THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2018 – 0491

2019 TERM
AUGUST SESSION

Working Stiff Properties, LLC.

v.

City of Portsmouth

BRIEF OF APPELLEE
THE CITY OF PORTSMOUTH

RULE 7 APPEAL FROM FINAL ORDER OF
ROCKINGHAM SUPERIOR COURT

City of Portsmouth
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QUESTIONS PRESENTED[1]

1. Is the Appellant's use of a single family home, the Lilac House, in the City of Portsmouth's General Residence A District as a short-term rental a prohibited transient occupancy?
2. Is the Ordinance constitutional as applied to the Appellant?[2]

[1]Questions presented for review are restated in accordance with N.H. Sup. Ct. RULE 16 (4) (a).
[2] In the Appellant's Notice of Appeal to the Supreme Court, the Appellant presented five (5) questions for this Court's review. The Appellant only briefed three of these questions thus the unbriefed questions are deemed waived. *See State v. Oakes*, 161 N.H. 270, 278 (2010) ("Because the defendant has not developed his constitutional arguments, we decline to address them").

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STATUTES

N.H. RSA 674:17, II.

II. Every zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

N.H. RSA 674:20.

In order to accomplish any or all of the purposes of a zoning ordinance enumerated under RSA 674:17, the local legislative body may divide the municipality into districts of a number, shape and area as may be deemed best suited to carry out the purposes of RSA 674:17. The local legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within each district which it creates. All regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

N.H. RSA 674:33, I-a

(a) Variances authorized under paragraph I shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.
(b) The zoning ordinance may be amended to provide for the termination of all variances that were authorized under paragraph I before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that variances authorized before August 19, 2013 are scheduled

to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

N.H. RSA 677:4.

Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing; provided however, that if the Appellant shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the Appellant shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. The petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable. For purposes of this section, "person aggrieved" includes any party entitled to request a rehearing under RSA 677:2.

N.H. RSA 677:6.

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

ORDINANCES

City of Portsmouth Zoning Ordinance § 10.431.

All **building**s or **structure**s hereafter erected, reconstructed, altered, enlarged or moved, and all **use**s hereafter established, shall be in conformity with the provisions of this Zoning Ordinance.

City of Portsmouth Zoning Ordinance § 10.432.

No **building**, **structure**, or land shall be used for any purpose or in any manner other than that which is permitted in the district in which it is located.

City of Portsmouth Zoning Ordinance § 10.434.40.

Any **use** not specifically authorized in Article 4 (including **use**s defined in Article 15 but not listed in Article 4), shall be deemed prohibited in all zoning districts.

City of Portsmouth Zoning Ordinance § 10.1511.

Unless otherwise expressly stated, the following words and terms shall have the meanings shown in this Article.

City of Portsmouth Zoning Ordinance § 10.1514.

Where terms are not defined in this Ordinance or in the Building Code, such terms shall have the ordinarily accepted meaning such as the context implies.

City of Portsmouth Zoning Ordinance § 10.1530.

Dwelling Unit: A **building** or portion thereof providing complete independent living facilities for one or more **person**s, including permanent provisions for living, sleeping, eating, cooking and sanitation. This **use** shall not be deemed to include such transient occupancies as **hotel**s, **motel**s, rooming or **boarding house**s.

Use: Any purpose for which a **lot**, **building** or other **structure** or a tract of land may be designated, arranged, intended, maintained or occupied; or any activity, occupation, business or operation carried on or intended to be carried on in a **building** or other **structure** on a tract of land.

STATEMENT OF FACTS AND THE CASE

Property

Working Stiff Partners, LLC ("Working Stiff Partners" or "Appellant") owns the Lilac House, a four bedroom single family residence located at 87 Lincoln Avenue, in the City of Portsmouth, County of Rockingham, State of New Hampshire, further identified by reference to City Tax Map 113, Lot 034. ("Lilac House"). Lilac House is located in the General Residence A District (GRA), which is one of seven residential districts in the City of Portsmouth. The GRA consists of primarily single-family residences and multifamily dwelling with up to two dwelling units by right and up to three or four dwelling units by special exception. App. at 292 – 297, (Ordinance definition of GRA district).[3] The members of Working Stiff Partners do not reside at Lilac House. Add. at 8. Working Stiff Partners use the property is for short-term rentals to paying guests, and Working Stiff Partners pay the State Meals and Rooms tax for short-term rentals. App. at 7. Working Stiff Partners also use Lilac House as a guesthouse for their family and friends. Add at 8, Order at 7. Notwithstanding Working Stiff Partners's assertions to the contrary, the Zoning Board of Adjustment ("ZBA") and the Trial Court did not find as a matter of fact that the "Plaintiff purchased the Property to hold it for one of

[3] The following citations will be used throughout this document:
Appellant's Brief (hereinafter "Pet.'s brief at page number");
Addendum to Appellant's Brief (hereinafter "Add. at page number");
Appendix to Appellant's Brief (hereinafter "App. at page number").
Further, a parenthetical may be added following such a citation to further guide this Court as to the specific document referenced therein. For example, "Order at page number" shall refer to the Trial Court's order, and the page number within that Order.

their children who was thinking of moving back to Portsmouth." Pet.'s Brief at 4.

> The ZBA determined that plaintiff was using its property for a prohibited "transient occupancy" rather than as a permitted dwelling. The record established that (a) nobody lives on the property, (b) the property was renovated and specifically marketed for year round use as an Airbnb-style short term rental and (c) the only other use that plaintiff makes of the property is as an occasional guesthouse for short-term visits by plaintiff's members' extended family and friends.

Add. at 4, Order at 3.

The members of Working Stiff Partners reside in a single-family residence next door at 81 Lincoln Avenue, City Tax Map 113, Lot 035. Add. at 8, Order at 7.

Procedure

This case began when the City received complaints from the Appellant's neighbors during the renovation of Lilac House. Neighbors advised the City that the Appellant intended to use the renovated property for short-term rental use. In response to these neighbors' complaints, the City Attorney wrote the following to the Appellant:

> The City has been advised by neighbors of your property at 87 Lincoln Avenue that you may be proposing to use it for some sort of commercial or short term rental purposes.
>
> This will advise you that such uses of property are regulated by the city and not permitted in every location. Therefore it is my strong recommendation that before you would use the 87 Lincoln Avenue property for any purpose other than single family residential, that you contact the City's Planning Department to confirm that the proposed use would be permitted.

See App. at 124; Add. at 9, Order at 8. Despite this notice, the Appellant began to use Lilac House for short-term rentals. The City's Zoning Enforcement Officer issued a Cease and Desist Order on May 18, 2017 to Working Stiff Partners for using a single-family residence, the Lilac House, in the GRA for short-term rental use in contravention of the City's Zoning Ordinance ("Ordinance"). App. at 39. The City's Zoning Enforcement Officer issued a second Cease and Desist Order on August 18, 2017. App. at 41.

Pursuant to N.H. RSA 674:33, 1-a, Working Stiff Partners appealed the August 18, 2017 Cease and Desist Order to the Zoning Board of Adjustment ("ZBA") on September 17, 2017, alleging that Lilac House, as a four bedroom single-family residence, was a dwelling unit under the Ordinance and its use for short-term rental purposes was not a prohibited transient occupancy. App. at 43. The ZBA denied Working Stiff Partners's appeal, finding that the Ordinance prohibits the use of the Lilac House for short-term rentals as an impermissible transient occupancy. App. at 128-29.

On December 20, 2017, Working Stiff Partners appealed the ZBA's decision to the Rockingham County Superior Court pursuant to N.H. RSA 677:4, arguing that the use of Lilac House as a short-term rental was permitted by the Ordinance under the definition of dwelling unit, and that the definition of dwelling unit was vague and as such, unconstitutional. App. at 3-20. The matter of *Working Stiff Partners, LLC v. City of Portsmouth,* Docket Number 218-2017-CV-01450 was heard on April 3, 2018. Judge Andrew R. Schulman issued an Order denying Working Stiff Partners's appeal on June 22, 2018 ("Order"). See generally Add. at 1.

Working Stiff Partners filed a Motion for Reconsideration on July 2, 2018, which the Trial Court denied on July 17, 2018. App. at 418, 425.

The Trial Court reviewed matters of interpretation and construction of the Ordinance *de novo* and applied traditional rules of statutory construction, finding that: the Ordinance is permissive, meaning that those uses not specifically permitted are not allowed (Add. at 12-13, Order at 11-12); dwelling unit was a defined term prohibiting transient occupancies (Add. at 13, Order at 12); the common usage definition of transient means "brief" or "short" (Add. at 14, Order at 13); when construing dwelling unit, applying the traditional cannons of statutory construction of *ejusdem generis* and *noscitur a sociis*, the list of prohibited transient occupancies was not exclusive, and that the common trait or characteristic shared between hotel, motels, boarding house and short-term rentals was that they all provide temporary, short-term stays to paying guests, not the physical structure, layout or degree of access guests have to independent living facilities (Add. at 15-18, Order at 14-17); the national case law cited by Working Stiff Partners was unpersuasive because "so much depends on the particular wording of an ordinance" (Add. at 23, Order at 22); the Ordinance is constitutional because it is neither ambiguous nor vague as applied to Working Stiff Partners (Add. at 23-27, Order at 22-26), and; injunctive and declaratory relief was denied (Add. at 6, 29; Order at 5, 28).

SUMMARY OF THE ARGUMENT

The narrow question before this Court is whether the Appellant's use of the Lilac House in Portsmouth was a permitted use of property under the Ordinance.

The Ordinance is permissive; meaning any use of property not explicitly allowed is prohibited. The Ordinance does not explicitly allow the Appellant's use of the Lilac House for short-term rental occupancy. Moreover, Ordinance explicitly prohibits the transient, short-term rental use of property in the GRA. A plain reading of the Ordinance, aided by recognized principles of statutory construction and interpretation, supports the Trial Court's conclusion that "(a) the plaintiff is not principally using its property as a permitted dwelling and (b) plaintiff is instead principally using its property as a prohibited 'transient occupancy.'" Add. at 23, Order at 22.

Finally, because a person of average intelligence would understand the Ordinance would prohibit short-term rentals as transient occupancies in the GRA, the Ordinance is not subject to constitutional infirmity, contrary to the Appellant's allegations.

ARGUMENT

I. Standard of Review

The Trial Court's review in zoning appeals is limited. *Brandt Dev. Co. of N.H. v. City of Somersworth*, 162 N.H. 553, 555 (2011). In the Trial Court's review of the Board of Adjustment's decision "[t]he Court must treat all factual findings of the ZBA as prima facie lawful and reasonable, and may not set them aside, absent errors of law, unless it is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable." *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 512 (2011). The Trial Court "acts as an appellate body, not as a 'fact finder' ". *Lone Pine Hunters' Club v. Town of Hollis*, 149 N.H. 668, 669-70 (2003). The Applicants bear the burden of proof to set aside the Board of Adjustment's decision. *Pike Industries, Inc. v. Woodward*, 160 N.H. 259, 262 (2010); see also N.H. RSA 677:6. If any of the Board of Adjustment's reasons support its decision, then the appeal must fail. See *NBAC Corp. v. Town of Weare*, 147 N.H. 328, 332 (2001).

On appeal, this Court may review "whether the evidence before the superior court reasonably supports its findings." *Garrison v. Town of Henniker*, 154 N.H. 26, 29 (2006) and may overturn the Trial Court's decision if it is "unsupported by the record or erroneous as a matter of law…" *Hill v. Town of Chester*, 146 N.H. 291, 292-93 (2001); see also *Brandt,* 162 N.H. at 555. This Court will "look to whether a reasonable person could have reached the same decision as the Trial Court based on the evidence before it." *Nadeau v. Town of Durham*, 129 N.H. 663, 666 (1987) quoting *Zimmerman v. Suissevale, Inc.*, 121 N.H. 1051, 1054 (1981). This Court may review questions of law *de novo*, *Sutton v. Town of*

Gilford, 160 N.H. 43, 57 (2010), as well as issues of plain error. *State v. MacInnes*, 151 N.H. 732, 736 (2005).

II. Short-term vacation rentals are not a permitted principal use in the GRA District.

Working Stiff Partners allege that the Trial Court misconstrued pertinent provisions of the Ordinance. Specifically, Working Stiff Partners alleges that the Ordinance's definition of dwelling unit permits the use of Lilac House as a short-term rental, and that such use is not a prohibited transient occupancy.

To understand the Trial Court's order properly, this Court should first review the City's Zoning Ordinance, its rules of construction and defined terms.

A. The City's Ordinance is permissive.

The Ordinance is 'permissive' as it "is an example of the common variety of zoning ordinance that prohibits uses for which it does not provide permission." *Triesman v. Kamen*, 126 N.H. 372, 375-6 (1985); see also *Tonnesen v. Town of Gilmanton*, 156 N.H. 813, 815 (2008). If an ordinance does not expressly permit a proposed use, it is prohibited as a matter of law. *See generally Old Street Barn, LLC v. Town of Peterborough*, 147 N.H. 254, 258 (2001); City of Portsmouth Zoning Ordinance § 10.432; City of Portsmouth Zoning Ordinance § 10.434.40. The City's permissive Ordinance is the lens through which this Court should view Working Stiff Partners's appeal of the Trial Court's decision because the Ordinance represents the decisions made by the Portsmouth Planning Board and City Council as to what are the best land use regulations for the City of Portsmouth. Short-term rentals are not listed as a

primary or accessary use in the GRA district, and are therefore not permitted.

"A first step in the application of such an ordinance one looks to the list of primary uses permitted in a given district established by the ordinance." *Town of Windham v. Alfond*, 129 N.H. 24, 27 (1986). In each of the seven residential zoning districts in the City, the Zoning Ordinance permits some residential and nonresidential uses and prohibits others. The GRA permits single-family dwellings and multifamily dwelling with up to two dwelling units by right and up to three or four dwelling units by special exception. It also prohibits inns, hotels, motels, boarding houses and bed and breakfasts with 5 or more guest rooms but permits bed and breakfasts with five or less guest rooms by special exception. App. at 292-297.

Critically, the GRA is a residential district that prohibits hotels, motels, inns, rooming houses and short-term rentals for a reason. The primary purpose and function of the GRA is to create and preserve residential neighborhoods. The character of a residential district like the GRA is maintained by prohibiting transient occupancies. N.H. RSA 674:20 provides:

> [T]he local legislative body may divide the municipality into districts of a number, shape and area as may be deemed best suited to carry out the purposes of RSA 676:17. The local legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within each district which it creates.

N.H. RSA 674:17, II, provides that:

> [e]very zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area

> involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

Multiple dwelling units per lot and transient occupancies are unsuitable and out of character in the GRA.

B. The plain text and everyday meaning of the Ordinance.

The City Council and Planning Board drafted and enacted the rules of construction and definitions considering the character of the GRA and its peculiar suitability for residential use. The issue in this case is whether short-term rentals are a prohibited transient occupancy under the definition of dwelling unit in the Ordinance. In order to review the Order properly, this Court must review the rules of construction and defined terms in the Ordinance because review of a zoning ordinance is determined "from its construction as a whole, not by construing isolated words and phrases." *Fein v. Town of Wilmot*, 154 N.H. 715, 719 (2007); see also *Dolbeare v. City of Laconia*, 168 N.H. 52, 55 (2015). The rules of construction and defined terms adopted by the City Council ensure proper interpretation and preservation of this residential neighborhood. The relevant rules of construction are as follows:

> Unless otherwise expressly stated, the following words and terms shall have the meanings shown in this Article.

City of Portsmouth Zoning Ordinance § 10.1511.

> Where terms are not defined in this Ordinance or in the Building Code, such terms shall have ordinarily accepted meanings such as the context implies.

City of Portsmouth Zoning Ordinance § 10.1514. The relevant definitions in the Ordinance are as follows:

> **Dwelling Unit:** A **building** or portion thereof providing complete independent living facilities for one or more **person**s, including permanent provisions for living, sleeping, eating, cooking and sanitation. This **use** shall not be deemed to include such transient occupancies as **hotel**s, **motel**s, rooming or **boarding houses**. [4]
>
> **Use**: Any purpose for which a **lot, building** or other **structure** or a tract of land may be designated, arranged, intended, maintained or occupied; or any activity, occupation, business or operation carried on or intended to be carried on in a **building** or other **structure** or on a tract of land.

City of Portsmouth Zoning Ordinance § 10.1530.

Working Stiff Partners argues that the definition of dwelling unit turns solely on the internal layout or structure of a dwelling unit. Working Stiff Partners asserts once a dwelling unit is physically altered to remove or limit access to independent living facilities it is "converted" or "transformed" into a prohibited transient occupancy, such as a hotel, motel or boarding house. However, that interpretation of the Ordinance is flawed because it only considers the physical layout of the structure, and not its use.

Two aspects must be examined to determine a building's use as defined above. The first is the physical layout of the building and the second is the activity conducted inside the building. Working Stiff Partners's argument and analysis ignores and avoids any discussion of the

[4] Bolded terms are those which are defined elsewhere in the Ordinance.

second aspect of use, the activity conducted inside the dwelling unit. The only way to reach this conclusion is to strip the definition of use of half its meaning. *State Employees Ass'n of N.H. v. N.H. Div. of Personnel*, 158 N.H. 338, 345 (2009) (The "elementary principle of statutory construction that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words," (internal citations omitted)). Working Stiff Partners's wholesale disregard of the actual use of a structure would lead to an absurd result. *See New England Brickmaster v. Salem*, 133 N.H. 655, 663 (1990) ("This court will not interpret ambiguous statutory language in a way that would lead to an absurd result and nullify to an appreciable extent the purpose of the statute" (internal citations omitted)).

The term "transient" is not a defined term in the Ordinance, but is defined by its "ordinarily accepted meanings such as the context implies." City of Portsmouth Zoning Ordinance § 10.1514. Working Stiff Partners objects to the ordinarily accepted meaning of the word "transient" as either "brief" or "short." This is notwithstanding the Ordinance's rules of construction, which require the application of the ordinary and accepted meaning of undefined terms, and in contrast to the Trial Court's citation to seven separate dictionary definitions. See Add. at 14-15, Order p 13-14. "[A]pplying the everyday, dictionary definition of the term 'transient,'" the court would have to find that the ordinance prohibits Airbnb-style and VRBO style, short-term rentals as a principal use in the GRA District." Add. at 15, Order at 14. The drafters deliberately used the broad term transient to describe the prohibited conduct and further clarified by the dictionary definitions and the examples in the Ordinance.

C. *Ejusdem generis* and *noscitur a sociis.*

> [T]raditional rules of statutory construction generally govern our review, the word and phrases of an ordinance should be construed according to the common and approved usage of the language. When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent. Moreover, we will not guess what the drafter of the ordinance might have intended, or add words that they did not see fit to include.

Harrington v. Town of Warner, 152 N.H. 74, 79 (2005).

Working Stiff Partners argues this Court should ignore the term transient, and only rely on the defined terms of hotel, motel and rooming house when defining transient occupancies. In this analysis, once again, Working Stiff Partners rely on the similarities in the physical structures of hotel, motel and rooming houses, all of which provide either supervised or limited access to independent living facilities based on the physical structure of the building. Working Stiff Partners argues that the only characteristic material to the purpose of the classification of transient occupancies is the structure of buildings, not their use.

However, this analysis is inapposite to the principle of statutory construction of *ejusdem generis*. The Trial Court found:

> [t]he first cannon, *ejusdem generis* (Latin for "of the same kind") "provides that where general words follow an enumeration of persons or things, by words of a particular or specific meaning, such general words are not to be construed in their widest extent, but are to be held as to apply only to persons or things of the same kind or class as those specifically mentions." [Quotations omitted] (*Ejusdem generis* "applies equally to the opposite sequence, i.e. specific words following general ones, to restrict application of the general terms to things that are similar to those enumerated."). The related

> cannon of *noscitur a sociis* (Latin for "known by associates), counsels against ascribing to one word a meaning so broad that it is inconsistent with the neighboring words with which it is associated.

Add. at 16-17, Order at 15-16.

The character that the defined terms hotel, motel and rooming house share is not the structure or access to a kitchen or a lobby, but the shared transient nature of the occupancy provided to paying guests that those places of lodging provide. The Trial Court applied traditional cannons of statutory construction to reach this conclusion as follows:

> [t]hese distinctions without a difference with respect to the matter at hand, i.e. transience. See *State v. Wilson*, 169 N.H. 755, 762 (2017) ("the likeness contemplated by the rule [of *ejusdem generis],* however, is as to characteristics material to the purpose of the classification.") . . . The purpose of including a catch-all category of "transient occupancies" was to recognize the possibility of uses that share the essential and transient nature of hotels, motels, rooming houses and boarding houses, even if those uses are somewhat different with respect to immaterial matters. Thus, the fact that it is possible to distinguish plaintiff's use from any of the four specifically prohibited uses does not mean that plaintiff's use is *ipso facto* not transitory."

Add. at 18, Order at 17.

D. National case law.

The Trial Court also carefully consulted several cases from foreign jurisdictions, which the Appellant again raises in its brief. See Add. at 19-20, Order at 18-20; Pet.'s Brief at 11. As the Trial Court noted, "[t]here is nothing approaching a uniform rule" because the analysis relies on the "particular wording of each ordinance." Order at 20. The three cases the

Appellant cites do not support the conclusion that the City's Ordinance does not permit short-term rentals.

Slice of Life and *Fruchter*[5] are distinguishable from the present case, because neither ordinance actually included the term "transient." *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 164 A.3d 633, 636-37 (Pa. Commw. Ct. 2017), *Fruchter v. Zoning Bd. of Appeals of Town of Hurley*, 20 N.Y.S.3d 701, 703 (N.Y. App. Div. 2015). In each case, the ordinance listed specific uses of property, such as a hotel or bed and breakfast, and the municipalities tried to prohibit the short-term rental of single-family homes under those specific definitions. Those courts found that the specific, defined term did not allow broad prohibitions of all transient uses of property. *Viviano* presents the opposite problem, where the broad term transient is presented in isolation, without providing any context to narrow the scope. *Viviano v. City of Sandusky*, 991 N.E.2d 1263, 1265 (Ohio Ct. App. 2013).

Those cases are unhelpful in this context, as the City's Ordinance presents the broad word transient, and then narrows its scope with some examples of transient use, which share the common characteristic of providing "temporary furnished housing to paying guests, frequently on a very short-term basis." Add. at 17, Order at 16.

[5] The Appellant's conclusion that the decision in *Fruchter* resulted in an ambiguous ordinance is unsupported by the facts of that case. On the contrary, the court in that case found that the ordinance clearly defined the terms "hotel" and "bed and breakfast" and that the use of a single family home as a short-term rental did not fall into either clearly defined category.

III. The Trial Court did not find that the Ordinance was ambiguous, and properly consulted with dictionary definitions of the undefined term transient in accordance with the rules of construction contained within the Ordinance.

"In matters of statutory interpretation, this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." *Estate of Ireland v. Worcester Ins. Co.*, 149 N.H. 656, 661 (2003). This Court looks to the "statutory language itself, and, where possible . . . ascribe[s] the plain and ordinary meanings to words used." *Id*. "If the language is plain and unambiguous, [the Court] need not look beyond the statute for further indications of legislative intent." *Id*. "When statutory language is ambiguous, however, [this Court considers] legislative history and examine[s] the statute's overall objective and presume[s] that the legislature would not pass an act that would lead to an absurd or illogical result." *Id.* at 661.

In the proceedings below, the Trial Court properly consulted with the dictionary definition of the term transient in arriving at the meaning of the undefined term. See Add. at 14-15, Order at 13-14. The Trial Court did so in accordance with the rules of construction contained within the Ordinance, which guides the reader to the ordinary and accepted meaning of any term not specifically defined in the Ordinance. Thus, the Trial Court stayed within the four corners of the Ordinance and did not consult with legislative history or any other sources, as it would had it found the Ordinance to be ambiguous.[6]

[6] The Appellant cites no other case law supporting the proposition that ambiguity, as opposed to vagueness, is an independent method to challenge a statute or ordinance. The Trial Court, by consulting with dictionary definitions, merely followed the rules of construction contained in the

Further, the Appellant references the colorful illustrations the Trial Court employed to show that sometimes hotels and motels, which are ordinarily reserved for transient lodging, might be used for long term, or even permanent housing. See Add. at 17, Order at 16, Pet.'s Brief at 11. The Appellant does so apparently to prove that the Trial Court's reasoning is "inherently flawed" and leads to an "absurd result," concluding their guests to be "unlawful transients under the Trial Court's framework initially, but, after an unspecified period of time, they would all cease being transient and the Property . . . would revert back into a dwelling unit." Pet's Brief at 10. The Appellant misses the Trial Court's point in raising these examples, which is to illustrate that long term, permanent stays are the exception to the expected use of hotels, motels, rooming houses and boarding houses. The exception does not define the rule. The Trial Court states: "[w]hat all of these have in common is that they provide temporary furnished housing to paying guests, frequently on a very short-term basis." Add. at 17, Order at 16. What binds these uses of property together is their common nature; that they are available for short-term stays to paying customers.

To the extent the Appellant raises ambiguity in an attempt to overturn the Ordinance on Constitutional grounds, that argument is addressed at length in the Trial Court's Order at 23-26, and in the following section regarding vagueness.

Ordinance, and thus did not "rewrite the [Ordinance]" as the Appellant claims. Pet.'s Brief at 9-10.

IV. The Ordinance is not unconstitutionally vague as applied to the Appellant, because the Appellant's use is at the heart of what is prohibited by the Ordinance, and the Ordinance will not lead to or encourage discriminatory enforcement.

When an ordinance is challenged for unconstitutional vagueness, the threshold dispute is whether it may be challenged on its face or as applied to the specific plaintiff before the court. *State v. MacElman*, 154 N.H. 304, 307 (2006). An ordinance may only be challenged on its face when it implicates a First Amendment or fundamental right. *Id.* ("Where a defendant's vagueness claim does not involve a fundamental right, a facial attack on a statutory scheme is unwarranted"). Furthermore, "[w]hen a municipal ordinance is challenged, there is a presumption that the ordinance is valid and, consequently, not lightly to be overturned." *N. Hampton v. Sanderson*, 131 N.H. 614, 619 (1989). "It is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever reasonably possible." *Wilson*, 169 N.H. at 767. In addition, "[m]athematical exactness is not required . . . nor is a law invalid merely because it could have been drafted with greater precision." *State v. Porelle*, 149 N.H. 420, 423 (2003). "An ordinance is not necessarily vague because it does not precisely apprise one of the standards by which an administrative board will make its decision." *Alexander v. Hampstead*, 129 N.H. 278, 281 (1987).

The Trial Court found, and the Appellant does not dispute, that the Ordinance does not implicate a First Amendment or Fundamental right. Order at 23. *See Wilson*, 169 N.H. at 769 (where the defendant did not properly preserve a facial vagueness challenge to a statute, thus the New Hampshire Supreme Court declined to address the facial challenge). Thus,

this Court's review is limited to whether the Ordinance (a) failed to provide a person of ordinary intelligence that the Appellant's conduct was prohibited, or (b) could lead to or encourages discriminatory enforcement. *See, MacElman*, 154 N.H. at 307; *see also Wilson*, 169 N.H. at 770. The answer to each question is "no".

A. A person of ordinary intelligence would understand that the Ordinance prohibits the Appellant's use of the Lilac House for short-term vacation rentals.

Statutes and ordinances "must be framed in terms sufficiently clear, definite, and certain so that an average [person] after reading it will understand when [one] is violating its provisions." *Alexander*, 129 N.H. at 281.

In *Alexander*, a resident appealed the decision of Hampstead's Zoning Board of Adjustment denying his variance, in part claiming the ordinance was unconstitutionally vague. *Id.* at 280. The ordinance in that case limited residential buildings to one and a half stories, and the resident had constructed a two-story house without a permit. *Id.* At trial, several witnesses testified that a person of ordinary intelligence would not understand what constituted a half story, and the resident claimed this was sufficient evidence to invalidate the Hampstead ordinance on constitutional grounds. *Id.* The court found, however, that "[t]he fact that one and one-half stories may be arranged in various patterns and heights does not change the fact that a two-story house is not a one and one-half story house." *Id.* at 281. To put it another way, just because the precise definition of one and one-half stories may be difficult to ascertain, the fact

that a person of ordinary intelligence would understand that a two-story building is prohibited controlled the analysis.

Here we have an analogous situation. The Ordinance permits a broad category of dwelling units, but prohibits "such transient uses as hotels, motels, rooming and boarding houses." City of Portsmouth Zoning Ordinance § 10.1530. Even if this Court finds transient occupancies are not precisely defined in all cases, a person of ordinary intelligence would readily understand a property "clearly marketed . . . for wedding and corporate events" and rented at a daily rate would be prohibited. App. at 425. Further, the fact that the Appellant itself understood the use to be for short-term rentals, as evidenced by its payment of State Meals and Rooms tax for short-term rentals, confirms this conclusion. *See Sanderson*, 131 N.H. at 620 (where a claim that an ordinance requiring a permit to operate a gravel pit was unconstitutionally vague failed, because the Appellant testified at trial he "himself understood the ordinance to require a permit"), see also App. at 7.

B. The Ordinance does not open the door for discriminatory enforcement.

An argument that a statute or ordinance authorizes or encourages discriminatory enforcement will fail if either:

> (1) that the statute as a general matter provides sufficiently clear standards to eliminate the risk of arbitrary enforcement or (2) that, even in the absence of such standards, the conduct at issue falls within the core of the statute's prohibition, so that the enforcement before the court was not the result of the unfettered latitude that law enforcement officers and factfinders might have in other, hypothetical applications of the statute.

Wilson, 169 N.H. at 771 (citing *Farrell v. Burke*, 449 F.3d 470, 494 (2d Cir. 2006))

Here the Ordinance is sufficiently clear, as described above, supra at 17-19. The Ordinance provides a two-part inquiry into the character of a building in order to determine if it is permitted. The first part asks if the building's structure provides access to independent living facilities. The second is if that the building is used for a transient purpose, such as a hotel, motel, rooming house or boarding house. If a building meets the structural requirements, and is not used for a transient purpose, then it is a permitted dwelling unit under the Ordinance. However, if the building is used for a transient purpose, then the building is not a permitted dwelling unit. These standards may not invoke mathematical precision, however they do provide sufficiently clear standards so that an agent of the City enforcing this Ordinance would not have unlimited discretion, and the decision would be held to the standards of the Ordinance.[7]

Further, even if this Court finds the Ordinance does not set out sufficiently clear standards for enforcement generally, the conduct at issue is at the core of what the Ordinance prohibits. While it may be true that properties offered via Airbnb may not always be offered for transient use, it is clear from the facts found by the ZBA and the Trial Court that the Lilac House was offered for short-term transient use, which is clearly prohibited by the Ordinance. Although the Appellant argues that the Trial Court could not find evidence that the Lilac House was used only for short-term

[7] This is limited to a legal analysis of the hypothetical, lawful actions an enforcement officer may take given the structure of the Ordinance, as opposed to any analysis of what actions an enforcement officer undertook in the present case. The latter was addressed at trial under a claim of selective enforcement, and was not appealed to this court.

housing, the Appellant itself understood its use to be for short-term rentals, as evidenced by the fact it paid the State of New Hampshire's Meals and Rooms tax for short-term rentals. App. at 7. "[The use of the Lilac House] falls squarely within the core of what the term 'transient occupancies' prohibits." Add. at 27, Order at 26.

The Appellant states that the record does not support a conclusion that the Lilac House was "only offered on a short-term basis," thus the Trial Court has opened the door to arbitrary enforcement of the Zoning Ordinance. These arguments fail, because the Appellant bears the burden of raising sufficient evidence to show that discriminatory enforcement is likely or encouraged, and it fails on that charge.

The Trial Court and the Cease and Desist Orders are limited to prohibiting the short-term rental of the Lilac House to paying guests. This does not apply to other, hypothetical uses of Lilac House, all of which would be evaluated on a case-by-case basis on the full record of that case and subject to administrative and court review. Because this is an as applied challenge, the decision in this case holds no precedential value to any other use, even of the same property. See Add. at 6-7, Order at 5-6.

CONCLUSION

For the reasons set forth above, the City requests that this Court deny Working Stiff Partners's appeal and affirm the decision of the Trial Court below.

REQUEST FOR ORAL ARGUMENT

If this Court grants Working Stiff Partners's request for oral argument, Attorney Robert P. Sullivan will make oral argument on behalf of the City of Portsmouth.

Respectfully submitted,

The City of Portsmouth
By its attorneys,

Dated: 4/9/2019

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CERTIFICATIONS

I, Jane M. Ferrini, hereby certify that on this 4/9/2019, copies of the foregoing brief and appendix have been sent to Christopher J. Fischer, Esquire, through the electronic filing system.

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Jane Ferrini, Esq.

I, Jane M. Ferrini, hereby certify that on this 4/9/2019, copies of the foregoing brief and appendix have been sent to Francis X. Quinn, Esquire, through the electronic filing system.

/s/ Jane Ferrini
Jane Ferrini, Esq.

I, Jane M. Ferrini, hereby certify that on this 4/9/2019, copies of the foregoing brief and appendix have been sent to Monica Kieser, Esquire, attorney for the intervenors, through the electronic filing system.

/s/ Jane Ferrini
Jane Ferrini, Esq.