THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2022-0098

Town of Conway

v.

Scott Kudrick

On appeal from a decision of the Carroll County Superior Court

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BRIEF OF DEFENDANT-APPELLEE SCOTT KUDRICK

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STATUTES

RSA 48-A:1 Definitions. –
The following terms, wherever used or referred to in this chapter, shall have the following respective meanings, unless a different meaning clearly appears from the context:

I. "Municipality" shall mean any city or town in this state.

II. "Governing body" shall mean, in a city, that governing body which is designated as such by the charter of the particular city; in a town, the town meeting.

III. "Dwelling" shall mean any building, structure, trailer, mobile-home or camp or part thereof, used and occupied for human habitation or intended to be so used and includes any appurtenances belonging thereto or usually enjoyed therewith.

IV. "Public agency" shall be a board, department, officer, or employee of a municipality, designated by ordinance, code or bylaw to exercise the powers and perform the duties conferred upon it by this chapter.

V. "Vacation rental" or "short-term rental" means any individually or collectively owned single-family house or dwelling unit or any unit or group of units in a condominium, cooperative, or timeshare, or owner occupied residential home, that is offered for a fee and for less than 30 consecutive days. For purposes of this chapter, vacation rental and short-term rental are residential uses of the property and do not include a unit that is used for any nonresidential use, including retail, restaurant, banquet space, event center, or another similar use.

CONWAY ZONING ORDINANCE PROVISIONS

CZO, § 190-31. Definitions.

RESIDENTIAL/DWELLING UNIT — A single unit providing complete and independent living facilities for one or more persons living as a household, including provisions for living, sleeping, eating, cooking, and sanitation.

OWNER-OCCUPIED LODGING HOUSE AND/OR OWNER-OCCUPIED BOARDINGHOUSE — Any place consisting of a room or group of rooms located on one premises where regular, nontransient-type accommodations for sleeping or living purposes, together with meals, are offered for compensation, provided that the same is occupied and operated conjunctively by the owner, an individual person or persons, and shall not have more than four double-occupancy sleeping units.

OWNER-OCCUPIED TOURIST HOME AND/OR OWNER-OCCUPIED ROOMING HOUSE — Any place consisting of a room or a group of rooms located on one premises where transient or semi-transient accommodations for sleeping or living purposes are offered for compensation, provided that the same is occupied and operated conjunctively by the owner, an individual person or persons, and shall not have more than four double-occupancy sleeping units.

BED-AND-BREAKFAST — Any dwelling in which transient lodging or boarding and lodging are provided and offered to the public by the owner for compensation. This dwelling shall also be the full-time, permanent residence of its owner; otherwise it shall be classified as a hotel/motel. There shall be no provisions for cooking in any individual guest room.

HOTEL/MOTEL — A commercial building or group of buildings built to accommodate, for a fee, travelers and other transient guests who are staying for a limited duration with sleeping rooms, each rental unit having its own private bathroom and a common corridor or hallway. A hotel may include restaurant facilities where food is prepared and meals are served to its guests and other customers.

TRANSIENT ACCOMMODATIONS — Living quarters which do not have a kitchen as defined in “residential unit.” Such accommodations are not counted as residential units for density purposes, but rather are part of, or all of, a nonresidential use on the lot.

CZO, § 190-13(B)(4)(a). Residential/Agricultural (RA) District – Lot Size and Density – Special Exceptions

In order to preserve and safeguard Conway's older homes, but also allow for their conversion to multifamily dwellings, the Zoning Board of Adjustment may grant special exceptions for residential structures and accessory structures on the same lot, provided that:

[1] Substantially all of the structure was constructed prior to 1930.

[2] The total number of dwelling units on the site does not exceed four.

[3] No less than 5,000 square feet of land area must be provided on the parcel for each unit that exists or is to be constructed thereon.

[4] No significant changes to the exterior lines or architectural detail are made which would diminish the historical or architectural heritage of the structure.

[5] Adequate area is available for parking outside the setback and buffer areas.

[6] Accessory structures must have at least 300 square feet of occupiable space per unit suitable for conversion to a dwelling unit.

[7] All of the dwelling units shall be used for long-term residency; short-term transient occupancies of less than 30 consecutive days of any dwelling unit is prohibited.

[8] Scaled floor plans and a scaled site drawing must be submitted to the Zoning Board at time of application to ensure compliance with the requirements for this special exception.

QUESTION PRESENTED

Whether the trial court correctly decided that the Defendant-Appellee's short-term rental properties meet the definition of a "residential/ dwelling unit", as defined in the Conway Zoning Ordinance ("CZO"). *See* Order on Cross Motions for Judgment on the Pleadings, Appendix (hereinafter "App.") at 137.

STATEMENT OF THE CASE AND FACTS

In his capacity as a trustee, Scott Kudrick owns various properties in Conway that he rents to others. Answer, App. at 12, ¶ 2. All of his Conway properties include provisions for living, sleeping, eating, cooking, and sanitation. Amended Objection to Plaintiff's Cross-Motion for Judgment on the Pleadings, Affidavit of Scott Kudrick (hereinafter "Kudrick Affidavit"), App. at 111-12, ¶¶ 1-3; 5. Some of these properties, which Mr. Kudrick does not occupy, are located in residential zoning districts. *Id.* at ¶ 4.

Under the CZO, there are four enumerated residential districts in Conway: Residential/Agricultural District; Center Conway Village Residential District; Conway Village Residential District; and North Conway Village Residential District. Order on Cross-Motions for Judgment on the Pleadings, App. at 135-36.

The CZO does not impose an owner-occupancy requirement for "residential" uses. *Id.* Instead, it defines a "residential/dwelling unit" as follows:

> A single unit providing complete and independent living facilities for one or more persons living as a household, including provisions for living, sleeping, eating, cooking, and sanitation.

CZO, § 190-31, App. at 42.

For certain enumerated uses, the CZO does require properties located in residential zoning districts to be owner-occupied. These uses include "boardinghouses", "lodging houses", "rooming houses", and "tourist homes." Kudrick's Motion for Judgment on the Pleadings, Exhibit 1, App. at 29-32. The CZO also uses a "transience" requirement to define these

commercial, nonresidential uses. They must have either "transient", "semi-transient", or "non-transient" accommodations for sleeping or living purposes. "Transient Accommodations" is defined as:

> Living quarters which **do not have a kitchen as defined in "residential unit."** Such accommodations are not counted as residential units for density purposes, but rather are part of, or all of, a nonresidential use on the lot.

CZO, § 190-31 (emphasis added), App. at 48.

Therefore, even if a unit can be rented for a short period of time, it is not "transient" under the CZO if it has a kitchen. The CZO contains a definition of the word "transient" that clearly does not apply to Mr. Kudrick's properties. In other factually comparable cases – including *Working Stiff Partners, LLC v. City of Portsmouth*, which Plaintiff-Appellant heavily relies on – the ordinance at issue contained no definition of a "transient" accommodation. The absence of a definition has led some courts to interpret the term as imposing a durational requirement. Here, the CZO supplies a definition, and that definition controls.

The CZO is a "permissive" ordinance – like most, if not all, zoning ordinances in New Hampshire. As a result, any given use is allowed if it is (or is accessory to) a permitted use, or a use allowed by special exception.

Single-family, two-family, and multifamily units are a permitted use in all four of Conway's residential districts. *See* CZO, Permitted Use Table, App. at 31.

Therefore, the CZO expressly allows the residential use of properties in residential districts. Mr. Kudrick's rental properties fit squarely within

the definition of a "residential/dwelling unit". These properties are freely permitted in Conway, and Mr. Kudrick does not need to occupy them.

The parties filed cross-motions for judgment on the pleadings in Carroll County Superior Court on this issue. After interpreting the CZO, the trial court found in favor of Mr. Kudrick and held that his rental properties were "residential/dwelling units" within the meaning of the CZO. The Court concluded that the use of Mr. Kudrick's rental properties is permitted in Conway's residential districts, and does not require owner-occupancy. Order on Cross Motions for Judgment on the Pleadings, App. at 133.

SUMMARY OF ARGUMENT

The Town of Conway ("the Town") filed its Petition for Declaratory Judgment on June 7, 2021. The petition acknowledges that Conway residents have been renting their properties to third parties for "holiday and vacation purposes" for many years prior to the Town's decision to file this action against Mr. Kudrick. Petition for Declaratory Judgment, App. at 6, ¶ 7. Yet, the Town never sought to prohibit such uses because the short term rentals were allegedly not generating "nuisance-type or other objectionable activity."[1] *Id.*

Although the Town makes much of the allegedly "bad" behavior of renters who rent from online platforms and other allegedly negative impacts to communities from short-term rentals, this case has nothing to do with the merits or demerits of short-term rentals in the Town (or any other community in New Hampshire). As Judge Ignatius succinctly identified in her well-reasoned opinion, this dispute simply turns upon the narrow issue of "whether the defendant's short-term rental properties meet the definition of residential/dwelling unit (thus not needing to be owner-occupied) or if they are more akin to a boardinghouse, lodging house, or rooming house, or tourist house (which would require them to be owner-occupied in residential districts)." *See* Order on Cross Motions for Judgment on the Pleadings, App. at 137.

Applying the plain and unambiguous language of the CZO to the undisputed circumstances of Mr. Kudrick's short-term rental units leads to

[1] Although hard to fathom, the Town seems to suggest that nobody in the history of the Town ever complained about a weekend ski rental before the advent of Airbnb or VRBO.

the inescapable conclusion that the properties in question meet the definition of a residential/dwelling unit and do not need to be owner-occupied. The occupants of Mr. Kudrick's properties "live as a household" within the meaning of the CZO, because the rental units are independently equipped for living, sleeping, eating, cooking, and sanitation. Contrary to the Town's suggestion, there is no familial or temporal requirement in the CZO's definition of residential/dwelling unit. As a result, the trial court correctly concluded that Mr. Kudrick's properties met the CZO's definition of residential/dwelling unit and the Town has offered no basis for this Court to reach a contrary conclusion. Accordingly, Mr. Kudrick respectfully requests that this Court affirm the trial court and conclude that Mr. Kudrick's short term rentals are a permitted use under the CZO.

ARGUMENT

I. Standard of Review

The interpretation of a zoning ordinance is a question of law, which is reviewed *de novo*. *Anderson v. Robitaille*, 172 N.H. 20, 22 (2019); *Old Street Barn v. Town of Peterborough*, 147 N.H. 254, 257 (2001). Where terms in a zoning ordinance are defined, the definitions govern. *Trottier v. Lebanon*, 117 N.H. 148, 150 (1977). Otherwise, because "traditional rules of statutory construction govern", words and phrases of an ordinance are construed "according to the common and approved usage of the language." *Town of Barrington v. Townsend*, 164 N.H. 241, 246 (2012). Finally, "when the language of an ordinance is plain and unambiguous," the Court "need not look beyond the ordinance itself for further indications of legislative intent." *Duffy v. City of Dover*, 149 N.H. 178, 181 (2003).

II. The CZO's Definition of "Residential/Dwelling Unit" Plainly Applies to Mr. Kudrick's Rental Units

The CZO provides the following definition of a "residential/dwelling unit":

> A single unit providing complete and independent living facilities for one or more persons living as a household, including provisions for living, sleeping, eating, cooking, and sanitation.

CZO, § 190-31, App. at 42.

Because the CZO expressly defines "residential/dwelling unit", the above definition governs. *Trottier v. Lebanon*, 117 N.H. 148, 150 (1979). Each of Mr. Kudrick's residential rental units contains complete and independent living facilities. Kudrick Affidavit, App. at 112, ¶ 5. In other

words, occupants have the ability to live, sleep, cook, and eat in the unit itself. In addition, they have access to sanitation within the unit. Furthermore, Mr. Kudrick rents his units exclusively for residential purposes. In fact, the lease prohibits any events of a commercial nature, parties, and additional guests. Kudrick Affidavit, App. at 112, ¶ 7.

The absence of any owner-occupancy requirement from the CZO's definition is readily apparent. Simply put, Mr. Kudrick—or any other property owner in Conway—can use his properties as residential dwelling units without occupying them.

The CZO's definition also imposes no durational requirement for the use of residential dwelling units. It logically follows that the duration of a given use has no bearing on its qualification as residential. Instead, the nature of the use operates as the distinguishing factor. In theory, Mr. Kudrick's units could be rented for half a day or a full year. Either way, this fact would carry no weight in deciding whether they qualify as residential dwelling units.

The Town suggests that Mr. Kudrick's units are not residential because their use is "transient". The CZO defines the term "Transient Accommodations" as follows:

> Living quarters which **do not have a kitchen as defined in "residential unit."** Such accommodations are not counted as residential units for density purposes, but rather are part of, or all of, a nonresidential use on the lot.
>
> CZO, § 190-31 (emphasis added), App. at 48.

As noted above, the word "transient", or any derivative thereof, does not appear in the definition of residential dwelling units. Regardless, the CZO

does not define the "transience" of an accommodation as requiring a specific duration of its use. Instead, an accommodation is "transient" if it does not have a kitchen. Mr. Kudrick's units are all equipped with a kitchen. Thus, they are not "transient".

This Court recently addressed this issue in a similar context, in *Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611 (2019). In *Working Stiff Partners*, the Court held that the plaintiff's provision of short-term rentals to paying guests did not constitute a "dwelling unit". The circumstances of *Working Stiff Partners*, however, differ from the instant matter in two crucial aspects. First, the applicable Portsmouth ordinance expressly excludes "transient occupancies" from the definition of a "dwelling unit". *Working Stiff Partners*, 172 N.H. at 620. Specifically, the Portsmouth Zoning Ordinance defined a "dwelling unit" as follows:

> 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. This use shall not be deemed to include such transient occupancies as hotels, motels, rooming or boarding houses.
>
> *Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611, 617 (2019)

Second, the ordinance did not define "transient" or "transient occupancies". *Id.* a 617. As a result, the Court defined the term "transient" according to its common and approved usage rather than based on a definition prescribed by the ordinance. Based on its determination of the common usage of "transient", the court concluded that the short-term rentals at issue were "transient" and, therefore, did not qualify as "dwelling units".

In stark contrast to the Portsmouth ordinance that was considered in *Working Stiff Partners*, the CZO does not expressly exclude "Transient Accommodations" from the definition of a "Residential/Dwelling Unit". Instead, the CZO draws a distinction between "Residential/Dwelling Units" on the one hand, which are defined as providing "independent and complete living facilities, including provisions for … cooking", and "Transient Accommodations" on the other, which "do not have a kitchen". Conway has chosen to exclude residential units equipped with kitchens – like Mr. Kudrick's – from the definition of "Transient Accommodations". Under the CZO, any residential home in Conway that has a kitchen can never qualify as a "Transient Accommodation". As a result, the short-term rental of residential properties has always been both common and legal in Conway. The Town expressly gave its residents the right to rent their homes for short periods of time, without running the risk of being classified as a "Transient Accommodation".

Unlike in *Working Stiff Partners*, the term "Transient Accommodations" is expressly defined. According to the definition provided by the CZO, the term "transient" simply does not apply to the duration of a permitted use at a given property, but rather to whether the property has a kitchen. While the CZO ascribes a meaning to the word "transient" that may differ from its commonly used meaning – and from the meaning that the Court considered in *Working Stiff Partners*, the definition supplied in the ordinance governs. *Trottier*, 117 N.H. at 150; *see also Working Stiff Partners*, 172 N.H. at 615-16 ("We construe the words and phrases of an ordinance according to the common and approved usage of the language, but ***where the ordinance defines the terms in issue, those***

definitions will govern.") (emphasis added) (citations omitted). Because Mr. Kudrick's units all have kitchens, they are residential units that do not have "Transient Accommodations".

The trial court properly followed this Court's guidance in *Working Stiff Partners* by focusing on the plain and unambiguous language of the ordinance. As a result, the trial court reached the appropriate conclusion based on the markedly different language in the CZO as compared to the Portsmouth ordinance. The CZO's definitions of "Residential/Dwelling Units" and "Transient Accommodations" are controlling. These definitions clearly provide that a residential dwelling unit can be used for any length of time. They also specify that "Transient Accommodations" do not have a kitchen.

The Town's argument seeks to circumvent the express language of the CZO by focusing on the alleged undesirable impacts of short-term rentals or the fact that they may differ in some material way from other residential uses. The problem with the Town's argument is that it seeks to re-write the ordinance to achieve its aims rather than applying the plain and unambiguous language of the ordinance. For example, the Town refers to various statutory definitions of "short-term rental" or "rental unit" that apply a temporal requirement.[2] Appellant's Brief, pp. 20-21. But such definitions are absent from the CZO and its definition of "Residential/Dwelling Units." While the Town attempts to articulate a variety of policy-based arguments for why it wants to regulate Mr.

[2] The Town conveniently omits to mention statutes that specifically define short-term rentals as residential uses. *See, e.g.,* RSA 48-A:1, V ("For purposes of this chapter, **vacation rental and short-term rental are residential uses of the property** and do not include a unit that is used for any nonresidential use") (emphasis added).

Kudrick's properties differently than similar households that may be rented for longer durations, it cannot escape the language of its own duly-enacted ordinance. The issue is the correct classification of Mr. Kudrick's units for zoning purposes. The Town simply cannot refuse to apply the definitions it created because it perceives short-term rentals as undesirable.

Incredibly, the Town cites *Barry v. Town of Amherst* in support of its untenable position that "the trial court did read into the definition of residential/dwelling unit the omitted concept of permitted transient use". Appellant's Brief, p. 18. In *Barry*, the plaintiff appealed the denial of his application for a variance, and argued that the Amherst zoning board's failure to hold a hearing within thirty days after the application was filed required that the variance be granted. *Barry v. Town of Amherst*, 121 N.H. 335, 336 (1981). Notably, the plaintiff relied on a zoning statute under which any plat submitted to the planning board for consideration and not acted upon within the statutory period "shall be deemed to have been approved." *Id.* at 338. The statute at issue, however, contained no such provision for variance applications. As a result, the Court refused to imply it. Here, several nonresidential uses are specifically defined as either "transient", "semi-transient", or "non-transient". Residential dwelling units, however, are not. Just like in *Barry*, this omission cannot be ignored. Yet, the Town starts by asking this Court to apply a different definition of "transient accommodations" than the one supplied by the CZO, in order to create a temporal requirement that does not exist.[3] It then proceeds to argue

[3] The Town also fails to supply a workable definition of "transient accommodations" that, in its view, should be substituted for the CZO's definition. Many Conway residents have second homes elsewhere that they may occupy for part or most of the year. Under the Town's argument, some of these residents' properties in Conway may no longer qualify as residential dwelling units.

that Mr. Kudrick's units do not fit within the definition that it created for this litigation – but did not include in the CZO.

III. The CZO's Definition of Nonresidential Uses Are Inapplicable to Mr. Kudrick's Rental Units

The Town's arguments inserts two requirements (owner-occupancy and temporality) in a definition that specifically omits them. In so doing, the Town alleges that the trial court failed to "determine the meaning of the zoning ordinance from its construction as a whole, not by construing isolated words and phrases." Appellant's Brief, p. 18 (citing *Working Stiff Partners, LLC*, 172 N.H. at 615). To the contrary, the trial court referred to other definitions contained in the CZO to reach its conclusion. Specifically, it analyzed the CZO's definitions of boardinghouses, lodging houses, rooming houses, and tourist homes, noted that these definitions contained an explicit owner-occupancy requirement, and concluded that "[t]he Ordinance sets forth a scheme where so long as a short-term rental unit meets the definition of a residential/dwelling unit, it need not be owner-occupied." Order on Cross Motions for Judgment on the Pleadings, App. at 137. To borrow the Town's language, "[i]f the legislative body had intended" to require owner-occupancy in residential dwelling units, "it knew how to do so by using that word." Appellant's Brief, pp. 18-19.

The CZO's Permitted Use Table does in fact require owner-occupancy for multiple other uses. "Boardinghouses" are not a permitted use in Conway's four residential districts, but "boardinghouses, owner-occupied" are freely permitted. This distinction also applies to lodging

houses, rooming houses and tourist homes. The CZO defines "Owner-occupied Lodging House and/or Owner-Occupied Boardinghouse" as:

> Any place consisting of a room or group of rooms located on one premises where regular, non-transient type accommodations for sleeping or living purposes, together with meals, are offered for compensation, provided that the same is occupied and operated conjunctively by the owner, an individual person or persons, and shall not have more than four double-occupancy sleeping units.

CZO, § 190-31.

An "Owner-Occupied Tourist Home and/or Owner-Occupied Rooming House" is defined as:

> Any place consisting of a room or group of rooms located on one premises where transient or semi-transient accommodations for sleeping or living purposes are offered for compensation, provided that the same is occupied or operated conjunctively by the owner, an individual person or persons, and shall not have more than four double-occupancy sleeping units.

CZO, § 190-31.

Like Mr. Kudrick's properties, these uses offer living quarters to third parties for varying lengths of time—ranging from a single night to many weeks—in exchange for payment. However, the CZO makes a fundamental distinction: lodging houses, boardinghouses, tourist homes, and rooming houses must be owner-occupied, while there is no such requirement for "residential/dwelling units".

Similarly, the CZO's definition of a "Bed-and-Breakfast" reads as follows:

> Any dwelling in which transient lodging or boarding and lodging provided and offered to the public by the owner for compensation.

> **This dwelling shall also be the full-time, permanent residence of its owner**; otherwise it shall be classified as a hotel/motel. There shall be no provisions for cooking in any individual guest room.

CZO, § 190-31 (emphasis added).

The CZO also requires owner-occupancy for properties being used as a bed-and-breakfast. The same requirement applies, for example, to homes where "substantially all of the structure was constructed prior to 1930". CZO, § 190-13(B)(4)(a). The ordinance explicitly imposes an owner-occupancy requirement for certain uses. Whenever such a requirement applies, the CZO articulates it clearly and unequivocally so as to avoid ambiguity and conflicting interpretations. By contrast, the definition of a "residential/dwelling unit" is devoid of any mention of, or reference to, owner-occupancy. It simply cannot be read into, or implied from, the actual language of the CZO. Therefore, the definition of a "residential/dwelling unit" does not mandate that owners must occupy their property.

The fundamental and operative distinction between residential dwelling units and owner-occupied nonresidential units under the CZO is the presence or absence of kitchen or cooking facilities. CZO, § 190-31. The living units in Mr. Kudrick's properties offer complete and independent living facilities, including fully equipped kitchens. Kudrick Affidavit, App. at 112, ¶ 5. Because occupants have the ability to cook, Mr. Kudrick does not offer meals in exchange for compensation. Thus, his units are not lodging houses, boardinghouses, bed-and-breakfasts, or any other nonresidential use for which the CZO explicitly requires owner-occupancy.

In addition to the owner-occupancy requirement, several nonresidential uses are defined as offering either "transient", "semi-transient", or "non-transient" accommodations for sleeping or living purposes. Owner-occupied lodging houses or boardinghouses must contain "non-transient type accommodations", while owner-occupied tourist homes or rooming houses must contain "transient or semi-transient type accommodations" for living and sleeping. CZO, § 190-31.

The CZO uses a durational requirement to define certain nonresidential uses. By contrast, it does not require residential dwelling units to be either "transient", "semi-transient", or "non-transient".

In addition, and despite the Town's arguments, Mr. Kudrick's units are not "transient" under the only relevant definition of the term because they do offer independent kitchens and cooking facilities. Kudrick Affidavit, App. at 112, ¶ 5. Even if Mr. Kudrick occupied his units, they could not qualify as tourist homes or rooming houses. Likewise, bed-and-breakfasts require "transient lodging or boarding and lodging." CZO, § 190-31. Mr. Kudrick's units could not be included in this definition, even if they were owner-occupied.

In owner-occupied lodging houses and boardinghouses, meals must be offered for compensation. *Id.* In Mr. Kudrick's units, no meals are offered for compensation. Instead, the units include provisions for cooking independently. Kudrick Affidavit, App. at 112, ¶ 5. Even if Mr. Kudrick occupied his units, they could not qualify as lodging houses and boardinghouses.

If Mr. Kudrick's units were owner-occupied, they would not meet the definition of any use under the CZO. Only one permitted use defined in

the CZO properly applies to Mr. Kudrick's units: "Residential/Dwelling Units".

IV. Under the CZO, "Living as a Household" Does Not Require Owner-Occupancy and Does Not Impose a Durational or Familial Requirement

The CZO's definition of a "residential/dwelling unit" requires that persons occupying the unit must be "living as a household". In no way does this requirement imply that residential units must be occupied by their owner. In fact, a large proportion of households both in Conway and across the United States, the occupants of residential properties do not own the unit they occupy. They "live as a household" but rent the property in which they reside. *See* Drew Desilver, As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S., PEW RESEARCH CENTER (Aug. 2, 2021), https://www.pewresearch.org/fact-tank/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/ ("Renters headed about 36% of the nation's 122.8 million households in 2019, the last year for which the Census Bureau has reliable estimates.").

In fact, the "living as a household" requirement has no connection to ***who*** is occupying a residential unit. Rather, it relates to ***how*** the occupants are using the unit. This distinction is further reinforced by the rest of the CZO's definition of "residential/dwelling units", which requires "provisions for living, sleeping, eating, cooking, and sanitation." Persons "living as a household" are provided with, and use, these facilities.

Importantly, the CZO does not define "household". The Town advocates for the insertion of a familial requirement and, in doing so, relies on a host of cases that are both irrelevant and inapposite. These cases focus

on the definition of terms other than "household". Instead, they analyze the definition of "family", *see Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886 (Pa. 2019) and *Region 10 Client Management, Inc. v. Town of Hampstead*, 120 N.H. 885, 887 (1980), or "housekeeping unit", *see White Enterprises, Inc. v. Town of Durham*, 115 N.H. 645 (1975) and *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886 (Pa. 2019). The Court's analysis must begin with the CZO's relevant definitions, and these definitions contain neither term. Simply put, the "evolution of zoning and the use of the phrase 'single housekeeping unit,'" Appellant's Brief at p. 25, or "litigation interpreting [the word 'family']", *id.*, are of no relevance to the narrow interpretative issue before this Court. Once again, the Town attempts to remove itself from the express language of the CZO due to its arbitrary distaste for Mr. Kudrick's use of his properties. The fact remains that, despite the Town's subjective views on short-term rentals and their alleged detrimental effects, the CZO plainly authorizes such use as residential.

There is no merit in the Town's argument that "the trial court's reliance on *Schack v. Prop. Owner Ass'n of Sunset Bay*, 555 S.W. 3d 339 (Tex. App. 2018) is misplaced, and its analysis converts the permissive CZO into a prohibitory ordinance." Appellant's Brief, p. 26. Contrary to the Town's allegations, the trial court used *Schack* for a single, delineated purpose: to determine the common usage of the phrase "living as a household." *See* Order on Cross Motions for Judgment on the Pleadings, App. at 139 ("Thus, the common usage of the phrase 'living as a household,' taken as a whole, means the state of living in a social unit or group of people together in the same dwelling place. Moreover, the court

finds the Texas Court of Appeals' analysis in Schack v. Prop. Owners Ass'n of Sunset Bay particularly instructive ***on this issue***.") (emphasis added).

Consistent with this Court's analysis of zoning ordinances, as applied in *Working Stiff Partners*, any term that the CZO does not define must be construed according to its common usage. In determining a term's common usage, courts use the dictionary for guidance. *Working Stiff Partners*, 172 N.H. at 617. The trial court applied this exact analytical framework, and correctly concluded that familial relationships are not an inherent component of a "household". *See* Household, Webster's Third New International Dictionary 1324 (unabridged ed. 2002) (defining "household" as "a social unit comprised of those living together in the same dwelling place"); Household, Black's Law Dictionary (11th ed. 2019) (defining "household" as "[a] group of people who dwell under the same roof."). Families, business partners, long-time friends, and complete strangers, respectively or in the aggregate, can all "live as a household". As long as they dwell or reside in the same unit, they form a social group called a "household". The identity of, and relationships between, the occupants is entirely irrelevant.

Ultimately, as the trial court recognized, "family" and "household" are two words that designate different sociological objects. *See* Order on Cross Motions for Judgment on the Pleadings, App. at 139-140. The term "family" refers to genealogical or marital links between individuals, while the term "household" refers to the presence of one or more individuals in the same physical location. A "family" is defined by its members' relationships and connections to each other. *See* Family, Black's Law

Dictionary (10th ed. 2014) (defining "family" as "[a] group of persons connected by blood, by affinity, or by law, esp[ecially] within two or three generations" or "[a] group consisting of parents and their children.") A "household", on the other hand, is defined by the physical location of one or more individuals and—within the context of the CZO—by the activities conducted in that location. By definition, a single individual cannot constitute a family. The same individual can, however, constitute a "household", as demonstrated by the commonly-used phrase "single-member household". "Household" and "family" are two distinct terms, both conceptually and practically. The use of one does not require or imply a reference to the other. In other words, the term "household" cannot impose a familial requirement, as the Town argues, because many households are not families. *See* Katharine Silbaugh, *Distinguishing Households from Families*, 43 Fordham Urb. L.J. 1071, 1084 (2016) ("Today, the U.S. Census Bureau counts a third of households as "non-family", meaning it contains no relationships by birth, marriage, or adoption.")

The term "living", which immediately precedes the term "household" in the CZO provision at issue, is defined as "having life" and "the condition of being alive or the action of a being that has life." Webster's Third New International Dictionary 1324 (unabridged ed. 2002). Within the CZO's definition of Residential/Dwelling Unit, the phrase "living as a household" requires "the nature of the use to be residential and not commercial." Order on Cross Motions for Judgment on the Pleadings, App. at 139-140. In essence, the CZO uses the phrase to require residential activities that involve the use of cooking, sleeping, and sanitation accommodations. By contrast, occupants do not "live as a household" if

they are using the unit for academic, professional, or manufacturing endeavors. They also do not "live as a household" if they use the rented premises to organize exceptional sociocultural celebrations such as weddings or religious ceremonies. Under the CZO, renting units for such activities is a commercial use. The occupants of Mr. Kudrick's units do not, and cannot, do so. Kudrick Affidavit, App. at 112, ¶ 7. They use accommodations at their disposal to conduct the same activities that they would conduct in their own homes – mainly cooking, eating, sleeping, and sanitation. As a result, their use is residential.

In no way did the trial court rely on *Schack* to inform its analytical framework. Instead, it correctly analyzed the CZO's ordinance as a permissive ordinance and, "as a first step in the application of such an ordinance, [the court] look[ed] to the list of primary uses permitted in a given district established by the ordinance." Order on Cross Motions for Judgment on the Pleadings, App. at 135. When the trial court engaged in this analysis, it determined that Mr. Kudrick's rental units fit completely within the CZO's definition of "Residential/Dwelling Unit". *Id.* at 140. Instead of construing that phrase in isolation, the trial court determined its meaning by examining the CZO as a whole and referring to other definitions within it. *Id.* at 136-37. In doing so, it methodically and correctly applied this Court's analysis in *Working Stiff Partners*.

Any argument that "living as a household" implicitly requires occupants to be part of the same "family" is unavailing. The CZO simply does not determine permitted occupancy based on familial relationships. If its drafters intended to do so, they could have easily used the term "family" instead of "household". *See Dalton Hydro, LLC v. Town of Dalton*, 153

N.H. 75, 78 (2005) ("When the language of a statute is clear on its face, its meaning is not subject to modification."); *Lally v. Flieder*, 159 N.H. 350, 352 (2009) ("We will neither consider what the legislature might have said nor add words that it did not see fit to include."). Moreover, in practice, such an interpretation would be extremely difficult—if not impossible—to implement. Unrelated individuals can, and often do, live as a functional family. Conversely, members of "traditional" or "biological" families sometimes live apart for extended periods of time with no communication. To avoid the risk of arbitrary distinctions, the CZO would need to define the term "family" meticulously. That term, however, is not even present in the definition of "residential/dwelling unit". Determining on a case-by-case basis whether a given group of persons constitutes a "family" before they can occupy a residential unit is both nonsensical and impracticable. What is more, it invites discriminatory treatment. As the trial court noted, under the Town's analysis, "a traditional family (or any group 'living as a family' according to the plaintiff) would seemingly be permitted to rent a short-term rental, but a non-traditional family or group of unrelated persons (who nonetheless form a functional family) would not." Order on Cross Motions for Judgment on the Pleadings, App. at 139, n. 4.

As the trial court correctly concluded, the phrase "'living as a household' within the CZO's definition of residential/dwelling unit does not relate to who is using the property or for how long they choose to do so, but rather requires the nature of the use to be residential and not commercial." *Id.* at 140. In fact, this distinction is best illustrated by the Rhode Island case that the Town relies upon to criticize the trial court's analysis. *Id.* at 24. In that case, the property at issue was used "for a variety

of purposes, including holding dinner parties, college friends' reunions, and the occasional small-scale backyard wedding" as well as "academic retreats" and "religious celebrations such as bar mitzvahs." *R.I. Sch. of Design v. Begin*, No. PC-2020-06584, 2021 R.I. Super. LEXIS 83, at *3-4 (Super. Ct. Nov. 12, 2021) (internal citations omitted). Moreover, occupants received a "limited license" and not a "lease". *Id.* at *5. These uses are unequivocally commercial, and not residential. Occupants in *R.I. Sch. of Design* were not living as a "household" because their use of the property was inextricably linked to a professional or academic affiliation, or to a specific sociocultural celebration.

Occupants of Mr. Kudrick's properties do not, and cannot, organize academic retreats, professional conferences, weddings, dinner parties, or other nonresidential activities. Occupants receive a lease, and not a "limited license." Kudrick Affidavit, App. at 112, ¶ 7. The lease expressly prohibits parties, late night loud noise, events, and additional guests. *Id.* Before checking out, occupants are also required to strip the sheets, start the laundry machine and dishwasher, and bring any trash to a dumpster. Affidavit of Thomas Holmes, appended websites, App. at 58; 63; 68.[4] During their stay, they live as a "household" because they conduct the same activities of daily living that they would conduct in their permanent home.

In the context of the CZO, individuals are "living as a household" if they live in the same residential unit and use the unit's accommodations for living, sleeping, eating, cooking, and sanitation. The same individuals

[4] *See, e.g.,* https://www.airbnb.com/rooms/32483394?source_impression_id=p3_1662649083_sW64kIBk4igvvcWy (navigate to "Things to know" section; click on "Show More" button under "House Rules" section). All of Mr. Kudrick's listings contain the same provisions.

would not be "living as a household" if they used the unit for storage, manufacture, research, professional conferences, or other commercial uses. The common usage of the phrase "living as a household" does not require owner-occupancy. It does not, and cannot, prohibit owners from renting units that they do not occupy. *See Schack v. Prop. Owners Ass'n of Sunset Bay*, 555 S.W.3d 339, 350 (Tex. App. 2018) (holding that a property is used for "living purposes" or "residential purposes" if the "renters continue to relax, eat, sleep, bathe, and engage in other incidental activities," and concluding that the phrase "living as a household" does not prohibit short-term rentals as long as they are not used for commercial purposes). It also does not impliedly impose a temporal requirement, nor does it require that occupants must be members of the same family.

CONCLUSION & REQUEST FOR ORAL ARGUMENT

This Court has developed an analysis to interpret municipal zoning ordinances, and to give meaning to the terms employed therein. The trial court in this case correctly and consistently applied this analysis to the CZO.

The requirement that an owner occupies his or her unit is used throughout the CZO to define several nonresidential uses. However, it is wholly absent from the definition of a residential dwelling unit. Furthermore, the CZO does not establish that occupants must use a residential unit for a specific amount of time. Finally, occupants need not share any special relationship, other than living in the same unit for any length of time, to be "living as a household".

Mr. Kudrick's rental units provide complete and independent living facilities for its occupants, who "live as a household" when they rent the same unit. Each unit is equipped with accommodations for living, sleeping, eating, cooking, and sanitation. Therefore, Mr. Kudrick's units are "residential/dwelling units" within the meaning of the CZO. This Court should affirm the trial court.

The Appellee requests oral argument, to be presented by Matthew R. Johnson, Esq.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rule 26 and the word limitation of Rule 16(11). This brief contains 5,939 words, exclusive of pages containing the cover page, table of contents, table of authorities, statutes, and rules.

CERTIFICATE OF SERVICE

Copies of the foregoing brief have been forwarded to all counsel of record via the Court's electronic filing system.

/s/ Matthew R. Johnson
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