Conservation districts, requires lots to have an area of at least 5 acres, and a width of at least 300 feet. (WCZA Record, Part 5, pp. 101-05, Doc. 40.) With an area of less than one-half an acre, and a width of no more than 130 feet at its widest point, the C-2 zoned portion of the Property comprises only 10% of the required acreage, and 20% of the required width. (WCZA Record, Part 4, p. 7, Doc. 39.)

At the June 19 hearing, the WCZA appeared to dismiss concerns about the substandard lot size, based on the argument that the lot was legally created before the zoning ordinance was in place and "met the applicable lots size requirements **when created**." (WCZA Hr'g Tr. p. 4:15-30, Doc. 35, June 19, 2025 (emphasis added).)[5] This reasoning fails because the creation of the C-2 portion does *not* predate the zoning ordinance and is therefore not a legal nonconforming use. A nonconforming use is one that "existed lawfully **before** the current zoning ordinance was enacted or amended, but that does not conform with the use restrictions in the current ordinance." *See* Wis. Stat. § 59.69(10) (emphasis added). Here, while the initial C-4

[5] The Court owes no deference to the WCZA's determinations of law. *See Ottman*, 2011 WI 18, ¶ 54.

portion of the Property existed lawfully before the current zoning ordinance was enacted, the C-2 portion of the Property was only created when the property was rezoned in 2025. Because the current zoning ordinance was already in place at that time, the C-2 portion is subject to the current lot size requirements—which it does not meet. West Rod Cottage must therefore obtain a variance to operate a marina on the C-2 portion given it does not meet the "applicable lot size requirements" when the WCZA created it in 2025.[6]

West Rod Cottage never pursued a variance for its marina for the C-2 portion or the C-4 portion, and it is highly unlikely that it would have been granted one. County Ordinance 74-240(2) allows the Board of Adjustment to grant variances only under special conditions, when the variance is "not contrary to the public interest," and observes the "spirit and purpose" of the ordinance. A variance also cannot permit "any use in a district that is prohibited in that district." County Ordinance, Section 74-240(2). West Rod Cottage's marina does not observe the "spirit and purpose" of the ordinance, because the structures and boating activities associated with it are damaging to the environment and do not "assure the preservation and protection of . . . ground and surface water" as the shoreland ordinance requires. (WCZA Record, Part 5, p. 101, Doc. 40.) Additionally, as noted above, granting a variance to use the marina in the C-2 zoned portion of the Property would necessarily enable use of a marina in the portion zoned C-4, which the ordinance prohibits. Because the marina is at odds with the ordinance and would promote a prohibited use, a variance would be improper under Section 74-240(2).

Moreover, Wisconsin authorities have generally prohibited use variances in shoreland zoning areas. Wis. Stat. § 281.31 establishes that the purpose of shoreland zoning regulations is

[6] Wis. Stat. § 59.69(5e)(a)1 makes clear that a variance is separate from approving a conditional use: "'Conditional use' means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a county, **but does not include a variance**." (Emphasis added).

to "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement and structure of land uses and preserve shore cover and natural beauty." Citing this statute, the Wisconsin Supreme Court has recognized that shoreland zoning "carries the additional purposes of protecting the public's interest in navigable waters, including promoting safe and healthful water conditions, controlling pollution, and protecting fish and aquatic life and natural beauty." *State v. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI, ¶ 22, 269 Wis.2d 549, 676 N.W.2d 401. For these reasons, "[u]se variances are prohibited in shoreland zoning." (WCZA Record, Part 6, p. 11, Doc. 41 (University of Wisconsin-Madison Land Use Training & Resources website).)

III. Defendants Failed to Consider that Wisconsin Statutes Prohibit the Proposed Number of Boat Slips.

The CUP that Defendants granted to West Rod Cottage would also violate Wisconsin statutes by permitting an excessive number of boat slips. 2011 Wisconsin Act 167 created new standards for piers beginning April 17, 2012, but grandfathered in almost all existing piers (with limited exception for those deemed to be detrimental to the public interest, and those interfering with neighboring owners' riparian rights). (WCZA Record, Part 4, p. 151, Doc. 39.) Piers that were grandfathered in could be relocated or reconfigured, but could not be enlarged. In applying for the CUP, West Rod Cottage took the position that the piers on the Property were grandfathered in and exempt from the restrictions of Wis. Stat. § 30.12 because they existed prior to April 2012. In support of this claim, West Rod Cottage produced a photograph, purportedly taken in August 2011, depicting a number of boats docked at the Property. (WCZA Record,

Part 4, p. 90, Doc. 39; Part 6, p. 24, Doc. 41.) Assuming this picture was taken at that time, the use it depicts is an unlawful one.

Walworth County issued a citation to West Rod Cottage in 2012 for illegally operating a marina on the Property. *West Rod Cottage Industries*, 2015 WI App 20. (WCZA Record, Part 4, p. 25, Doc. 39.) West Rod Cottage began "large-scale boat slip rentals" in 2010. *Id.* ¶ 14. They posted an advertisement for rental of its boating slips for the "2011 boating season." *Id.* ¶ 12. West Rod Cottage also had nine leases for those boat slips in place in 2011. *Id.* If the photograph offered by West Rod Cottage to support its application for the CUP was taken in August 2011, then all it shows is further evidence of its illegal use of the Property. The photograph is supposedly of the same "2011 boating season" that formed the basis for Walworth County later issuing West Rod Cottage a citation. *Id.* Both the Walworth County Circuit Court and the Wisconsin Court of Appeals determined in 2012 that West Rod Cottage's prior and current operation of a marina was an illegal use of the Property. *Id.* ¶¶ 1-4. There is no evidence in the record of any piers being lawfully used prior to April 2012.[7] When the use of a property is not lawful to begin with, it cannot be grandfathered in as a legal nonconforming use. *See Town of Fulton v. Schiffer*, No. 97-3429, 1998 WL 319225, *1 (Wis. App. 1998) ("because Hodges' use of the property constitutes a public nuisance, that use cannot be grandfathered as a nonconforming use.") *See also* Wis. Stat. § 59.69(10)(ab) (defining "nonconforming use" as a use of land "that existed lawfully before the current zoning ordinance . . . .").

[7] West Rod Cottage contends it is able to "keep existing boats slip usage" for piers placed before April 2012. (WCZA Hr'g Tr. pp. 15:26-31, Doc. 34, May 15, 2025). But to support such usage, it merely provides the same photograph depicting illegal boating activity. There is clear evidence in the record and from the Court of Appeals decision in *West Rod Cottage Industries,* that the photograph depicts illegal usage of the Property. Surely the Wisconsin Statutes or the WDNR intended to permit continued **legal** use of the piers and Property, not **illegal** ones.

Even if the piers in the photograph did represent a lawful use of the Property prior to April 2012—it does not—this has no effect on the number of boat slips that West Rod Cottage may operate today. Wis. Stat § 30.12 prohibits placing structures "upon the bed of any navigable water" where no bulkhead line has been established or beyond a lawfully established bulkhead line without a permit. Wis. Stat. § 30.12(1g)(f)(1c) allows for exceptions for piers, only when the pier "has no more than 2 boat slips for the first 50 feet of the riparian owner's shoreline frontage and no more than one additional boat slip for each additional 50 feet of the riparian owner's shoreline frontage."

The structures proposed in the CUP do not qualify for the exemption in Wis. Stat. § 30.12(1g). A Rezone and Conditional Use Map survey, last updated on October 22, 2024, lists the property as being approximately 120.92 feet wide at its widest point. (WCZA Record, Part 6, p. 18, Doc. 41.) Pursuant to the statute, no more than three boat slips are permitted on the Property. There is no evidence in the record that West Rod Cottage was ever permitted to lawfully exceed this number. The CUP seeks to use "8 commercial use mooring spaces long with 2 personal use mooring spaces"—more than three times the amount of boat slips that the statute allows for a Property of this size. Additionally, the exemptions of Wis. Stat. § 30.12(1g) are available only "if the structure . . . is located in an area **other than** an area of special natural resource interest." (Emphasis added). As noted above, the WDNR has designated the area around the Property to be an ASNRI. Even if the piers in West Rod Cottage's photograph were grandfathered in, this does not entitle West Rod Cottage to install unlimited boat slips in violation of Wis. Stat. § 30.12.

CONCLUSION

Defendants made the wrong decision in granting a CUP to West Rod Cottage. This CUP authorizes the operation of a commercial, for-profit marina that Wisconsin courts have already deemed unlawful for the Property, that does not comply with statutory restrictions, and that compromises the health of a sensitive natural resource and habitat. Even if West Rod Cottage met all the conditions of its permit, the marina would still cause the sort if irreparable environmental harm that the County Shoreland Zoning Ordinance is intended to prevent. Defendants ignored all of this, and used their will and not their judgment to grant the CUP. The WCZA disregarded its obligation to apply the correct standards, to support its reasoning with evidence, and to otherwise act in accordance with the law. For these reasons, all of the reasons set forth above, and for the reasons set forth by the Lake District in the record,[8] the Court should reverse Defendants' decision granting the CUP, and issue a declaration that the CUP application must be denied.

Dated this 12th day of January, 2026.

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[8] See WCZA Record, Part 4, p. 2, Doc. 39 to Part 6, p. 22, Doc. 41; WCZA Hr'g Tr., Doc. 34, May 15, 2025.