

December 26, 2019

VIA HAND DELIVERY

Lew Ginsberg, Chairman
Pocono Township Zoning Hearing Board
Pocono Township Municipal Building
112 Township Drive
Tannersville, PA 18372

Re: **3262 Birch Hill Drive – Pocono Township**

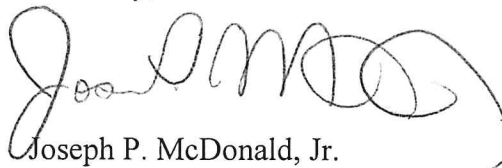
Dear Mr. Ginsberg:

I represent Cesarina L. and Jermaine L. Johnson, owner of property known as 3262 Birch Hill Drive, in Pocono Township. Enclosed are the following:

1. Application to the Zoning Board of Adjustment (original and 16 copies);
2. Supporting Statement (original and 16 copies); and
3. My client's check in the amount of \$750.00.

Thank you for your consideration.

Sincerely,



Joseph P. McDonald, Jr.

JPM/srp
Enclosures

cc: Cesarina L. and Jermaine L. Johnson

**APPLICATION FOR A ZONING PERMIT OR APPEAL
REQUIRING ACTION BY THE ZONING BOARD OF ADJUSTMENT
POCONO TOWNSHIP, MONROE COUNTY, PENNSYLVANIA**

ACTION REQUESTED:

Special Use or

Exception

Appeal X

Variance

Interpretation X

December 26, 2019

Date

FEE \$750.00

1. Applicant's Name Cesarina L. and Jermaine L. Johnson

Address 250 Bambridge Street, Brooklyn, NY 11233

Phone

2. Applicant's Attorney Law Office of Joseph P. McDonald, Jr., Esq., P.C.

Address 1651 West Main Street, Stroudsburg, PA 18360

3. Interest of Applicant Fee simple owner of record.

4. If interest is other than owner, furnish name and address of owner : n/a

5. Property Location 3262 Birch Hill Drive, Tannersville, Pocono Township 18372

Zone R-1

Present Use Single-family dwelling and partial transient residential accommodation

6. Interpretation, Special Use or Exception, or Variance sought: Applicant appeals the Zoning Officer's November 26, 2019 Decision denying a Certificate of Non-Conforming Use Application. (See Attached.)

7. Grounds for appeal or interpretation or reasons for special use or variance are: See attached statement in support of Application for Certificate of Non-Conformance as amended.

8. For an appeal for interpretation, attach a true copy of the order, requirement, decision or determination of the Zoning Official.

9. Number of copies: 16

Cesarina L. Johnson & Jermaine L. Johnson, by their Attorney
Joseph P. McDonald, Jr.
Signature of Applicant

| | | |
|-------------|---------------------------------|----------|
| Received | Fees | Received |
| Publication | Notices | |
| Hearing | Referred to Planning Commission | |
| Order | Planning Commission Action | |

NOTE: This application must be accompanied by a detailed site plan indicating property boundaries, relation to existing streets or roads, buildings, etc., proposed buildings, parking areas, landscaping or screening, lighting, signs, etc. This plan shall include all necessary dimensions, including yards and North shall be indicated by arrow. All information submitted supporting this application shall become a part of the record and cannot be returned.

**STATEMENT IN SUPPORT OF
APPLICATION FOR CERTIFICATE OF NON-CONFORMANCE
as AMENDED**

Cesarina L. and Jermaine L. Johnson
3262 Birch Hill Drive, Tannersville, Pocono Township, Monroe County, PA 18372
Tax ID #12/11B/1/87, Parcel ID# 12636301258581

I. BACKGROUND

1. The Johnsons acquired the single-family dwelling known as 3262 Birch Hill Drive, Cobble Creek Estates in December, 2016. The Johnsons promptly occupied the house as a second home, dividing time between the Birch Hill Drive dwelling and their primary home in Brooklyn, NY. In May, 2017 the Johnsons began leasing the Birch Hill Drive home to short-term tenants utilizing several major online platforms. For the past two years the Johnsons rented the dwelling approximately one third of the time on a partial, non-exclusive short-term rental basis. Tenants occupy the home on average eight (8) to twelve (12) days per month or one hundred (100) to one-hundred forty five days (145) per year.

2. Pocono Township enacted a Short-Term Rental Registration and License Ordinance applicable to all residential units, previously codified at Chapter 30 of the Township's Code of Ordinances. The Johnsons satisfied the terms of Chapter 30, obtained a Zoning Certificate of Use for Short Term Rental Permit on April 17, 2018, Permit No. 180004R. The permit authorized "...ten (10) overnight and six (6) daytime guests." The late Pocono Township Zoning Officer, Michael Tripus, renewed the Johnson's Short-Term Rental permit on November 19, 2018. The renewed permit included the following use:

**"RENT HOME AS SHORT TERM RENTAL EXPIRES
10/31/18."**

The Johnsons made substantial investments in building, electrical and permit related expenses to satisfy the criteria of former Chapter 30 of the Pocono Township Code.

3. Throughout this time, Pocono Township enacted no zoning ordinance or zoning ordinance amendments defining or regulating short term rentals or distinguishing the short-term rental of a single family dwelling from a long term rental or a shared owner occupied/rental calendar.

4. Pocono Township Commissioners enacted Ordinance No. 2019-03 in July 2019 effectively repealing Chapter 30, the prior Short-Term Rental Licensing Ordinance.

5. Pocono Township Commissioners enacted Ordinance No. 2019-17 on September 16, 2019 titled the “Transient Dwelling Use of Single-Family Dwellings Ordinance of Pocono Township. The “TDU” ordinance reestablished a licensing procedure but only for dwelling units in the Township’s C Commercial and RD Recreation development Zoning Districts.

6. Zoning Officer Shawn F. McGlynn issued a “NOTIFICATION REGARDING SHORT-TERM RENTAL ORDINANCE REPEAL” to the applicants September 19, 2019 declaring in part

“...you can no longer operate as a transient, short-term rental after October 31, 2019.”

II. LEGAL BASES FOR ISSUANCE OF LAWFUL NON-CONFORMING USE PERMIT

A. Vested Right

The Johnsons are entitled to rely in good faith upon the previous zoning permit, Permit No. 180004R recognizing short-term rental use in the Johnsons R-1 District. Rather than amend its ordinance legislatively to create one or more definitions for short-term rental, exclusive short-term rental or non-exclusive short-term rental Pocono Township now attempts, for the first time since enactment of its current Zoning Ordinance (Ordinance No. 110 enacted on November 17, 2003) to breathe life and legal restriction, retroactively to the term “transient

dwelling accommodations” as that term may appear elsewhere in the zoning ordinance. Rather than amend its ordinance in accordance with the strict public notice and due process procedures mandated by the Municipalities Planning Code, Pocono Township now attempts to rely on the holding of *Slice of Life LLC and Val Kleyman v. Hamilton Township*, A3d 633 (Pa. Cmwlth. 2019) to retroactively prohibit short-term rentals to its C and RD districts despite recognizing and permitting the Johnson’s use for the past two years.

B. Variance by Estoppel

Usually, a variance by estoppel theory arises where a municipality attempts to shut down an illegal use through a later enacted Zoning Ordinance or Ordinance Amendment. Such variances are appropriate when a use does not conform to the zoning ordinance and the property owner establishes all of the following: (1) a long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal use; (2) the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceeding; (3) the landowner has made substantial expenditures in reliance upon his belief that his use was permitted; and (4) denial of the variance would impose an unnecessary hardship on the applicant. *Springfield Township v. Kim*, 792 A.2d 717, 721 (Pa. Cmwlth. 2002), petition for allowance of appeal denied, 573 Pa. 693, 825 A.2d 640 (2003). *Borough of Dormont v. Zoning Hearing Bd. of Borough of Dormont*, 850 A.2d 826, 828 (Pa. Cmwlth. 2004)

Applied to the Johnson’s Application for a Certificate of Non-Conforming Use:

1. Pocono Township allowed sixteen years to pass, since the adoption of Ordinance No. 110 on November 17, 2003 through the Pa Supreme Court’s Opinion in *Slice of Life* before considering whether it could restrict short-term in a retroactive fashion, with no new zoning legislation. The only legislation is former Chapter 30, a licensing ordinance that legally recognized the “use” in question.

2. At all times since acquiring the property in question, the Johnson's have acted in good faith (and continue to do so through this application) in compliance with Pocono Township ordinances, as applied.
3. The Johnson's expended thousands of dollars in construction, permit, licensing, insurance, membership and advertising fees in strict reliance upon Pocono Township's direct, objective approval of their short-term rental use.
4. Any attempt by Pocono Township to limit or deny the Johnson's continued use of 3262 BIRCH HILL DR. for shared single family and non-exclusive transient use on a short term rental basis, the same intensity of use since 2017 deprives the Johnson's of their substantive due process, equal protection of the laws and their constitutionally protected property rights under the PA and US Constitutions.

C. Validity Challenge Pursuant to Title 53 P.S. §10909.1(a)(1)

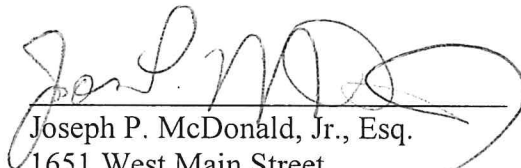
In the alternative, the Johnsons challenge the substantive validity of the Pocono Township Zoning Ordinance for failure to recognize partial transient dwelling accommodations as a separate use of land, distinct from exclusive transient dwelling accommodations. The Pennsylvania Supreme Court's Decision in *Slice of Life* makes a clear distinction between exclusive and partial transient dwelling accommodation uses. *Slice of Life* prohibits only exclusive transient dwelling accommodation uses in Pocono Township's R-1 zone. The Ordinance is defective and invalid for failing to recognize the Johnson's custom, partial transient dwelling accommodation use.

For these reasons and without waiving any other rights, the Johnsons respectfully requests the Zoning Hearing Board to reverse the Zoning Officer's denial of a Non-Conforming Use Certificate and, grant the Johnsons appeal and affirm the Johnsons continued use of 3262 Birch Hill Drive for partial, transient dwelling accommodation use as described herein and at the Hearing.

Dated: December 26, 2019

Respectfully submitted,

JOSEPH P. MCDONALD, JR., ESQ.

A handwritten signature in black ink, appearing to read "Joseph P. McDonald, Jr.", is written over a horizontal line.

Joseph P. McDonald, Jr., Esq.

1651 West Main Street

Stroudsburg, PA 18360

(570) 424-6877

Attorney for Cesarina L. & Jermaine L. Johnson

Joseph P. McDonald, Jr.,
Esq., P.C.
1651 West Main Street
Stroudsburg, PA 18360
(570) 424-6877

POCONO TOWNSHIP



www.poconopa.gov

November 26, 2019

Joseph P. McDonald, Jr., Esquire
1651 West Main Street
Stroudsburg, PA 18360

Re: Application for Certificate of Nonconformity, 3262 Birch Hill Rd.,
Monroe County PIN#12636301258581, Pocono Township

Dear Attorney McDonald,

The Zoning Office has reviewed the application for a Certificate of Nonconformity for a *non-exclusive short-term single-family residential rental*, at your client's property situated at 3262 Birch Hill Road, Monroe County PIN# 12636301258581 (the Property). The Certificate of Nonconformity cannot be approved at this time due to the following:

1. The Property is situated in the R-1 Zoning District.
2. A single-family detached dwelling is a use by-right in the R-1 Zoning District.
3. §470-32, A of the Township's Zoning Ordinance states, "A nonconforming use is any use, whether of building or lot or both, legally existing on the effective date of this chapter, or any amendments hereinafter enacted, which does not conform to the use regulations of the district in which it is located."
4. A Zoning Permit was issued on July 23, 1998 for establishment of a residential, single-family detached dwelling use on the Property. A single-family detached dwelling was, and is currently, a use by-right in the R-1 District.
5. The use of the property as a single-family detached dwelling is conforming.
6. Pocono Township enacted a health, safety and welfare Ordinance (stand-alone ordinance) known as "The Short-Term Rental Ordinance of Pocono Township" on July 17, 2017, Ord. No. 2017-03, Chapter 30 of the Pocono Township Code of Ordinances. The Short-Term Rental Ordinance is not an amendment to the Zoning Ordinance and is not regulated under the provisions of the Township's Zoning Ordinance.
7. Township records indicate a Short-Term Rental license was issued on April 17, 2018 for the Property.
8. Pocono Township rescinded the Short-term Rental Ordinance in July of 2019 and allowed all short-term rental licenses issued under Chapter 30 to expire.

Certificates of Non-conformity can only be issued for zoning non-conformities and since the Short-term Rental Ordinance is not regulated under the Zoning Ordinance, your application for a Certificate must be denied. Appeals under health, safety, and welfare, stand-alone

ordinance are generally appealed to the governing body (Board of Commissioners). The use of the Property as a single-family detached dwelling continues as a use by-right.

You have the right to appeal this determination to the Pocono Township Zoning Hearing Board in accordance with §470-116 of the Pocono Township Zoning Ordinance. You must file this appeal within thirty (30) days of receipt of this correspondence. An appeal to the Zoning Hearing Board is not complete until the fee is paid to the Township in accordance with the Pocono Township fee schedule.

If you have any questions, or require additional information, contact the Zoning Office at 570-629-1922 or visit our website at www.poconopa.gov.

Sincerely,



Shawn McGlynn
SFM Consulting, LLC
Pocono Township Zoning Officer

Cc: Property file
Donna Asure, Township Manager
Leo Devito, Solicitor

3666

JOSEPH P. MCDONALD, JR., ESQ., P.C.
ATTY AT LAW TRUST ACCOUNT
1651 WEST MAIN STREET
STROUDSBURG, PA 18360-1023
PH. 570-424-6877

Wells Fargo Bank, N.A.
wellsfargo.com
3-50/310

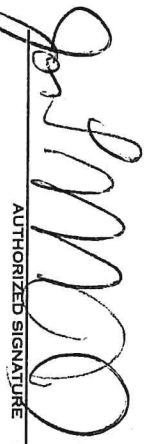
12/24/2019

PAY TO THE
ORDER OF Pocono Township

\$ **750.00

Seven Hundred Fifty and 00/100 ***** DOLLARS

Pocono Township
Pocono Township Municipal Bldg
112 Township Drive
Tannersville, PA 18372


AUTHORIZED SIGNATURE



Johnson, Cesarina & Jermaine - Filing Fee

⑈003666⑈ ⑆031000503⑆ 2000029771936⑈

JOSEPH P. MCDONALD, JR., ESQ., P.C.
ATTY AT LAW TRUST ACCOUNT
Pocono Township

Appeal Filing Fee

12/24/2019

3666
750.00

Wells Fargo - Trust Ac Johnson, Cesarina & Jermaine - Filing Fee

750.00

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1651 WEST MAIN STREET
STROUDSBURG, PA 18360-1023
PH. 570-424-6877

WELLS FARGO
Wells Fargo Bank, N.A.
wellsfargo.com
3-50/310

3666

12/24/2019

PAY TO THE
ORDER OF Pocono Township

\$ **750.00

Seven Hundred Fifty and 00/100***** DOLLARS

Pocono Township
Pocono Township Municipal Bldg
112 Township Drive
Tannersville, PA 18372

Joe McDonald
AUTHORIZED SIGNATURE

MEMO

Johnson, Cesarina & Jermaine - Filing Fee

⑈003666⑈ ⑆031000503⑆ 2000029771936⑈

JOSEPH P. MCDONALD, JR., ESQ., P.C.
ATTY AT LAW TRUST ACCOUNT
Pocono Township

3666

12/24/2019

Appeal Filing Fee

750.00

Wells Fargo - Trust Ac Johnson, Cesarina & Jermaine - Filing Fee

750.00

| ACCOUNT | | HOW PAID | |
|-----------------|-----|-------------|------|
| AMT. OF ACCOUNT | 750 | CASH | |
| AMT. PAID | 750 | CHECK | 3666 |
| BALANCE DUE | 0 | MONEY ORDER | |

NOTES

RECEIPT

DATE 12/26/19 NO. 336122

RECEIVED FROM Joe McDonald

ADDRESS _____

FOR Zoning Appeal 3262 Birch Hill Dr. ^{750.00}

BY J. Brodsky

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