THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2022-0098

Town of Conway
v.
Scott Kudrick

BRIEF OF *AMICUS CURIAE* NEW HAMPSHIRE ASSOCIATION OF REALTORS

IN SUPPORT OF DEFENDANT/APPELLEE SCOTT KUDRICK

RULE 7 APPEAL BY THE TOWN OF CONWAY OF FINAL DECISION OF THE CARROLL COUNTY SUPERIOR COURT

Danielle Andrews Long
(NH Bar #20447)
Robinson & Cole LLP
One Boston Place, 25th Floor
Boston, MA 01208
617-557-5934
dlong@rc.com

Timothy C. Twardowski
(*Pro Hac Vice*)
Robinson & Cole LLP
One Boston Place, 25th Floor
Boston, MA 01208
617-557-5965
ttwardowski@rc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE FACTS AND OF THE CASE

The New Hampshire Association of Realtors® (NHAR) defers to the Statement of the Facts and of the Case contained within the Brief submitted by Defendant/Appellee Scott Kudrick and relies thereon.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Founded in 1933, NHAR is a nonprofit trade organization whose primary members are licensed real estate professionals. With more than 7,000 members involved in all aspects of real estate throughout New Hampshire, NHAR's mission is to provide its members with support and resources to serve consumers in an efficient, effective and ethical manner. Since its inception, NHAR has been a leading advocate for private property rights in New Hampshire.

This case presents questions of statewide importance to NHAR's members and private property owners in New Hampshire regarding the classification and regulation of short-term rentals by zoning ordinances and the impacts of such classification and regulation on private property rights. The question whether Defendant/Appellee Scott Kudrick's short-term rentals constitute a residential use under the Conway Zoning Ordinance is of substantial importance to NHAR and its members, and to residential property owners throughout New Hampshire. The Court's decision potentially could have a significant impact on the private property rights.

NHAR's brief of *amicus curiae* supports the position of Defendant/Appellee Scott Kudrick that the Court should affirm the trial court's decision that short-term rentals fit within the definition of "residential/dwelling unit" and therefore are permitted under the Conway Zoning Ordinance.

SUMMARY OF THE ARGUMENT

The trial court correctly applied the traditional rules of statutory construction in concluding that short-term rentals fit within the Conway Zoning Ordinance's (CZO) definition of "residential/dwelling unit." By expressly prohibiting short-term rentals from accessory dwelling units and certain multifamily conversions, the CZO manifests an intent to prohibit short-term transient occupancies only from specific types of dwelling units, not from all dwelling units. Moreover, unlike the City of Portsmouth's definition of "dwelling unit," which this Court determined did not permit short-term rentals, the Town's definition of "residential/dwelling unit" does not exclude transient occupancies.

In concluding short-term rentals are a "new form of residential rental," the trial court correctly on the occupants' use of the Kudrick properties for eating, sleeping, cooking, bathing, and other residential activity. Furthermore, neither the transitory or temporary nature of short-term rentals nor the fact that the owner receives income from the use defeats its residential character.

Because private property ownership rights are fundamental rights under the New Hampshire Constitution, NHAR respectfully requests that the Court decline to interpret the CZO in a manner that would deprive homeowners of the right to rent out their property on a short-term basis by reading into the definition of "residential/dwelling unit" a duration of occupancy requirement that does not exist in the text of the CZO.

ARGUMENT

I. Short-Term Rentals Fit Within the Conway Zoning Ordinance's Definition of "Residential/Dwelling Unit."

The trial court correctly concluded that short-term rentals fit within the Conway Zoning Ordinance's definition of "residential/dwelling unit." When interpreting a zoning ordinance, the courts apply the traditional rules of statutory construction. *Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611, 615 (2019). In doing so, the courts must "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." *Id*. (citing *Town of Carroll v. Rines*, 164 N.H. 523, 526 (2013), *Severance v. Town of Epsom*, 155 N.H. 359, 361 (2007)).

A. Interpreting the Definition of "Residential/Dwelling Unit" to Exclude Short-Term Rentals Would Render Several Provisions of the Conway Zoning Ordinance Superfluous.

The Conway Zoning Ordinance (CZO) defines "residential/dwelling unit" to mean:

> 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.

Appendix to Brief of Appellant (hereinafter "Appellant App.") at 324; CZO § 190-31. Notably, the definition does not mention, much less prohibit, short-term rentals. In order to interpret the definition of "residential/ dwelling unit" as prohibiting short-term rentals, as the Town and *Amici* New Hampshire Municipal Association and New Hampshire Planning

Association (hereinafter "*Amici* NHMA & NHPA") suggest, one would have to ignore the well-established rule that the courts "determine the meaning of a zoning ordinance from its construction as a whole, not by construing isolated words or phrases." *Working Stiff Partners*, 172 N.H. at 616 (citing *Feins v. Town of Wilmot*, 154 N.H. 715, 719 (2007)).

1. The CZO Expressly Prohibits Short-Term Rentals from Specific Types of Dwelling Units, Not from All Types of "Residential/Dwelling Units."

The Permitted Use Table of the CZO identifies "Residential" as a use category that includes several specific uses, including single-family, two-family (duplex), multifamily (> 2 units), and accessory apartments. Appellant App. at 356; CZO at 190 Attachment 2.4. Because the definition of "residential/dwelling unit" does not explicitly address short-term rentals, in order to determine whether short-term rentals fit within that definition it is necessary to examine the CZO as a whole to determine whether other provisions of the CZO do address short-term rentals, and if so, how.

Remarkably, there numerous provisions of the CZO that explicitly address "short-term transient occupancies," and how they do so leads to the inevitable conclusion that short-term rentals do fit within the definition of "residential/dwelling unit." In fact, an examination of the CZO reveals several provisions that expressly prohibit "short-term transient occupancies," but only in certain types of dwelling units. Section 190-15(B)(4), for example, provides for the conversion of existing "older homes" in the Conway Village Residential District to multifamily dwellings, subject to the following restriction: "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." Appellant App. at 181; CZO § 190-15(B)(4) (emphasis added). The same ban on short-term transient occupancies in conversions of older homes is also found in the regulations of several other residential districts, including the North Conway Village Residential District (CZO § 190-16), the Residential/Agricultural District (CZO § 190-13), and the Center Conway Village Residential District (CZO § 190-14).

Several of the CZO's accessory dwelling unit regulations likewise contain an explicit ban on short-term rentals. Section 195-14(B)(4), for example, states: "Both the primary single-family dwelling and the accessory dwelling unit shall be used for long-term residency, and *short-term transient occupancy of either dwelling unit is prohibited*." Appellant App. at 165-66; CZO § 195-14(B)(4) (emphasis added).

Furthermore, the Affordable Housing Chapter of the Conway Town Code prohibits short-term rentals in compact cluster housing developments. Section 195-7 authorizes the Planning Board to grant a conditional use permit for compact cluster housing developments, subject to the following restriction: "All dwelling units shall be used for long-term residency and as primary residences, and *short-term transient occupancy of any dwelling unit is prohibited*." Conway Code § 195-7(D) (emphasis added). Although the Affordable Housing Chapter (Chapter 195 of the Town Code) is not incorporated into the CZO, the fact that Section 195-7 expressly "authorizes the Planning Board to grant a conditional use permit for compact cluster housing developments" effectively makes it part of the Town's zoning scheme.

Altogether, the Affordable Housing Chapter and the CZO contain a total of 18 provisions that prohibit short-term transient occupancies from certain types of dwelling units, namely those located in cluster housing developments (Town Code § 195-7(D)); dwelling units in multifamily dwellings created via conversion of an existing "older home" (CZO §§ 190-15(B)(4)(a)[7], 190-16(B)(4)(a)[7], 190-13(B)(4)(a)[7], 190-14(B)(4)(a)[7], 190-17(B)(4)(a)[7], 190-18(B)(4), 190-19(B)(4)(a)[7], 190-20(B)(4)(a)[7]); and accessory dwelling units (CZO §§ 190-15(B)(4)(b)[4](a)[7], 190-16(B)(4)(b)[4], 190-13(B)(4)(b)[4], 190-14(B)(4)(b)[4], 190-17(B)(4)(b)[4], 190-18(B)(4)(b)[4], 190-19(B)(4)(b)[4], 190-20(B)(4)(b)[4], 190-24(B)(4)(b)[4]).

Considered as a whole, the CZO manifests a clear intent to prohibit short-term transient occupancies only from specific types of dwelling units – namely those in cluster housing developments, multifamily dwellings created via conversion of an existing "older home," and accessory dwelling units – not from "residential/dwelling unit" generally. Stated differently, if short-term rentals were already excluded from the definition of "residential/dwelling unit," there would be no need for the Town to amend the CZO to prohibit them from cluster housing developments, multifamily conversions, or accessory dwelling units.

To interpret the definition of "residential/dwelling unit" as not including short-term transient occupancies would render superfluous the many provisions of the CZO that expressly prohibit short-term transient occupancies from specific types of dwelling units. Such an outcome is plainly contrary to the rule that the courts "must give effect to all words in a statute, and presume that the legislature did not enact superfluous or

redundant words." *State v. Thiel*, 160 N.H. 462, 465 (2010) (quotation omitted).

2. The Trial Court Appropriately Declined to Read into the Definition of "Residential/Dwelling Unit" a Durational Requirement that the Town Did Not See Fit to Include.

The trial court correctly noted that the CZO definition of "residential/dwelling unit" "makes no reference to the duration of the occupancy" and "refuse[d] to reach such a requirement into the definition." Appellant App. at 140; Order at 8. If the Town wanted to ban short-term rentals in all residential dwelling units, it could have done so by amending the definition of "residential/dwelling unit" to exclude short-term rentals, or to include a minimum duration of occupancy requirement, as it did, for example, in Section 190-15(B)(4) of the CZO (providing that "short-term transient occupancies of less than 30 consecutive days" are prohibited in multifamily conversions). Appellant App. at 181; CZO § 190-15(B)(4)(a)[7]. Instead, the Town chose to adopt a narrowly-tailored ban on short-term transient occupancies that applies only to cluster housing developments, multifamily conversions, and accessory dwelling units.

Based on the foregoing, the Court should decline to read into the definition of "residential/dwelling unit" a duration of occupancy requirement that the Town did not see fit to include. *See Town of Lincoln v. Chenard*, 174 N.H. 762, 765 (2022) (stating that the court will "will not ... add language that the legislature did not see fit to include"). The courts of other states have appropriately declined to read into the zoning definition of "residential" or an analogous term a duration of occupancy requirement

that does not exist in the zoning ordinance. *See, e.g.*, *Heef Realty & Invs., LLP v. City of Cedarburg Bd. of Appeals*, 361 Wis. 2d 185, 194 (2015) ("The words 'single-family,' 'residential' and 'dwelling' do not operate to create time restrictions that the legislative body did not choose to include in the ordinance."); *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207 (Utah Ct. App. 1998) (an ordinance that allows use of a dwelling for occupancy by single family and does not limit the use by duration of occupancy does not prohibit short-term rentals); *People v. Venice Suites, LLC*, 71 Cal. App. 5th 715, 730 (2021), *review denied* (Feb. 23, 2022) (stating that the court "may not read a minimum length of occupancy into the definition of Apartment House where one is not specified").

B. The Definition of "Multiresidential Units" Supports the Conclusion that a Short-Term Rentals are a Residential Use Under the CZO.

The argument that a temporary short-term occupancy cannot be considered a residential use is undercut by Section 190-31 of the CZO, which defines "multiresidential units" to mean:

> Units providing living quarters for two or more housekeeping units, such as, but not limited to, condominiums, clustering units, common-wall or row-type housing units, such as duplex or multihousekeeping units of the same nature, *time-share arrangements in any type of housekeeping unit*.

Appellant App. at 322-23; CZO § 190-31 (emphasis added). The CZO does not define the term "time-share arrangements," but as defined by the Condominium Act the term "time sharing interest" clearly encompasses short-term occupancies, including "vacation license[s]":

> "Time sharing interest" means the exclusive right to *occupy one or more units for less than 60 days each year* for a period of more than 5 years from the date of execution of an instrument for the disposition of such right, regardless of whether such right is accompanied by a fee simple interest or a leasehold interest, or neither of them, in a condominium unit. Time sharing interest shall include "*interval ownership interest*," "*vacation license*" or any other similar term.

RSA 356-B:3.XXVII (emphasis added). By including time sharing interests including vacation licenses in the definition of "multiresidential units," the CZO explicitly recognizes that the short-term occupancy of such units is considered a residential use. The definition of "multiresidential units" therefore further supports the conclusion that the CZO, when considered as a whole, does not categorically exclude short-term rentals from "residential/dwelling units." *Working Stiff Partners*, 172 N.H. at 616 ("[W]e determine the meaning of a zoning ordinance from its construction as a whole, not by construing isolated words or phrases.").

C. In Contrast to the Definition of "Dwelling Unit" at Issue in *Working Stiff Partners*, the CZO Definition of "Residential/Dwelling Unit" Does Not Expressly Exclude Transient Occupancies.

In *Working Stiff Partners*, the Court concluded that the use of the plaintiff's property for short-term rentals was not a "dwelling unit" as that term is defined in Portsmouth's zoning ordinance. *Working Stiff Partners*, 172 N.H. at 622. However, a key difference between Portsmouth's definition of "dwelling unit" and the Town's definition of "residential/dwelling unit" demands a different outcome in this case.

Portsmouth's zoning ordinance defines "dwelling unit" to mean:

> [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, 172 N.H. at 617 (quoting Portsmouth Zoning Ord. § 10.1530) (emphasis added). The first part of this definition closely resembles the CZO definition of "residential/dwelling unit": Both contemplate "complete independent living facilities" that include "provisions for living, sleeping, eating, cooking, and sanitation." However, the definitions differ in one important respect: Portsmouth's definition of "dwelling unit" expressly excludes "such transient occupancies as hotels, motels, rooming or boarding houses," but the Town's definition of "residential/dwelling unit" does not.

The analysis of Portsmouth's definition of "dwelling unit" in *Working Stiff Partners* focuses predominantly on the second sentence of the definition, which expressly excludes "such transient occupancies as hotels, motels, rooming houses or boarding houses," not on the first sentence, which closely resembles Conway's definition of "residential/dwelling unit." The analysis examines in great detail the meaning of virtually every word of the second sentence, including "transient," "transient occupancies," "hotel," "motel," "boarding house," and "rooming house," *id*. at 617-619, before concluding:

> Thus, when we consider the definition of "[d]welling unit" as a whole, we find that, even if a building would otherwise qualify as a "[d]welling unit" because it provides "complete independent living facilities," if the building's principal use is for "transient

> occupancies" similar to hotels, motels, rooming houses, or boarding houses, it is not being principally used as a "[d]welling unit."

Id. at 620. In contrast, the CZO definition of "residential/dwelling unit" does not exclude "transient occupancies" of any kind.

The difference between Portsmouth's definition of "dwelling unit" and the CZO definition of "residential/dwelling unit" is analogous to a key definitional difference that led to two very different outcomes in a pair of Pennsylvania short-term rental zoning cases. First, in *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board*, the Supreme Court of Pennsylvania held that the transient use of a home for short-term rentals did not constitute use as a "single-family dwelling" under the township's zoning ordinance and therefore was not a permitted use in the applicable zoning district. *See Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd*., 652 Pa. 224, 252 (2019). A year later, the Commonwealth Court of Pennsylvania reached the opposite conclusion in another short-term case, ruling that the short-term rental use of a home did conform to the definitions of "dwelling unit" and "dwelling unit; single-family detached" under the Lynn Township's zoning ordinance. *See Leinberger v. Stellar as Tr. of Deborah E. Stellar Revocable Tr.*, 240 A.3d 673 (Pa. Commw. Ct. 2020), *appeal denied*, 251 A.3d 779 (Pa. 2021).

In reaching that conclusion, the court in *Leinberger* observed that the definition of "dwelling" at issue in *Slice of Life* expressly excluded "hotel, motel, rooming houses or other tourist home," *id.* at *7, much like Portsmouth's definition of "dwelling unit" expressly excludes "such transient occupancies as hotels, motels, rooming or boarding houses." By contrast, the ordinance at issue in *Leinberger* "did not exclude from the

definition of dwelling a hotel, motel, rooming house or tourist home, which terms implicate rentals to tourists, thus, barring such use in a dwelling." *Id*. Based in part on this key difference between the definitions at issue, the *Leinberger* court held that the township's zoning ordinance did "not prohibit short-term rentals of a single-family dwelling." *Id*.

The Pennsylvania cases therefore provide a roadmap for deciding this case. The exclusion of "transient occupancies" in Portsmouth's definition of "dwelling unit," a factor that weighed heavily in the *Working Stiff Partners* analysis, is conspicuously absent in the CZO definition of "residential/dwelling unit." Therefore, the trial court was correct in concluding that short-term rentals fit within the CZO definition of "residential/dwelling unit."

II. Short-Term Rentals are a Residential Use of Property.

At the heart of this matter lies a question that state and federal courts across the country have been asked to decide with rising frequency in recent years: Are short-term rentals, sometimes referred to as "vacation rentals" or "Airbnbs," a residential use? As will be discussed below, many of the cases that have been decided to date involve the interpretation restrictive covenants, such as one that requires lots within a subdivision to be used for "residential purposes" or prevents them from being used for "business," "commercial," or "nonresidential" purposes. *See, e.g.*, *Lowden v. Bosley*, 395 Md. 58 (2006); *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash. 2d 241 (2014). Other cases, like the instant matter, arise in the context of a zoning ordinance, often from of an enforcement action notifying a homeowner that short-term rentals are not allowed in the zoning district and ordering them to cease and desist. *See, e.g*., *Working Stiff*

Partners, LLC v. City of Portsmouth, 172 N.H. 611 (2019); *Protect Our Neighborhoods v. City of Palm Springs*, 73 Cal. App. 5th 667 (2022).

A. Short-Term Rental Cases Interpreting Restrictive Covenants Requiring Real Property to be Used for "Residential" Purposes are Relevant to the Instant Case.

The Town and Amici NHMA & NHPA argue that the trial court erred in considering a restrictive covenant case, *Schack v. Property Owner's Association of Sunset Bay*, 555 S.W.3d 339 (Tex. App. Ct. 2018), in determining the meaning of the phrase "living as a household." Brief of Appellant at 26-27; Brief of Amici NHMA & NHPA at 11-12. On the contrary, the courts of other states have relied on decisions involving restrictive covenants in deciding whether a property owner's short-term rental activity conforms with the requirements of the applicable zoning ordinance.

The Texas Court of Appeals, for example, relied on the same decision cited by the trial court below, *Schack*, in determining that the meaning of the term "single-family detached dwelling" and of the phrase "living together as a single housekeeping unit interdependent upon one another" under the Grapevine's zoning ordinance had no occupancy-duration requirements and therefore did not prevent short-term rentals. *City of Grapevine v. Muns*, 2021 WL 6068952, at *10 (Tex. App. 2021) (citing *Schack*, 555 S.W.3d at 350). The Wisconsin Court of Appeals likewise cited a restrictive covenant decision by the Maryland Court of Appeals in declaring that if a municipality "is going to draw a line requiring a certain time period of occupancy in order for property to be considered a dwelling or residence, then it needs to do so by enacting clear and unambiguous

law." *Heef Realty & Invs., LLP*, 361 Wis. 2d at 194 (citing *Lowden v. Bosley*, 395 Md. 58 (2006)). Additionally, in a 2021 decision, a Connecticut superior court cited several covenant-based decisions in holding that the plaintiff's short-term rentals were a "lawful, permitted use consistent with the definitions of 'Single Family Dwelling' and 'Family'" under Branford's 1994 zoning regulations. *Wihbey v. Pine Orchard Ass'n Zoning Bd. of Appeals in Branford*, 2021 WL 5014096, at *8-*9, *11 (Conn. Super. Ct. 2021) (citing *Lowden v. Bosley*, 395 Md. 58 (2006), *Pinehaven Planning Board v. Brooks*, 138 Idaho 826 (2003)).

Based on the foregoing, the Court should not be dissuaded from considering the guidance provided by covenant-related short-term rental cases for the purpose of determining whether short-term rentals are a "residential" use of land under the CZO.

B. When People Use a Property for Ordinary Living Purposes, Such as Eating, Sleeping, and Bathing, the Use is Residential, Regardless of the Duration of the Rental Period.

In a 2017 decision, the Florida Court of Appeals, First District, observed that other state courts that had considered the specific issue before it – whether short-term rentals violate restrictive covenants requiring property to be used only for residential purposes and prohibiting its use for business purposes – had "almost uniformly held that short-term vacation rentals do not violate" such restrictive covenants. *Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord*, 219 So. 3d 111, 114 (Fla. Ct. App. 2017) (citing fifteen cases from thirteen states that determined short-term

rentals to be a residential use, compared with just two that reached the opposite conclusion). As *Santa Monica Beach* points out:

> These decisions explain that in determining whether short-term vacation rentals are residential uses of the property, the critical issue is whether the renters are using the property for ordinary living purposes such as sleeping and eating, not the duration of the rental. *See, e.g.*, *Wilkinson*, 180 Wash. 2d at 252 ("If a vacation renter uses a home 'for the purposes of eating, sleeping, and other residential purposes,' this use is residential, not commercial, no matter how short the rental duration." (quoting *Ross*, 148 Wash. App. at 50)); *Slaby*, 100 So.3d at 579 (explaining that the cabin at issue is "used for 'residential purposes' anytime it is used as a place of abode, even if the persons occupying the cabin are residing there temporarily during a vacation").

Santa Monica Beach, 219 So. 3d at 114–15.

In one of the most frequently cited short-term rental decisions, the Maryland Court of Appeals held that the owners of a vacation home did not violate a restrictive covenant requiring that lots in the subdivision be used for "single family residential purposes only" by renting their home to other families on a short-term basis. *See generally Lowden*, 395 Md. at 58. In *Lowden* the crux of the argument that short-term rentals were not allowed by the covenant was that "a homeowner's use of his or her home 'primarily to make money' by renting it does not constitute a 'residential' use, even though the tenant uses the home as a residence for a short term." *Id*. at 67-68. Notably, the Town makes the same argument in the instant case. *See* Brief of Appellant at 20.

The *Lowden* court rejected that argument, concluding that the covenant "on its face does not prohibit the short-term rental of a defendant's home to a single family which resides in the home.

Lowden, 395 Md. at 67. The court reasoned that "'[r]esidential use,' without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode," and that "[t]he transitory or temporary nature of such use does not defeat the residential status." *Id*. at 68.

Other courts have applied the same reasoning in concluding that short-term rentals are a residential use, not a business or commercial use of property. In concluding that a covenant prohibiting "commercial use" of property in a residential subdivision did not prohibit owners from renting their property on a short-term basis, the Court of Civil Appeals of Alabama, for example, declared:

> We agree ... that property is used for "residential purposes" when those occupying it do so for ordinary living purposes. Thus, so long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities, as the undisputed evidence indicates renters did in this case, they are using the cabin for residential purposes.

Slaby v. Mountain River Ests. Residential Ass'n, Inc., 100 So. 3d 569, 579 (Ala. Civ. App. 2012). *See also Ross v. Bennett*, 148 Wash. App. 40, 52 (2008) (concluding that renting a home "to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language" of a covenant requiring property to be used for "residence purposes only"); *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc*., 360 P.3d 255, 259–60 (2015) ("agree[ing] with the courts that have held that mere temporary or short-term use of a residence does not preclude that use from being "residential"); *Lake Serene Prop. Owners Ass'n Inc. v. Esplin*, 334 So. 3d 1139, 1142 (Miss. 2022) (declaring that a home that is rented out to persons who use it to eat, sleep, and bathe, "is

used as a place of abode [and] the use is considered residential no matter how short the rental period").

C. The Temporary Nature and Short Duration of a Short-Term Rental Does Not Defeat Its Residential Status.

The Maryland Court of Appeals has stated that, without more, the term "residential use," has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode. *Lowden*, 395 Md. at 68 (citing 43 A.L.R.4th 71, 76). "The transitory or temporary nature of such use does not defeat the residential status." *Id*. Other state courts have likewise ruled that the temporary nature and short duration of a rental by people who use the property for ordinary living purposes (e.g., eating, sleeping, cooking, bathing, and other residential activity) does not detract from its residential character. *See, e.g*., *Pinehaven Planning Board v. Brooks*, 138 Idaho at 830 (renting property for residential purposes, whether short- or long-term, is a residential use of property); *Slaby*, 100 So. 3d at 579 (holding that property is used for "residential purposes" when those occupying it do so for ordinary living purposes, regardless of the duration of the occupancy); *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash. 2d at 252 (stating: "If a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, this use is residential, not commercial, no matter how short the rental duration.") (internal quotation omitted); *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 360 P.3d at 259 (stating that the "mere temporary or short-term use of a residence does not preclude that use from being 'residential'"); *Lake Serene Prop. Owners Ass'n Inc. v. Esplin*, 334 So. 3d at 1142 (holding that "when the property is used as a place of abode,

the use is considered residential no matter how short the rental period"); *Estates at Desert Ridge Trails Home Owners' Association v. Vazquez*, 300 P.3d 736 (N.M. Ct. App. 2013) (stating that in the "context of a residential subdivision, we interpret a dwelling purpose to be use[d] as a house or abode, and once a proper use has been established, we do not attach any requirement of permanency or length of stay"); *JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n, Inc.*, 644 S.W.3d 179, 184 (Tex. 2022) (citation omitted) (stating that "covenants requiring 'residential use' of the property do not exclude short-term rentals absent language requiring a minimum duration for a tenant's occupancy").

As the trial court correctly pointed out, the CZO definition of "residential/dwelling unit" does not contain a duration of occupancy requirement. Like its many sister courts across the country, the Court should decline to read one into that definition. *Chenard*, 174 N.H. at 765 (stating that the court "will not consider what the legislature might have said or add language that the legislature did not see fit to include").

D. A Property Owner's Receipt of Rental Income Does Not Defeat the Residential Status of Short-Term Rentals.

The fact that Kudrick markets his property to and receives rental income from short-term renters does not detract from the residential character of the short-term rental use. In rejecting the argument that the short-term rental of a home was "not for residential purposes, but for business or commercial purposes," the Maryland Court of Appeals stated: "The fact that the owner receives rental income is not, in any way, inconsistent with the property being *used* as a residence." *Lowden*, 395 Md. at 68 (emphasis in original). The court reasoned that:

> While the owner may be receiving rental income, the use of the property is unquestionably "residential." The fact that the owner receives rental income is not, in any way, inconsistent with the property being used as a residence. The [plaintiffs], by focusing entirely upon the owner's receipt of rental income, ignore the residential use by the tenant.

Id. The court further explained:

> The owner's receipt of rental income in no way detracts from the use of the properties as residences by the tenants. There are many residential uses of property which also provide a commercial benefit to certain persons. Both in Maryland and in a great majority of other states, over 30 percent of homes are rented rather than owned by the families residing therein, thus providing much rental income to landlords.... When a property is used for a residence, there simply is no tension between such use and a commercial benefit accruing to someone else.

Id. at 69. *See also Ross v. Bennett*, 148 Wash. App. at 51 (stating: "The owner's receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant."); *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 360 P.3d at 260 (stating that the "receipt of income does not transform residential use of property into commercial use").

In contrast to these well-reasoned decisions, the Town argues that "Kudrick's use of his properties, incontrovertibly, is commercial." Brief of Appellant at 20. In support of that argument, the Town relies on the fact that Kudrick "markets his properties" and charges rates of up to $525 per night. *Id*. The fallacy of that argument, however, is laid bare when applied to long-term residential rentals. Under the Town's reasoning, a residential apartment building that is occupied by long-term tenants, or a single-family

home that is rented out on a month-to-month or an annual basis would be considered a commercial use by virtue of the fact that the property owner markets the property to prospective tenants and receives income from the property in the form of rental fees. Such an interpretation would illogical, absurd, and contrary to the "familiar principle of statutory construction that one should not construe a statute or ordinance to lead to an absurd result that the legislative body could not have intended." *Working Stiff Partners*, 172 N.H. at 620.

E. The General Court Recognizes Short-Term Rentals as a Residential Use of Property.

The General Court has declared short-term rentals to be a residential use of property. In particular, the Housing Standards Act defines "vacation rental" or "short-term rental" to mean:

> 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.

RSA 48-A:1 (emphasis added).

III. The Zoning Compliance of a Property is Properly Determined on the Basis of Its Actual Use and Occupancy.

A key characteristic of the local zoning power is the well-recognized principle is that "zoning deals with land *use*, not the owner, operator, or occupant of the land." RATHKOPF'S THE LAW OF ZONING AND PLANNING §

2:16 (4th ed.) (emphasis added). This fundamental principle is embedded in the State's zoning enabling legislation, which authorizes local legislative bodies to adopt a zoning ordinance for the purpose of regulating and restricting the "location and *use* of buildings, structures and land use for business, industrial, residential, or other purposes." RSA 674.16(d) (emphasis added); *see also Vlahos Realty Co. v. Little Boar's Head Dist.*, 101 N.H. 460, 463 (1958) (stating that "zoning conditions and restrictions are designed to regulate the land itself and its use and not the person who owns or operates the premises by whom such use is to be exercised").

Contrary to this fundamental zoning principle, the Town and Amici NHMA & NHPA argue that the trial court erred in focusing on the use of the Kudrick properties by short-term rental occupants for "living, sleeping, eating, cooking, and sanitation" (Appellant App. at 140; Order at 8). Amici NHMA & NHPA argue that:

> The court apparently believes that what matters is whether the *guests* at the properties are using them "for residential, as opposed to commercial, purposes." But regardless of what the guests are doing, the *owner* is unquestionably running a commercial business. Marketing and renting a property for one-night or one-weekend stays is a commercial use.

Brief of Amici NHMA & NHPA at 14 (emphasis in original). Similarly, the Town suggests that the trial court improperly focused "on the fact that the occupants ate and slept in the dwelling units," arguing that "it is not the occupant's activities, but rather the *owner's* use that is conclusive." Brief of Appellant at 23. Not so.

The idea that the Court should ignore the actual use of a property by its occupants and instead focus on the actions of the owner in order to

determine its zoning compliance would turn the fundamental principal that zoning regulates the "*use* of buildings, structures and land" on its head. Under reasoning espoused by the Town and Amici NHMA & NHPA, any residential rental property, including a single-family home rented out to a young family or an apartment building full of long-time tenants, would be considered a commercial use because the owner markets the property to and receives rental income from the occupants.

Based on the foregoing, the trial court was correct in focusing its analysis on the use of the Kudrick properties by the short-term rental occupants for "living, sleeping, eating, cooking, and sanitation."

IV. Interpreting the CZO to Prohibit Short-Term Rentals Would Infringe Upon the Fundamental Rights of Private Property Ownership.

Private property ownership rights are fundamental rights under the New Hampshire Constitution. *Bellevue Properties, Inc. v. 13 Green St. Properties, LLC*, 174 N.H. 513, 517 (2021) (citing *Merrill v. City of Manchester*, 124 N.H. 8, 14-15 (1983)). In the constitutional sense, the concept of "property ... is not the physical thing itself but is rather the group of rights which the owner of the thing has with respect to it." *Id*. (citation and quotation omitted); *see also State v. Boyer*, 168 N.H. 553, 562 (2016) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property.") (citation omitted). "The term refers to a person's right to possess, use, enjoy and dispose of a thing and is not limited to the thing itself." *Id*. (citation and quotation omitted).

Among the core rights that a property owner typically has, and that an owner does not expect to be deprived of by regulation, is the right to rent out their property on a temporary basis. In a 2001 decision invalidating a "no rental" condition imposed on a zoning variance, the Supreme Court of Connecticut identified the "right of rent" as one of the sticks in metaphorical bundle of property rights, stating: "[It] is undisputable that the right of property owners to rent their real estate is one of the bundle of rights that, taken together, constitute the essence of ownership of property." *Gangemi v. Zoning Bd. of Appeals of the Town of Fairfield*, 763 A.2d 1011, 1015-16 (Conn. 2001) (citing J. DUKENMINIER & J. KRIER, PROPERTY at 86 (3d ed. 1993)). Addressing the single-family home at issue in *Gangemi*, the court observed:

> Owners of a single-family residence can do one of three economically productive things with the residence: (1) live in it; (2) rent it; or (3) sell it. Thus, if the owners of a single-family residence do not choose, for reasons of family size or other valid reasons, to live in the house they own, their only viable options are to rent it or to divest themselves entirely of their ownership by selling it. Stripping the plaintiffs of essentially one-third of their bundle of economically productive rights constituting ownership is a very significant restriction on their right of ownership.

Id. at 151–52.

It is well-established that municipalities have the power to zone property for the health, safety and general welfare of the community, RSA 674:16, and that a zoning regulation "is not rendered *per se* unconstitutional because it may infringe upon a landowner's use and enjoyment of his or her property." *Town of Chesterfield v. Brooks*, 126 N.H. 64, 68 (1985) (emphasis in original). However, given the fundamental nature of private

property rights under the New Hampshire Constitution, the Court should decline to interpret the CZO in a manner that would deprive homeowners of the right to rent out their property on a short-term basis by reading into the definition of "residential/dwelling unit" a duration of occupancy requirement that does not exist in the text of the CZO.

CONCLUSION

New Hampshire Association of Realtors respectfully urges the Court to affirm the trial court's decision that short-term rentals fit within the definition of "residential/dwelling unit" and therefore are a permitted use of the Kudrick property under the CZO.

Respectfully submitted,

New Hampshire Association of Realtors,

By its Counsel,

/s/ *Danielle Andrews Long*
Danielle Andrews Long
(NH Bar #20447)
Robinson & Cole LLP
One Boston Place, 25th Floor
Boston, MA 01208
617-557-5934
dlong@rc.com

/s/ Timothy C. Twardowski
Timothy C. Twardowski
(Pro Hac Vice)
Robinson & Cole LLP
One Boston Place, 25th Floor
Boston, MA 01208
617-557-5965
ttwardowski@rc.com

Date: September 8, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to N.H. Supreme Court Rule 26(7), this Brief complies with N.H. Supreme Court Rule 26. I also hereby certify that this Brief complies with N.H. Supreme Court Rule 16(11) because it contains 6,289 words and therefore does not exceed 9,500 words, exclusive of pages containing the table of contents, tables of citations and any addendum.

/s/ Danielle Andrews Long
Danielle Andrews Long

CERTIFICATE OF SERVICE

I hereby certify that this 8th day of September, 2022 a copy of this BRIEF OF NEW HAMPSHIRE ASSOCIATION OF REALTORS as *AMICUS CURIAE* has been transmitted via the NH Supreme Court's electronic filing system to all counsel of record.

/s/ Danielle Andrews Long
Danielle Andrews Long