

Document No.

**NONCONFORMING USE
AGREEMENT**

The attached Nonconforming Use Agreement
pertains to the following described property:

[INSERT LEGAL]

Recording Area

Return to:

Attorney Duffy Dillon
c/o Dillon | Grube LLC
One Parker Place, Ste 715
Janesville, WI 53545

Parcel Numbers /WUP 00033A; /A 76200001; /WUP 00034

**LAWFUL NONCONFORMING USE AGREEMENT
(581 N. Jefferson Street, Whitewater, Wisconsin)**

THIS AGREEMENT (the "Agreement") is made and entered into effective November 15, 2023, by and between Kienbaum Iron & Metal, Inc., a Wisconsin corporation (hereinafter the "Property Owner"), and the City of Whitewater, a Wisconsin municipality (hereinafter the "City"). Property Owner and City are sometimes referenced in this Agreement individually as a "party" and collectively as the "parties".

RECITALS:

WHEREAS, Property Owner is the sole owner of the following described lands situated in the City of Whitewater, County of Walworth, State of Wisconsin, which are collectively referred to herein as the "KIM Property":

- ❑ The "M-1 Property," which has a street address of 564 N. Jefferson Street and a legal description of "Commencing at a point (which is the point of intersection of the West line of Jefferson Street, City of Whitewater, Walworth County State of Wisconsin, and the North line of Section 4, Town 4 North, Range 15 East, which North line is also the common boundary line between Walworth and Jefferson Counties, State of Wisconsin); thence West along the North line of Section 4, Town 4 North, Range 15 East, for a distance of 658 feet thence South along a line, which line is parallel to the West line of Jefferson Street, City of Whitewater, Walworth County, Wisconsin, for a distance of 410 feet, thence East along a line, which line is parallel to the North line of said Section 4 to the point where said line intersects the West line of Jefferson Street, City of Whitewater, County of Walworth, State of Wisconsin; thence North along the West line of Jefferson Street, City of Whitewater, Walworth County, Wisconsin, to the point of beginning. Situated in Walworth County and the State of Wisconsin"; and
- ❑ The "R-1 Property," which has a street address of 581 N. Jefferson Street and a legal description of "Lot 1 of Certified Survey Map #762 as recorded on February 27, 1978, in Volume 3 of Certified Surveys on Page 285 as Document Number 29494, located in the Northwest 1/4 and Northeast 1/4 of Section 4, Township 4 North, Range 15 East, in the City of Whitewater, Walworth County, Wisconsin. Situated in Walworth County and the State of Wisconsin"; and
- ❑ The "Triangular Property," which has no street address and a legal description of "art of the NE 1/4 of the NW 1/4 of Section 4, T. 4 N., R. 15 E., City of Whitewater, Walworth County, Wisconsin, described as: Commencing at a point on the North Line of Section 4 (which North Line is the County Line between Jefferson and Walworth Counties, State of Wisconsin), Town 4 North, Range 15 East and which point is 125.5 Feet West of the Northeast Corner of the Northwest Quarter of Section 4, Town 4 North, Range 15 East; thence West (along said North Line of Section 4, Town 4 North, Range 15 East) for a distance of 59.5 feet to a point on the East Line of Jefferson Street, in the City of Whitewater, Walworth County Wisconsin; thence South along East Line of Jefferson Street, City of Whitewater, Walworth County, Wisconsin for a distance of 92 Feet; thence Northeast along a straight line to the point of beginning. It being the intention of the Grantor herein to convey a triangular piece of land at the point where the East Line of Jefferson Street intersects with the North Line of Section 4, Town 4

North, Range 15 East; and which North Line is the common boundary between Walworth and Jefferson Counties, State of Wisconsin”; and

WHEREAS, Property Owner and its predecessors-in-interest have been operating a scrap yard on some or all of the KIM Property since at least 1962, which scrap yard has always done business under the trade name of “Kienbaum Iron & Metal,” also referred to as “KIM” for the remainder of this Agreement; and

WHEREAS, the founder of KIM, Carl Kienbaum, originally acquired the M-1 Property and the Triangle Property in 1962 and started KIM as a sole proprietorship on those lands; and

WHEREAS, Carl Kienbaum subsequently incorporated KIM as a Wisconsin corporation in 1969 and immediately contributed the M-1 Property to said corporation in 1969 and continued to operate a scrap yard there; and

WHEREAS, Carl Kienbaum subsequently acquired the R-1 Property in 1979 and immediately leased the R-1 Property to KIM for KIM’s use in its scrap yard operation; and

WHEREAS, the fact that the R-1 Property has featured commercial uses since at least the 1960s is evidenced by City assessment records showing (1) one storage warehouse was built on the R-1 Property in 1960, (2) a second storage warehouse was built on the R-1 Property in 1970, (3) the total square footage of both warehouses on the R-1 Property exceeds 2,000 square feet combined, and (4) the City assessor’s records reflect the land use of the R-1 property is “commercial” and not “residential”; and

WHEREAS, although KIM’s use of the M-1 Property has always involved the storage of scrap metal piles, KIM’s use of the R-1 Property has never involved the storage of scrap metal piles and instead has been limited to the storage of non-junked vehicles and other equipment used by KIM in the ordinary course of KIM; and

WHEREAS, upon Carl Kienbaum’s death on September 8, 2020, ownership of Property Owner was transferred to a trust established by Carl Kienbaum known as the “9-Kk Common Trust”, which subsequently caused ownership of all the KIM Property to be transferred to Kienbaum Iron & Metal, Inc.; and

WHEREAS, the 9-Kk Common Trust owns all the stock of Kienbaum Iron & Metal, Inc., and therefore indirectly owns and controls all the KIM Property today; and

WHEREAS, the terms of the 9-Kk Common Trust generally require that all assets owned by the Trust be distributed to the Trust’s beneficiaries, all of whom are Carl Kienbaum’s direct living descendants; and

WHEREAS, the trustees and beneficiaries of the 9-Kk Common Trust have agreed that the KIM Property and all of KIM’s assets relating to Property Owner’s existing scrap yard business should be sold in a closed bid process that will (1) restrict bids to the then-living Trust beneficiaries, (2) result in the transfer of the R-1 Property to the winning bidder and/or an entity controlled by the winning bidder, and (3) require the winning bidder to retain ownership of the R-1 Property and the rest of the purchased assets for at least 12 months following the transfer; and

WHEREAS, the trustees and beneficiaries of the 9-Kk Common Trust have agreed that the sale of Property Owner's assets as noted above is contingent upon obtaining confirmation from the City that all current uses of the R-1 Property by Property Owner are lawful under the City's zoning ordinance and will remain lawful under the zoning ordinance in the future so long as the uses are not expanded or intensified; and

WHEREAS, the R-1 Property is currently zoned for single-family residential uses and not zoned for commercial uses under the City's Zoning Ordinance, Whitewater Municipal Code Section 19.03.010 *et seq.*, despite the fact that the R-1 Property has been used as a commercial scrap yard since the 1970s, giving rise to a possibility the City could someday assert the current uses of the R-1 Property are in violation of the Zoning Ordinance; and

WHEREAS, the City's Zoning Ordinance has been amended from time to time after 1960 without the City identifying any use of the R-1 Property as violating the Zoning Ordinance; and

WHEREAS, the uses of the R-1 Property prior to 1962 are not known by the parties; and

WHEREAS, although the City has been unable to determine definitively that Property Owner's use of the R-1 Property is a lawful nonconforming use, the City has no evidence to show Property Owner's use of the R-1 Property is not a lawful nonconforming use based on the facts noted above; and

WHEREAS, to induce the City to confirm that all current uses of the R-1 Property are lawful, Property Owner is willing to enter into this Agreement so that any commercial uses of the R-1 Property going forward will be restricted to the current uses of the R-1 Property; and

WHEREAS, the parties are willing to enter into this Agreement to confirm the current uses of the R-1 Property are lawful under the City's Zoning Ordinance and to restrict the lawful uses of the R-1 Property going forward so as to avoid litigation that may otherwise be necessary to determine the lawful uses of the R-1 Property;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants contained in this Agreement, the parties agree as follows:

1. The above recitals are true and accurate and are incorporated by reference as though fully set forth herein.
2. The current uses of the R-1 Property by Property Owner are lawful uses of the R-1 Property.
3. Property Owner and its successors and assigns shall (1) limit any commercial uses of the R-1 Property to the current commercial uses consisting of the operation and maintenance of storage buildings and dry/cold storage of non-scraped vehicles and equipment used in the scrap business operated on the R-1 Property and M-1 Property combined, (2) refrain from expanding or intensifying the current uses of the R-1 Property going forward, and (3) not store any scrap metal on the R-1 Property at any time.
4. The City and its authorized agents may enter upon the R-1 Property at any time upon 48 hours notice for the purpose of inspecting and confirming the uses of the R-1 Property.

CITY:
CITY OF WHITEWATER

By: _____
Printed Name: *****
Title: *****

ACKNOWLEDGMENT

STATE OF WISCONSIN)
) ss.
COUNTY OF WALWORTH)

Personally came before me this _____ day of _____, 2023, the above named ***** , in his capacity as ***** for the City of Whitewater, a Wisconsin municipality, to me known to be the person who executed the foregoing instrument and acknowledged the same.

Name: _____
Notary Public, State of Wisconsin
My Commission: _____

THIS INSTRUMENT WAS DRAFTED BY:

Attorney Duffy Dillon
Dillon | Grube LLC
One Parker Place, Suite 715
Janesville, WI 53545