THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO.: 2018-0491

WORKING STIFF PARTNERS, LLC

v.

CITY OF PORTSMOUTH

RULE 7 MANDATORY APPEAL FROM FINAL ORDER OF THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF WORKING STIFF PARTNERS, LLC

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QUESTIONS PRESENTED

Whether the Rockingham County Superior Court (the "Trial Court") should be reversed, because:

(a) the Trial Court committed manifest error in finding the Plaintiff's land use to be among those specifically prohibited in the zoning ordinance's (the "Z.O.") definition of a dwelling unit, *see* App. at 227;

(b) the Trial Court erred in finding the reference to "such transient occupancies as hotels, motels, rooming or boarding houses" in the Z.O.'s definition of a dwelling unit to be unambiguous, *see* App. at 231; and

(c) the Trial Court erred in not finding the Z.O. unconstitutionally vague, *see* App. at 235.

STATEMENT OF THE FACTS AND THE CASE

The Plaintiff owns 87 Lincoln Avenue (the "Property"), and Mr. Matthew Beebe and Ms. Barbara Jenny, who are the limited liability company members, live in the single-family home next door. Add. at 7. The Plaintiff purchased the Property to hold it for one of their children who was thinking of moving back to Portsmouth. The Property was used for family and friends and also advertised for rent on websites such as Airbnb and VRBO. *See generally* App. at 205-221 (incorporating Plaintiff's appeal to the zoning board of adjustment (the "ZBA")).

The Defendant received complaints about the Plaintiff's advertisements for the Property on these websites. *See* Add. at 9. The complaints had nothing to do with excessive noise, traffic issues or safety concerns; rather, they were based on philosophical objections to having short-term rentals available in the neighborhood. *See* Add. at 10. In response to these complaints, the Defendant issued a cease and desist order based on its view that short-term rentals and advertisements for same violated the Z.O. *See* Add. at 10.

The Plaintiff appealed to the ZBA. *See* Add. at 1-11. In support, the Plaintiff argued, among other things, that the Property is a dwelling unit under the Z.O., it is rented for various durations and short-term rentals are not prohibited by the Z.O., the

Defendant's interpretation renders the Z.O. void for vagueness, and the actions of the Defendant are discriminatory and unconstitutional. *See* App. at 4. The ZBA upheld the cease and desist order, forcing the Plaintiff to appeal to the Trial Court. *See* App. at 1-11.

After submissions of memoranda of law and a hearing on April 3, 2018, the Trial Court issued a decision affirming the denial of the Plaintiff's appeal to the ZBA. *See* Add. at 1-30. The Trial Court considered the Plaintiff's arguments in turn: first, the Trial Court rejected the Plaintiff's argument that canons of statutory construction compelled the conclusion that the Plaintiff's use was permitted under the Z.O., concluding instead that such canons changed the use of the Plaintiff's land from a dwelling unit to one that fell within "such transient occupancies as hotels, motels, rooming or boarding houses" when offered for rent via Airbnb or VRBO, *see id.*; then, the Trial Court dismissed cases supporting the Plaintiff's position, declaring their discussions about the meaning of transient unhelpful to the matter at hand, *id.*; next, the Trial Court rejected the Plaintiff's claim that the Z.O. was unconstitutionally vague based on the analytical framework it had laid during the process of rejecting the Plaintiff's preceding arguments, *id.*; and finally, the Trial Court dispensed with all the Plaintiff's other arguments as lacking merit, *id.*.

SUMMARY OF ARGUMENT

The Trial Court's decision below must be reversed for several reasons. First, the Trial Court erroneously focused on the most imprecise term in the definition of a dwelling unit, *i.e.* transient, while simultaneously ignoring the specific elements that make a building a dwelling unit and, in turn, what is a dwelling unit use. The Plaintiff has always maintained that this case could have been decided without consulting any other sources or authorities beyond the Z.O. itself, and the Plaintiff remains resolute in its position as of the date of this filing. As discussed below, the Trial Court inexplicably ignored the obvious conclusion that the Property has always remained a dwelling unit as defined by the Z.O.

Second, the Trial Court's own reasoning highlights why any other construction needlessly creates ambiguous law that is ripe to be struck down as unconstitutionally vague. More specifically, the Trial Court's conclusion that renting a dwelling unit on a

short-term basis turns that dwelling unit into "such transient occupancies as hotels, motels, rooming or boarding houses" requires a wholesale revision of all these terms. As presently worded, these buildings all initially qualify as dwelling units. It is only when the internal composition, design and arrangement is altered that dwelling units morph into "such transient occupancies as hotels, motels, rooming or boarding houses." The result below, however, erroneously creates ambiguity where none exists by injecting an oblique length-of-stay component to uses defined in terms of design and structure. As a result, the decision below is incompatible with New Hampshire zoning jurisprudence.

And third, the Trial Court's decision left the Z.O. in such a state of disarray that no one can pinpoint the thresholds that dictate a permissible dwelling unit use in the rental context. As the first and second points mentioned above will show, the Trial Court's decision methodically shepherded the Z.O. down a path that, for purposes of this appeal, gutted its substance and obscured thresholds of its application.

ARGUMENT

I. The Plaintiff's Property Remains a Dwelling Unit under the Z.O.

The Z.O. plainly permitted the Plaintiff's use. Because of this inescapable conclusion, the only way to sustain the Trial Court's determination that the Property was being used in a manner authorized by the Z.O. is if this Court sanctions a rewriting of the Z.O. For the reasons discussed below, such an outcome cannot be allowed.

The Trial Court ruled that the undefined term transient defines the terms "hotels, motels, rooming or boarding houses," as well as the relationship between the foregoing buildings and dwelling units. The Trial Court opined that the inclusion of the undefined term transient evinced an intent to ban short-term rentals, because "hotels, motels, rooming or boarding houses" are also available for short periods of time. The Trial Court goes on to conclude that the reference to transient means that renting a dwelling unit on a short-term basis is not a permitted dwelling use under the Z.O., even though the term dwelling use appears nowhere in the Z.O. Although the Plaintiff presented the Trial Court with a road map for allowing the terms the Z.O. defines to give meaning to the main term that was not defined, *i.e.* transient, the Trial Court found little use of the

construction offered by the Plaintiff, declaring same to be "without a difference with respect to the matter at hand, i.e. transience." Add. at 18. The Trial Court's reasoning and decision constitute manifest error.

The Z.O. defines a dwelling unit in terms of the building's composition and arrangement. That is, a dwelling unit exists when there is "[a] building or portion thereof providing complete independent living facilities for one or more persons, including permanent provisions for living sleeping, eating, cooking and sanitation." The foregoing language is immediately followed by a sentence that begins as follows: "This use." These two words are critical to sound statutory construction because the Z.O. also defines "use" as "[a]ny purpose for which a lot, building, or other structure or a tract of land may be designated, arranged, intended, maintained or occupied." Add. at 44 (emphasis added). It therefore follows that the mere existence of a building having the aforementioned living facilities means that it is a dwelling unit and being used as such. *See Harrington v. Town of Warner*, 152 N.H. 74, 79 (2005) (noting the basic deference to the plain and unambiguous language when interpreting statutes).

That is, however, the starting point because the words that follow, *i.e.* "[t]his use," are, if applicable, capable of removing an otherwise dwelling unit or dwelling unit use from the scope of this definition. More specifically, a dwelling unit use "shall not be deemed to include such transient occupancies as hotels, motels, rooming or boarding houses." The focus thus shifts to what makes a building that could otherwise provide independent living facilities change into a hotel, a motel, a rooming house, or a boarding house.

Aside from a rooming house, the Z.O. defines the foregoing buildings. Importantly, the definitions of the foregoing buildings all have internal designs or arrangements that evidence a clear and unambiguous departure from what qualifies as a dwelling unit under the Z.O. *See* Add. at 35 (a boarding house is a "residential structure" in which "rooms are rented, leased or otherwise made available for compensation to more than two but not more than 10 individuals, and where such rooms do not contain separate cooking or bathroom facilities."), at 38 (a hotel is a "building in which the primary use is

transient lodging accommodations offered to the public," and "where ingress and egress to the sleeping rooms is made primarily through an inside lobby or office, supervised by a person in charge at all hours," and "[s]uch facilities may include . . . such accessory uses as restaurants, bars, taverns [and] nightclubs."), at 40 (a motel is a building or group of detached or connected buildings intended or used primarily to provide sleeping accommodations . . . for compensation and having a parking space generally located adjacent to the sleeping room). The foregoing buildings all qualify as dwelling units inasmuch as they are capable of providing "complete independent living facilities for one or more persons, including permanent provisions for living sleeping, eating, cooking and sanitation." However, when the internal layout is altered in such a way to limit access to such independent living facilities, these buildings become something other than a dwelling unit and they cease to be a dwelling unit use.

The only logical conclusion is that a building lacking access to these independent living facilities, like a hotel, motel or boarding house, becomes a transient occupancy within the meaning of the Z.O., and has ceased being a dwelling unit. The plain reading of the Z.O. compels the conclusion that a building or portion thereof having independent living facilities is a dwelling unit under the Z.O., and its continued classification as a dwelling unit is not dependent on the duration it is occupied. *See KSC Realty Trust v. Town of Freedom*, 146 N.H. 271, 273 (2001) (noting that the meaning of a zoning ordinance is extrapolated "from its construction as a whole, not by construing isolated words or phrases"); *Dolbeare v. City of Laconia*, 168 N.H. 52, 55 (2015) ("The principle of *ejusdem generis* provides that, when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words."); *see also Portland v. Carriage Inn*, 67 Ore. App. 44, 47 (Ore. 1983) (observing that, in Oregon, it is permissible to define a building in terms of design or structure).

Here, however, the Trial Court inexplicably concluded that the undefined and generalized reference to transient in the Z.O.'s definition of dwelling unit evinces the most reliable indicia of legislative intent on what constitutes a dwelling unit. *But see*

Anderson v. Robitaille, -- N.H. --, No. 2017-0195 (March 8, 2019) (noting that words and phrases are not considered in isolation, that courts will not look beyond the language of a statute in the absence of ambiguity, that courts construe all part of a statute together in order to avoid an absurd result and ensure harmony with the overall statutory scheme). Based upon this mislaid foundation, the Trial Court bypassed the terms that were defined and listed in the Z.O., explaining that the reference to transient, and not independent living facilities or how the Z.O. defined hotels, motels and boarding houses, determined whether a building was a dwelling unit. Since the Z.O. does not define transient, the Trial Court consulted the various dictionary definitions of transient. From there, the Trial Court concluded that "transient," although capable of meaning simply not permanent, clearly and specifically meant a brief or short time period. *See* Add. at 13-21. After jumping through these hoops, the Trial Court declared that a building which otherwise meets the definition of a dwelling unit is morphed into a transient occupancy when rented on a short-term basis. *See id.*

In undertaking the foregoing, however, the Trial Court committed manifest error. The Trial Court did not need to look any further than the Z.O. to conclude that both a dwelling unit and a dwelling unit use exist under the Z.O. so long as the building provides independent living facilities. Contrary to well-established New Hampshire law, the Trial Court looked to the term transient over defined terms, and then used that term redefine the Z.O. even though that ordinance clearly establishes that a dwelling unit remains a dwelling unit so long as it provides independent living facilities. The Trial Court's inquiry should have ended there, and this analysis on this appeal does not need to go any further than here.

II. The Trial Court's Effort to Resolve Ambiguities Created More Ambiguity.

This threshold error of going beyond the Z.O. was not, however, the Trial Court's only misstep in the proceedings below. When the Trial Court needlessly consulted the various dictionary definitions of transient, it should have immediately recognized that these definitions were nothing more than nebulous synonyms of the term it sought to define and clarify. The Trial Court then plucked the words "short" and "brief" from the

dictionary definitions and proceeded to rewrite the Z.O. to include such terms. This also amounts to reversible error.

The Trial Court's decision acknowledges that the dictionaries it consulted associate the term transient with time scales other than short or brief periods. Indeed, lengths of time that are either brief or short are within the embrace of the word transient to the same extent as a state of being not permanent. The Trial Court cleverly acknowledges this existential quagmire inherent in its decision by referencing renowned people or places that involved stays that were neither brief nor short at places that clearly qualify as transient occupancies under the Z.O. *See* Add. at 17 (discussing Howard Hughes' stay at the Desert Inn, and seasonal vacationers to the Mount Washington, and the fictional character Eloise's childhood at the Plaza, and Fonzie's 10-year stay with the Cunninghams). These anecdotes do the Trial Court no favors, because, if one accepts its argument that transient is the controlling term in the definition of dwelling unit, the following would also be true:

> Howard Hughes famously lived [at the Property] for four years [and always remained a transient]. [The Propery] used to have guests who stayed for an entire season [and they always remained transients]. The fictional character Eloise lived [at the Property] during her entire childhood [and she never grew out of being a transient]. For all ten seasons of the situation[al] comedy Happy Days, Fonzie lived [at the Property as a transient for years].

See id.

The point of the foregoing is meant to highlight the inherent flaw in the Trial Court's rationale. None of the occupants stayed forever, so none were permanent; yet, one stay was for a period of time that was shorter than the rest, while another stay was longer than the others. If all the people hypothetically renting above booked their stay at the Plaintiff's Property through Airbnb, they would all 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, without any change to its independent living facilities, would revert back into a dwelling unit. Only the complete disregard for the present language of the Z.O. can account for such an absurd result.

Unfortunately, that is precisely what the Trial Court did below. It should be noted that the Court disregarded the Plaintiff's attempt to dissuade it from focusing its energies on the undefined term transient. The Trial Court only considered them, however, after it had already begun its descent down the rabbit hole. That is, the Trial Court had already decided that the term transient had a specific and unambiguous meaning before it turned its attention to such cases. The Trial Court was, unsurprisingly, dismissive of the persuasive value of these cases, presumably believing its inquiry by that time had resolved all doubts about the word transient. In doing so, the Trial Court overlooked the critical feature that prompted the Plaintiff to bring the case to the Trial Court's attention, *i.e.* the uncertainty that ensues when the regulation of short-term rentals is attempted by assigning an time scale like transient both legal and threshold implications. *See, e.g., Slice of Life, LLC v. Hamilton Twp. Zoning Bd.*, 164 A.3d 633, 637-642 (Pa. Commw. Ct. 2017) (noting that the ordinance did not define the terms "transient lodging" or "transient tenancies" and finding that the attempt to regulate short-term rentals using transient as a benchmark resulted in ambiguous zoning); *Fruchter v. Zoning Bd. of Appeals of Town of Hurley*, 20 N.Y.S.3d 701 (N.Y. App. Div. 2015) (finding the attempt to regulate short-term rentals based on the appearance of transient occupancy in the list of excluded activities resulted in ambiguous zoning because the ordinance did not define transient); *Viviano v. Sandusky*, 991 N.E.2d 1263, 1267 (Ohio Ct. App. 2013) (observing that any attempt to define transient when the term is not defined by zoning regulations brings no clarity or precision in terms of a time scale).

By ignoring the cautions espoused in these cases, the Trial Court's decision leaves the Z.O. in a state of ambiguity and uncertainty in that it can encompass a brief stay or a much longer stay so long as it does not become permanent. Consequently, the Trial Court knowingly opened the door to scenarios where "reasonable minds can debate how long an occupancy must be before it is no longer transient." Add. at 15. The Trial Court therefore acknowledges that its interpretation could be construed to encompass both short-term and long-term rentals. This represents the precise ambiguity New Hampshire jurisprudence says must be avoided in zoning cases. *See, supra, Anderson*. New

Hampshire jurisprudence further demands that "any ambiguity be resolved by reference to the apparent object" of the zoning. *See Storms v. Eaton*, 131 N.H. 50, 52-53 (1988). Here, the object of the Z.O. is to permit all buildings or portions thereof that provide "complete independent living facilities for one or more persons, including permanent provisions for living sleeping, eating, cooking and sanitation." The Trial Court's interpretation effectively restricts a permitted use in further derogation of common law property rights, *see Moyer v. Bd. of Zoning Appeals*, 233 A.2d 311, 316-17 (Me. 1967), even though the Plaintiff presented the Trial Court with an alternative interpretation based on the plain and unambiguous language of the Z.O. The Trial Court, however, interpreted the Z.O. in a way that leads to an absurd result and nullifies a purpose that is clearly evident from the plain and unambiguous language of the law. *See New Eng. Brickmaster v. Salem*, 133 N.H. 655, 663 (1990). For these reasons, the decision below constitutes manifest error.

III. The Decision Below Is Also Unconstitutional.

"A municipal ordinance 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 v. Town of Hampstead*, 129 N.H. 278, 281 (1987). "A[n] [ordinance] can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or it authorizes or even encourages arbitrary and discriminatory enforcement." *State v. MacElman*, 154 N.H. 304, 307 (2006).

For the reasons discussed above, the Trial Court's ruling opens the relevant Z.O. to a variety of potential interpretations. It leaves the definition of dwelling units in such a state of obscurity that it is beyond of comprehensive of reasonably intelligent persons to know when a particular rental term sheds itself of a transient identity. Consequently, the Trial Court's has effectively created an unconstitutionally vague if not overturned by this Court.

The Trial Court's has also laid the groundwork for arbitrary or discriminatory enforcement in violation of constitutional principles. More specifically, the Trial Court's

conclusion rests upon the fact that the Property was advertised for rent on Airbnb. The cease and desist order was issued because of those advertisements. The record, however, does not include any evidence showing that the Property was only offered on a short-term basis. Instead, both the Trial Court and the Defendant assumed that, because the Property appeared on Airbnb, it could only be rented on a short-basis. For the reasons already stated above, as well those presented to the Trial Court in the Plaintiff's memorandum of law, the use of transient or short or brief or not permanent as a benchmark to determine property rights is a scenario that is rife for abuse and discrimination. Accordingly, the outcome below creates a law that is too vague to withstand constitutional scrutiny.

CONCLUSION

The outcome required on appeal is obvious: the Trial Court's decision must be reversed. If the Defendant wants to regulate short-term rentals, then it must do so through the legislative process. The Plaintiff believes the record before this Court provides sufficient grounds for issuing such a reminder.

STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff requests oral argument before the entire Court. If the Court grants this request, Attorney Fischer will argue this appeal on the Plaintiff's behalf.

Respectfully submitted,
The Plaintiff,
Working Stiff Partners, LLC
By Its Attorneys,
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Dated: March 11, 2019 By: /s/ Christopher J. Fischer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on counsel of record through the electronic filing system on this 11th day of March, 2019.

/s/ Christopher J. Fischer
Christopher J. Fischer, Esq.