

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**Case No. 2022-0098**

**Town of Conway**

**v.**

**Scott Kudrick**

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**Brief of the Appellant, Town of Conway**

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## STATUTES

**RSA 676:14 Determination of Which Local Ordinance Takes Precedence.** – Whenever a local land use ordinance is enacted or a regulation is adopted which differs from the authority of an existing ordinance or other regulation, the provision which imposes the greater restriction or higher standard shall be controlling.

### CONWAY ZONING ORDINANCE PROVISIONS

#### **§ 190-5. Interpretation.**

In interpreting any provision of this chapter, it shall be held as the minimum requirement adopted for the promotion of the public health, safety, and general welfare of the Town. Whenever any provision of this chapter is at variance with any other provision of this chapter, or with the requirements of any other lawfully adopted rule or regulation, the most restrictive, or that imposing the highest standard, shall govern. [RSA 676:14] This chapter is constructed as a permissive zoning ordinance; if a use is not identified as a permitted use or a use permitted by special exception in a zoning district, then the use is not permitted in that zoning district.

#### **§ 190-13. Residential/Agricultural (RA) District.**

The RA District is primarily designed to accommodate a compatible mixture of residential and agricultural uses at lower densities of approximately one unit or less per acre. These areas are generally without municipal sewer service and are not yet appropriate for development at higher densities. Land uses permitted in this district are represented in the Permitted Use Table included as an attachment to this chapter.

#### **§ 190-14. Center Conway Village Residential (CCVR) District.**

The CCVR District is primarily designed to accommodate a compatible mixture of residential and agricultural uses at lower densities of approximately one unit or less per acre. These areas are generally without municipal sewer service and are not yet appropriate for development at higher densities. Uses permitted in this district are represented in the Permitted Use Table included as an attachment to this chapter.

**§ 190-15. Conway Village Residential (CVR) District.**

The CVR District is primarily designed to accommodate a mix of uses that complement the Village’s residential neighborhoods. This area is generally serviced by municipal water and sewer services, thereby accommodating higher densities in the order of two units to four units per acre. Domestic farm animals are specifically prohibited in this district. Land uses permitted in this district are represented in the Permitted Use Table included as an attachment to this chapter.

**§ 190-16. North Conway Village Residential (NCVR) District.**

The NCVR District is primarily designed to accommodate a mix of uses that complement the Village’s residential neighborhoods. This area is generally serviced by municipal water and sewer services, thereby accommodating higher densities in the order of two units to four units per acre. Domestic farm animals are specifically prohibited in this district. Land uses permitted in this district are represented in the Permitted Use Table included as an attachment to this chapter.

**§ 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.

### **QUESTION PRESENTED FOR REVIEW**

Whether the trial court erroneously interpreted the “permissive” Conway Zoning Ordinance to allow short-term rentals that are not owner-occupied in the residential districts. *See* Objection to Motion for Judgment on the Pleadings, Appendix (hereinafter “App.”) at 50; Cross-motion for Judgment on the Pleadings, App. at 70.

## STATEMENT OF THE CASE AND FACTS

Scott Kudrick, the defendant, resides at 500 Market Street, 11R, in Portsmouth, New Hampshire. App. at 5 (Petition for Declaratory Judgment, ¶2). In the Town of Conway, he owns six properties through various trusts all of which are offered exclusively as short-term rentals (STRs). They are offered via online marketplace websites such as Airbnb at nightly rates for as little time as a single night.<sup>1</sup>

Three of these properties are located in residential zoning districts. App. at 53 (Holmes Affidavit, ¶3), *infra* at 43. The properties located at 92 and at 94 Seavey Street are in the North Conway Village Residential District, and the property located at 180 Intervale Cross Road is in the Residential/Agricultural District. App. at 53 (Holmes Affidavit, ¶3), *infra* at 43. These Districts are “primarily designed to accommodate a compatible mixture of residential and agricultural uses at lower densities of approximately 1 unit or less per acre.” App. at 148, 164 (Conway Zoning Ordinance (hereinafter “CZO”), §§190-13 and 14). Properties operated as lodging or boarding houses and tourist homes that are not owner occupied, as well as hotels and motels, are expressly excluded from these residential zoning districts. *See* Permitted Use Table, App. at 353-57. Kudrick’s properties are not owner-occupied.

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<sup>1</sup> “[I]n reviewing the pending cross motions for judgment on the pleadings, the court must employ the same standard applicable to a motion to dismiss for failure to state a claim. This means accepting the non-moving party’s allegations as true and viewing the facts in the light most favorable to that party and granting judgment on the pleadings if the moving party is entitled to judgment as a matter of law.” App. at 134 (Order at 2) (citations omitted), *infra* at 33.

The CZO is a “permissive” ordinance, meaning that if a use is not identified as a permitted primary use, or use permitted by special exception in a zoning district, then the use is not permitted in that district. App. at 135 (Order at 3), *infra* at 34; *see also* App. at 146, 353 (CZO §190-5 and Permitted Use Table). The CZO does not expressly permit, as a primary use in residential zoning districts, commercial uses such as Airbnb, vacation rental by owner (VRBO), or similar STRs, unless owner occupied.

These new uses have proliferated recently, many being investor-owned, and the resulting disruptions in neighborhoods have become a widespread cause *celebre* within the Town. This proliferation of STRs—in large part due to the increasing popularity of platforms such as Airbnb—has resulted in “frequent and significant disturbances to residential neighborhoods in terms of excessive noise, illegal parking, disorderly conduct, and other consequences inconsistent with the normal use of a residential dwelling unit.” App. at 6 (Petition for Declaratory Judgment, ¶8).

The CZO includes the following definition of residential/dwelling unit, permitted in residential districts:

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. (emphasis added)

The ordinance also permits owner-occupied tourist homes and boarding houses in these districts as follows:

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. *Id.*

Such definitions do not include the commercial use of renting a house for short periods of time, as this is not “living as a household,” unless owner-occupied. *See Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611 (2019) and *Guzman v. City of Laconia*, Docket No. 211-2019-CV-00108 (Order issued October 29, 2019).

The Town brought this petition for declaratory judgment as a class action. The Town subsequently withdrew its motion to certify class action. Cross motions for judgment on the pleadings were filed, and the trial court entered an Order in favor of the defendant, dismissing the petition for declaratory judgment. App. at 133 (Order), *infra* at 32. This appeal followed.

## **SUMMARY OF ARGUMENT**

The Town of Conway brought this declaratory judgment petition to address a growing problem—the proliferation of STRs such as Airbnb, vacation rental by owner (VRBO), and other online marketplace websites that have disrupted life in residential districts with noise, parking, and other disturbances.

The Town sought a declaration that its zoning ordinance, an indisputably “permissive” one, did not permit such uses in the Town’s residential districts, unless owner-occupied.

The trial court ruled that the ordinance’s definition of “residential/dwelling unit” had no requirement that the occupants of an STR, who must be “living as a household,” be anything more than living human beings who cook, eat, and sleep there, even if only for a single night. Indeed, the court’s analysis gave no meaning whatsoever to the phrase “living as a household.”

The Town respectfully submits that the trial court’s mechanical interpretation is wrong, that STR guests are not “living as a household,” that Kudrick’s uses are commercial in nature—akin to a hotel suite—and that such commercial uses are prohibited in the Town’s residential districts.

This Court has plenary review of this ordinance construction issue, and ought to conclude that, in the absence of owner-occupation, such STRs are prohibited.

## ARGUMENT

### **I. Standard of Review.**

The standard of review when interpreting a zoning ordinance is *de novo*. See *Town of Lincoln v. Chenard*, 174 N.H. 762 (2022). More specifically:

The interpretation of an ordinance is a question of law, *id.*, and requires us to determine the intent of the enacting body, *Feins v. Town of Wilmot*, 154 N.H. 715, 719 (2007). We use the traditional rules of statutory construction when interpreting zoning ordinances. *Id.* We construe the words and phrases of an ordinance according to the common and approved usage of the language, *Town of Carroll v. Rines*, 164 N.H. 523, 526 (2013), but where the ordinance defines the terms in issue, those definitions will govern, *Severance v. Town of Epsom*, 155 N.H. 359, 361 (2007). Furthermore, we determine the meaning of a zoning ordinance from its construction as a whole, not by construing isolated words or phrases. *Feins*, 154 N.H. at 719. When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent. *Rines*, 164 N.H. at 526.

*Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611, 615-16 (2019). Additionally, in accordance with RSA 676:14, when there is a difference between ordinance provisions, “the provision which imposes the greater restriction or higher standard shall be controlling.”

### **II. The Conway Zoning Ordinance is a Permissive Ordinance.**

The CZO is a permissive ordinance, meaning it “prohibits all uses not expressly permitted (or permitted in limited circumstances by special exception) in any given zoning district.” App. at 135 (Order at 3), *infra* at 34; App. at 146 (CZO §190-5); see *Triesman v. Kamen*, 126 N.H. 372, 375

(1985) (“[A] permissive zoning ordinance...prohibits uses for which it does not provide permission.”); *see also* 15 Peter Loughlin, *New Hampshire Practice: Land Use Planning and Zoning* § 9.02, at 174 (2010) (explaining that under a ‘permissive’ ordinance, uses of land are generally prohibited “unless they are expressly permitted as primary uses or can be found to be accessory to a permitted use”); *Town of Lincoln v. Chenard*, 174 N.H. 762 (2022). Nothing in the CZO permits as a primary use in the residential zones STRs that are not owner occupied. App. at 353, Permitted Use Table.

Kudrick did not argue his use of the properties was accessory to a residential use. Nor does he occupy any of them as his residence. Rather he claims his primary use of the properties, *i.e.*, making them available for occupancy for a fee for as little as one night, is not commercial, but is residential under the definition of the term “residential/dwelling unit.” As explained herein, this use is not consistent with the definition in the CZO, and it is inconsistent with the ordinance as a whole.

### **III. The Permitted Use Table in the Conway Zoning Ordinance Does Not Expressly Permit In the Residential Districts As a Primary Use Short-term Rentals that are Not Owner Occupied.**

“Generally, as a first step in the application of a permissive zoning ordinance one looks to the list of primary uses permitted in a given district established by the ordinance.” *Working Stiff Partners*, 172 N.H. at 616 (quotations and brackets omitted).

The Permitted Use Table contained in the CZO identifies separately “Residential” and “Commercial” Zoning Districts. App. at 353. “Boarding



houses,” “hotels,” “motels,” “lodging houses,” “rooming houses” and “tourist homes” that are not owner-occupied are not considered “residential.” These uses are expressly excluded from the Residential Zoning Districts but permitted in the Commercial Zoning Districts. *Id.*

The common thread running through these nonresidential uses is they all contemplate the provision of lodging to paying guests on a nightly basis. *Working Stiff Partners*, 172 N.H. at 618. It is plain from the structure of the Permitted Use Table that the occupancy of a property for a short term for a nightly fee is a commercial use. *See generally Town of Lincoln v Chenard*, 174 N.H. 762 (2022) (Though term “junkyard” may be subject to multiple interpretations, context and structure of ordinance regulates them as industrial use.).

Moreover, the definition of “Transient Accommodations” identifies such units as “nonresidential.” App. at 330 (CZO Section 190-31). In contrast, single family, two-family and multifamily housing is classified as residential, and is permitted by right in the Residential Zoning Districts. *Id.* “Lodging houses” and “rooming houses” that are “owner occupied” are permitted in these districts.

Owner occupancy associated with these uses was likely critical to voters adopting this ordinance, as this requirement mitigates the frequent and significant disturbances to residential neighborhoods associated with STRs in terms of excessive noise, illegal parking, disorderly conduct, and other consequences inconsistent with residential use of a dwelling unit. Kudrick’s STRs in the Residential Zoning Districts are not owner occupied, and present the same problems the ordinance seeks to prevent. App. at 133 (Order at 1), *infra* at 32. The trial court’s Order makes no references to the

Permitted Use Table. This cuts out what is generally “a first step in the application of a permissive zoning ordinance.” See *Working Stiff Partners, supra*.

**IV. The Trial Court’s Decision Fails to Consider the Ordinance as a Whole.**

**A. Residential Dwelling Units are Not Intended for Transient Use.**

A key element informing the trial court’s decision was its conclusion that “the definition [of residential dwelling unit] makes no reference to the duration of the occupancy.” App. at 140 (Order at 8), *infra* at 39. In so doing, the court failed to “determine the meaning of the zoning ordinance from its construction as a whole, not by construing isolated words and phrases.” *Working Stiff Partners, LLC*, 172 N.H. at 615.

The definitions of hotel, motel, boarding house, rooming house, and tourist house contained in the CZO all include the word “transient.” In contrast, the word “transient” is absent from the definition of residential/dwelling unit. “The absence of such a provision is a strong indication that the legislature did not intend the same results, and we will not judicially supply this omission in the absence of a legislative intent to do so.” *Barry v. Town of Amherst*, 121 N.H. 335, 339 (1981). Yet the trial court did read into the definition of residential/dwelling unit the omitted concept of permitted transient use. Under the court’s analysis, all single family homes in the Town’s residential zoning districts are available for transient use as STRs for periods as little as one night. If the legislative body had intended that a residential/dwelling unit be a transient use, it

knew how to do so by using that word. *Town of Hudson v. Baker*, 133 N.H. 750, 752 (1990); *Allard v. Power*, 122 N.H. 27, 28 (1982) (“[I]f the legislature desires a full *de novo* hearing on appeal, it knows how to require it by using those words.”).

**B. Interpreting the Definition of Residential/Dwelling Unit to Permit Nightly Rentals in a Residential Zoning District is Inconsistent with the Conway Zoning Ordinance.**

The stated purposes of the CZO include, *inter alia*, promoting health and general welfare, lessening congestion in the streets, preventing the over-crowding of land, and avoiding undue concentration of population. App. at 145 (CZO §190-3); *see also* RSA 674:17. The CZO divides the Town into residential and commercial zoning districts to accomplish its stated purposes. In so doing it prevents the intrusion of excessive traffic and noise into residential districts. As the United States Supreme Court explained:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98 (1954) (discussing the broad concept of public welfare). The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

*Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S. Ct. 1536 (1974).

From its earliest conception, zoning has been used to separate incompatible uses, such as commercial uses in residential districts. *Village of the Euclid v. Ambler Realty Co.*, 272 US 365, 47 S. Ct. 114 (1926).

Kudrick’s use crowds the land and increases traffic within the residential zones. The properties are advertised on the Airbnb online marketplace, <https://www.airbnb.com> (previously known as [airbedandbreakfast.com](https://airbedandbreakfast.com)). The one-bedroom home at 92 Seavey Street is listed as accommodating six guests. 94 Seavey Street is a four-bedroom home listed as accommodating 14 guests, with 10 beds. The two-bedroom home at 180 Intervale Cross Road is said to accommodate six guests. As of September 2021, there were 99, 131, and 278 “reviews” of these homes respectively, *see* App. at 55-69 (Holmes Affidavit, appended websites), *infra* at 45-59, suggesting the number of guests—and commensurate level of activity and traffic—associated with these properties.

Kudrick’s use of his properties, incontrovertibly, is commercial. He markets his properties exclusively as STRs, charging nightly rates between \$125 and \$525. App. at 53-4 (Holmes Affidavit, ¶¶ 3 and 4), *infra* at 43-4. Guests “book” their visits. Rates vary according to the season. In Kudrick’s advertisements he is identified as a “host,” not a landlord, and those who book a night are “guests,” not tenants. *Id.* (appended websites). Guests “check in” and “check out.” If the price of \$525 per night were used for a long-term tenant, monthly rent would be approximately \$15,969.00—a rent term in no way consistent with residential use in New Hampshire.

STRs are required to pay the tax on meals and rooms. *See* RSA 78-A:3, VII (definition of “hotel” includes tourist and lodging homes) and RSA 78-A:3, XXIII (definition of “short-term rental” as “occupancy for tourist or transient use for less than 185 consecutive days”). RSA 78-A:4 requires STRs to have a meals and rooms license (although this section

goes on to say this is not determinative regarding local zoning compliance).

Likewise with landlord-tenant law: RSA 540-A:1-a, III defines “rental unit” as being for “nontransient residential purposes,” and RSA 540-A:1-a, IV (a, b) provides that “tenant” and “tenancy” do not include “rooming or boarding houses which are rented to transient guests for fewer than 90 consecutive days” or “rooms in hotels, motels, inns, tourist homes and other dwellings rented for recreational or vacation use.” Kudrick’s properties are not used as a home, but rather are part of the tourism industry.

As a California appellate court observed, short-term rentals of homes located in a single-family residential zoning district “undoubtedly affect the essential character of a neighborhood and stability of the community.”

*Ewing v. City of Carmel-By-The-Sea*, 286 Cal. Rptr. 382, 388 (6<sup>th</sup> Dist. 1991). Characterizing the nature of short-term rentals, the court stated:

Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally they are here today and gone tomorrow – without engaging in the sort of activities that weld and strengthen a community.

*Id.* As described by the California court, such a use is not “compatible” with residential uses. Similarly, the Massachusetts Supreme Judicial Court concluded, “[t]he plaintiff’s argument is fundamentally flawed because it fails to recognize that short-term rental use of a one-family home is inconsistent with the zoning purpose of the single-residence zoning district in which it is situated, *i.e.*, to preserve the residential character of the

neighborhood.” *Styller v Zoning Board of Appeals of Lynnfield*, 169 N.E.3d 160, 170-171 (2021) (internal citation omitted).

V. **The Commercial Use of Defendant’s Single Family Dwelling Units is Not Negated by the Presence of a Kitchen or the Activities of the Guests Occupying Them.**

The trial court concluded that “none of the defendant’s properties fall within the ordinance’s definition of transient accommodations because each have a kitchen.” App. at 141 (Order at 9), *infra* at 40. This focus on the unit caused the court to ignore the use. “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 non-residential use on the lot.” App. at 330 (CZO §190-31).

The presence of a kitchen in a dwelling unit, however, does not by itself render Kudrick’s use residential. As this Court observed in *Working Stiff Partners, LLC*, 172 N.H. at 620:

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 “completely 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.”

Under the trial court’s interpretation of the ordinance, there would be no impediment to every home with a kitchen in the Town’s residential zoning districts being used exclusively as STRs.<sup>2</sup> Such would clearly be

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<sup>2</sup> Cf. *Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611, 620-621 (N.H. 2019): “The plaintiff acknowledged to the trial court that, under

inconsistent with the intent of the CZO and the intentional establishment of residential zoning districts. An ordinance is not to be construed “to lead to an absurd result that the legislative body could not have intended.” *Id.*

Focusing on the fact the occupants ate and slept in the dwelling units, the trial court concluded the use was residential. But *Working Stiff Partners, LLC* instructs that it is not the occupant’s activities, but rather the *owner’s* use that is conclusive.

**VI. The Phrase “Living as a Household” Demands a Level of Stability in the Occupancy of a Residential Unit that is Not Satisfied by Merely Being Alive in the Same Place and Sharing a Meal.**

The trial court summarized the scope of its review as follows: “[t]o resolve the parties’ dispute, the court must determine the meaning of the phrase ‘living as a household.’” App. at 137 (Order at 5), *infra* at 36. The

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its interpretation, there would be no impediment to *every* home in the GRA district being used exclusively for short-term rentals. Were we to adopt the plaintiff’s construction of “[d]welling unit” and “use,” we fail to see how such a result could be avoided under the present ordinance. However, as noted, the stated purpose of the GRA district is “[t]o provide areas for single-family, two-family and multifamily dwellings.” Ordinance ch. 10, art. 4, § 10.410. In light of this purpose, it would seem absurd that by: (1) drafting the ordinance to exclude “such transient occupancies as” hotels and motels from the definition of “[d]welling unit”; (2) largely limiting permissible principal uses in the GRA district to dwelling units; and (3) expressly prohibiting hotels, motels, inns, boarding houses, and bed and breakfasts with more than five rooms in the district, the ordinance’s drafters intended for there to be *no* limitations on the use of homes for “transient occupancies” that are materially similar to hotels, motels, or boarding houses. *Id.* ch. 10, art. 15, § 10.1530; *see id.* ch. 10, art. 4, § 10.440.”

phrase is a term of art, but the court applied a mechanical analysis. The trial court continued, “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.” App. at 138 (Order at 6), *infra* at 37. “[T]he ordinance’s definition of residential/dwelling unit does not relate to who is using the property or for how long they chose to do so.” *Id.*

The Rhode Island Superior Court criticized this approach as follows:

The Zoning Board urges the Court to use the dictionary definitions of “living” (being alive) and “together” (in the same place) where they are not defined elsewhere. However, this argument is nonsensical. Simply because the occupiers are being alive in the same place for a brief period of time, does not mean they transform magically into a “household.” More is needed to affect this transformation.

*R.I. Sch. of Design v. Begin*, 2021 R.I.Super. LEXIS 83 (R.I. Super. Nov. 12, 2021). Instead, “[t]he term ‘household’ has been interpreted in several other contexts to require much more than merely being alive in the same place at the same time.” *Id.* (and cases cited therein).

Indeed, the Black’s Law Dictionary (11<sup>th</sup> ed. 2019) definition of “household” relied upon by the trial court (“a group of people who dwell under the same roof”), further defines “household” as “a family living together.” This supports the essential element of stability in construing the phrase “living as a household.” The trial court also failed to consider the definition of “dwell,” *i.e.*, “to reside in a place permanently or for some period.” *Id.* As the Supreme Judicial Court of Massachusetts observed:



Use of zoning regulation to foster stability and permanence is compatible with long-term property rentals because long-term inhabitants have the opportunity to “develop a sense of community and the shared commitment to the common good of that community” (citation omitted). *Slice of Life, LLC [v. Hamilton Twp. Zoning Hearing Bd.]*, 207 A.3d 886, 891 (Pa. 2019)]. Where short-term rentals are at issue, however, there is an “absence of stability and permanence of the individuals residing in those districts, [and] the goal is necessarily subverted” (quotations and citations omitted). *Id.*

*Styller v. Zoning Board of Appeals of Lynnfield*, 169 N.E. 3d 160, 171 (2021).

In *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886 (Pa. 2019), the court was called upon to “determine whether a zoning ordinance that defines ‘family’ as requiring ‘a single housekeeping unit’ permits the purely transient use of a property located in a residential zoning district.” *Id.* at 888. In order to “properly frame the matter,” the court surveyed the evolution of zoning and the use of the phrase “single housekeeping unit” in zoning ordinances. *Id.* It noted that initially the word “family” was used but undefined, leading to litigation interpreting that word. *Id.* at 889; *see e.g., White Enterprises, Inc. v. Town of Durham*, 115 N.H. 645 (1975) (construing definition of “family” and “housekeeping unit”); *see also, Region 10 Client Management, Inc. v. Town of Hampstead*, 120 N.H. 885, 887 (1980) (master erred in giving a broad definition to town’s undefined use of the word family).

This evolved to the use of the phrase “single housekeeping unit,” a “term of art” widely adopted in ordinances to define the term “family.” But this only “shift[ed] the focus of litigation” to parsing the phrase “housekeeping unit.” *Id.* at 889. “In defining ‘single housekeeping unit,’

courts adopted a definition that required the occupants of a home to live and behave in a manner like that of a family and a character that is ‘permanent...and not transitory.’” *Id.* (and cases cited therein). Rather than focus on how the occupants were related to each other, the courts engaged in a “functional analysis,” *id.* at 890, of whether “persons residing in the home function as a family and [are] sufficiently stable and permanent and not purely transient.” *Id.* at 899. The court concluded:

While this court has never before explicitly stated that transiency is incompatible with the notion of a single-family household, it is undeniable that inherent in the concept of “family” and, in turn, in the concept “single-family dwelling,” is a certain expectation of relative stability and permanence in the composition of the familial unit.

*Id.* at 891, quoting *Albert v. Zoning Hearing Bd. of N. Abington Twp.*, 854 A.2d 401, 407 (Pa. 2004).

Conversely, 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. *Schack* involved the interpretation of a restrictive covenant. “Covenants restricting the free use of land are not favored by the courts, but will be enforced if they are ‘clearly worded’ and confined to a lawful purpose.” *Id.* at 347. Finding a restrictive covenant failed to specifically address STRs, the court was unwilling “to add restrictions that the Occupancy Restriction does not state in clear wording.” *Id.* at 350 (quotations, brackets and citation excluded).

The analytical frameworks for interpreting a zoning ordinance and restrictive covenant are entirely different:

The LSPOA contends that this Court should side with the Supreme Courts of Pennsylvania and New Hampshire that found that short-term rentals are considered “transient use” of property not residential in nature. *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886, 903 (Pa. 2019); *Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611 (N.H. 2019). *But we observe that these cases involve zoning ordinances rather than restrictive covenants.*

*Lake Serene Prop. Owners Ass’n v. Esplin*, 334 So. 3d 1139, 1142-43 (2022) (emphasis added). Thus, instead of requiring Kudrick to identify where in the CZO his STRs are permitted as a primary use, as required in analyzing a permissive ordinance, the trial court looked to see where they were prohibited, in a manner consistent with construing a restrictive covenant.

To the extent that the trial court may have reviewed the CZO as a permissive ordinance, the court’s analysis did not sustainably apply the permissive ordinance standard. Judicial review is not employed as a mechanism to fit a particular use into an existing definition, but rather to identify in the applicable ordinance whether the use is specifically permitted as a primary use. *Cf. Town of Lincoln v. Chenard, supra* (explaining import of a permissive zoning ordinance).

Texas courts<sup>3</sup> have rejected the thesis that “living as a household” or as a “single housekeeping unit” implies any suggestion of stability in the living arrangement, instead finding that any number of people occupying a dwelling unit for as little as one night satisfies the definition. *See City of Grapevine v Muns*, 2021 Tex. App. LEXIS 10133\*24 (Tex.App. 2021). In

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<sup>3</sup> In Texas, unlike here in New Hampshire, land use ordinances are “strictly construed against the municipality and in the landowner’s favor.” *City of Grapevine v Muns*, 2021 Tex. App. LEXIS 10133\* 22 (Tex.App. 2021)

New Hampshire, the Court has required more. *White Enterprises, Inc. v. Town of Durham*, 115 N.H. 645 (1975) (construing definition of “family” and “housekeeping unit”); *see also, Region 10 Client Management, Inc. v. Town of Hampstead*, 120 N.H. 885, 887 (1980) (master erred in giving a broad definition to town’s undefined use of the word family). This Court’s analysis in *Working Stiff Partners, LLC* requires more.

Finally, a cardinal rule of statutory construction applicable to zoning ordinances requires that every word be given meaning. *See, Marcotte v. Timberlane/Hampstead School Dist.*, 143 N.H. 331, 339 (1999) (“The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.”). *See also, Town of Londonderry v. Faucher*, 112 N.H. 454, 456-7 (1972).

If the trial court’s analysis of the definition of “residential/dwelling unit” is correct, such that the term means nothing more than a single unit where one or more persons are alive under the same roof (with a kitchen), then there would be no reason to include the words “living as a household.” Put another way, the trial court’s analysis renders the words “living as a household” mere surplusage. This conclusion is confirmed by removing the words “living as a household” from the definition, to then find that the resulting definition<sup>4</sup> of “residential/dwelling unit” presents no practical difference from how the trial court analyzed the term.

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<sup>4</sup> The definition of “residential/dwelling unit” if the words “living as a household” are removed becomes: “A single unit providing complete and independent living facilities for one or more persons, including provisions for living, sleeping, eating, cooking, and sanitation.”

## **CONCLUSION**

The Town of Conway respectfully submits that the trial court has misinterpreted and misapplied the Conway Zoning Ordinance in granting Scott Kudrick's motion for judgment on the pleadings.

Use of the interpretive construct adopted by this Court with respect to a permissive zoning ordinance leads to the conclusion that the short-term rentals as operated by Mr. Kudrick, *i.e.*, nightly rentals of buildings that he does not occupy, are not permitted in the residential districts.

Accordingly, the decision of the trial court should be reversed, and judgment entered in favor of the Town.

**REQUEST FOR ORAL ARGUMENT**

The Town of Conway requests oral argument and designates Russell F. Hilliard, Esq. to be heard.

**CERTIFICATION OF COMPLIANCE WITH WORD LIMIT**

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 5,019, excluding the cover page, table of contents, table of authorities, statues, rules, and appendix.

**CERTIFICATION PURSUANT TO RULE 16(3)(i)**

I hereby certify that a copy of the appealed decision has been appended to this brief beginning at 32.

Respectfully submitted,

**The Town of Conway,**

By its Counsel,

**UPTON & HATFIELD, LLP**

Date: July 25, 2022

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was this day forwarded through the Court's electronic filing system to all counsel of record.

/s/ Russell F. Hilliard  
Russell F. Hilliard

THE STATE OF NEW HAMPSHIRE

CARROLL, SS.

SUPERIOR COURT

Town of Conway, New Hampshire

v.

Scott Kudrick

Docket No. 212-2021-CV-00074

**ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, the Town of Conway (the “Town”), brings this civil action against the defendant, Scott Kudrick, seeking an order declaring that the Conway Zoning Ordinance (the “Ordinance”) does not permit short term rentals in residential districts that are not owner-occupied. (Count index #1.) The defendant now moves for judgment on the pleadings. (Court index #11.) In turn, the plaintiff cross moves for judgment on the pleadings, (court index #13), to which the defendant objects (court index #17). The court held a hearing on November 26, 2021. For the reasons that follow, the defendant’s motion for judgment on the pleadings is **GRANTED**.

Factual Background

The record reflects the following undisputed facts. The defendant is the owner of several residential properties in Conway that he does not occupy but rather rents out on a short-term basis. (See Compl. ¶ 2; Def.’s Mot. ¶ 3.) The plaintiff contends that the proliferation of short-term rentals within the Town—in large part due to the increasing popularity of platforms such as Airbnb—has resulted in “frequent and significant disturbances to residential neighborhoods in terms of excessive noise, illegal parking, disorderly conduct, and other consequences inconsistent with the normal use of a residential dwelling unit.” (See *id.* ¶ 8.) In an attempt to



address these concerns, the Town notified “all owners and operators” of short-term rentals in the Town’s residential districts that, in its view, such activity is not permitted by the Ordinance. (Id. ¶¶ 9–10.) This action followed in which the plaintiff seeks a declaratory judgment finding the Ordinance does not permit such short-term rentals in residential districts unless they are owner-occupied. (See id. ¶¶ 6, 8, 11, Prayer B.)

### Legal Standard

“In general, a motion seeking judgment based solely on the pleadings is in the nature of a motion to dismiss for failure to state a claim upon which relief may be granted.” Sivalingam v. Newton, \_\_ N.H. \_\_, No. 2020-0216 (slip. op. at 3–4) (Oct. 5, 2021); LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 93 (2007). Therefore, in reviewing the pending cross motions for judgment on the pleadings, the court must employ the same standard applicable to a motion to dismiss for failure to state a claim. See Sivalingam, No. 2020-0216 (slip. op. 4). This means accepting the non-moving party’s allegations as true and viewing the facts in the light most favorable to that party and granting judgment on the pleadings if the moving party is entitled to judgment as a matter of law. See id. In doing so, the Court may “consider documents attached to the plaintiff’s pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint.” Id.

### Analysis

The defendant now moves for judgment on the pleadings, seeking a ruling “that the short-term rental of residential properties in [the Town] do not need to be owner-occupied.” (Def.’s Mot. ¶ 2; Prayer B (seeking a ruling “that in [the Town’s] residential districts, residential units that have their own cooking or kitchen facilities do not need to be owner-occupied.”).) For its part, the plaintiff cross moves for judgment on the pleadings, seeking a ruling that the Ordinance

“does not permit short term rentals that are not owner-occupied in the residential districts.” (See generally Pl.’s Cross Mot.)

“The interpretation of an ordinance is a question of law, and requires [the court] to determine the intent of the enacting body.” Working Stiff Partners, LLC v. City of Portsmouth, 172 N.H. 611, 615 (2019) (citations omitted). The court applies “the traditional rules of statutory construction when interpreting zoning ordinances.” Id. To that end, the court “construe[s] 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. at 615–16 (citations omitted). “Furthermore, [the court] determine[s] the meaning of a zoning ordinance from its construction as a whole, not by construing isolated words or phrases.” Id. “When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent.” Id.

The Ordinance establishes a “permissive” zoning scheme intended to prohibit all uses not expressly permitted (or permitted in limited circumstances by special exception) in any given zoning district. (See Pl.’s Cross Mot. ¶ 1 (“This chapter is constructed as a permissive zoning ordinance; if a use is not identified as a permitted use or a use permitted by special exception in a zoning district, then the use is not permitted in that zoning district.”).)<sup>1</sup> “Generally, as a first step in the application of such an ordinance, [the court] looks to the list of primary uses permitted in a given district established by the ordinance.” See Working Stiff Partners, 172 N.H. at 616 (quotations and brackets omitted).

The Ordinance establishes four residential districts: (1) Residential/Agricultural District (“RA District”); (2) Center Conway Village Residential District (“CCVR District”); (3) Conway

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<sup>1</sup> Because neither party disputes the authenticity of the portions of the Ordinance cited in the others’ pleadings, the court will substantively consider them in its analysis. See Sivalingam, No. 2020-0216 (slip. op. 4).

Village Residential District (“CVR District”); and North Conway Village Residential District (“NCVR District”). (Pl.’s Cross Mot. ¶ 3; see Pl.’s Attch. 2; Def.’s Ex. 1.) Section 190-31 of the Ordinance defines “RESIDENTIAL/DWELLING UNIT” as 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.” (Def.’s Mot. ¶ 13; Pl.’s Cross Mot. 5; see Def.’s Ex. 2.) In the four residential districts, single-family, two-family, and multifamily units are freely permitted. (See Pl.’s Attch. 2; Def.’s Ex. 1.)

Boardinghouses, lodging houses, rooming houses, and tourist houses, on the other hand, are only permitted if they are owner-occupied. (See Pl.’s Attch. 2; Def.’s Ex. 1.)<sup>2</sup> The Ordinance defines “OWNER-OCCUPIED LODGING HOUSE AND/OR OWNER-OCCUPIED BOARDINGHOUSE” as:

Any place consisting of a room or a 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.

(Pl.’s Cross Mot. ¶ 6; Def.’s Mot. ¶ 9; see Def.’s Ex. 2.) A “OWNER-OCCUPIED TOURIST HOME AND/OR OWNER-OCCUPIED ROOMING HOUSE” is defined as:

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.

(Pl.’s Cross Mot. ¶ 6; Def.’s Mot. ¶ 10; see Def.’s Ex. 2.) In turn, the Ordinance defines “TRANSIENT ACCOMMODATIONS” as “[l]iving quarters which do not have a kitchen as

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<sup>2</sup> Likewise, bed-and-breakfast units are permitted in residential districts if it is also “the full-time, permanent residence of its owner” and has “no provisions for cooking in any individual guest room.” Pl.’s Cross Mot. ¶ 6; Def.’s Mot. ¶ 11; see Def.’s Ex. 2. Hotels and motels are not permitted in residential districts. See Pl.’s Attch. 2; Def.’s Ex. 1.

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.” (See Def.’s Ex. 2.)

The 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. (See Pl.’s Cross Mot. ¶¶ 5–6; Def.’s Mot. ¶ 9–10, 13; see also Def.’s Ex. 2.) Therefore, this matter turns on 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, rooming house, or tourist house (which would require them to be owner-occupied in residential districts).<sup>3</sup>

The defendant focuses much of his argument on the issues of “cooking” and “eating,” submitting that “residential units that have their own cooking or kitchen facilities do not need to be owner-occupied.” (Def.’s Mot. ¶¶ 15–17.) In support of this argument, he contends that residential/dwelling units have “provisions for living, sleeping, eating, cooking, and sanitation,” whereas boardinghouses, lodging houses, rooming houses, and tourist houses “do not have provisions or accommodations for persons residing therein to cook their own meals.” (Id.; Def.’s Obj. ¶ 17 (noting that “the central distinction between [the defendant’s] properties (which contain residential/dwelling units) and lodging houses, tourists homes and the like (nonresidential uses) which require owner occupancy” is “that [the defendant’s] living units each

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<sup>3</sup> The plaintiff contends that “[r]esidential is not itself defined in the [Ordinance].” (Pl.’s Mot. ¶ 5.) To that end, it points the court to Town of Barrington v. Townsend to stand for the proposition that the relevant definitions of “residence” are “the place where one actually lives or has his home as distinguished from his technical domicile” and “a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit.” (Id. (citing 164 N.H. 241, 246 (2012)). The court disagrees. Unlike in Town of Barrington where no definition of residential was provided, see 164 N.H. at 246, the Ordinance does provide a definition for a residential/dwelling unit, (Def.’s Mot. ¶ 13; Pl.’s Cross Mot. 5; see Def.’s Ex. 2.) The court must apply the Ordinance’s definition. See Working Stiff Partners, 172 N.H. at 616 (noting that “where the ordinance defines the terms in issue, those definitions will govern.”).

have their own separate cooking and/or kitchen facilities while the other, nonresidential uses do not.”) Thus, the defendant argues he is entitled to judgment on the pleadings because his short-term rentals have accommodations for cooking and eating.

The plaintiff seemingly does not dispute that the defendant’s properties “include[e] provisions for living, sleeping, eating, cooking, and sanitation.” (See generally Pl.’s Cross. Mot.; Pl.’s Reply.) Instead, the plaintiff makes much of the fact “that the defendant’s properties are available for rent for as short a period as one day.” (Pl.’s Cross Mot. ¶ 10; Pl.’s Reply ¶ 2.) This “transient” use, it argues, “distinguishes [the defendant’s properties] from the definition of a residential dwelling unit,” i.e. “living as a household.” (Pl.’s Cross Mot. ¶ 10.) In further support of this argument, the plaintiff argues that the Supreme Court’s analysis of the Portsmouth Zoning Ordinance in Working Stiff Partners is helpful in distinguishing transient occupants from households and supports its overall “interpretation of [the Ordinance] with respect to the prohibition of short term rentals in residential districts.” (Id. ¶ 9.)

In response to that argument, the defendant contends that “[l]iving as a household does not in any way suggest or imply that the person occupying the residence be its owner,” but rather “relates to **how** persons living in a residential unit occupy the premises . . . .” (Def.’s Mot. ¶¶ 19–21; Def.’s Obj. ¶¶ 27–28.) On that point, the plaintiff retorts that “who” the occupants are does matter because the “common and approved usage” of the term “household” requires the occupants to be “living as a family.” (Pl.’s Reply ¶ 3.) To resolve the parties’ dispute, the court must determine the meaning of the phrase “living as a household.” (Compare Def.’s Mot. ¶¶ 19–21; Def.’s Obj. ¶¶ 27–28 with Pl.’s Reply ¶ 3.) “When a [phrase] is not defined in a statute or ordinance, [the court] look[s] to its common usage, using the dictionary for guidance.” See Working Stiff Partners, 172 N.H. at 617.

Webster’s Third New International Dictionary defines “living” 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). Webster’s further defines “household” as “a social unit comprised of those living together in the same dwelling place.” Id. at 1096; see Household, Black’s Law Dictionary (11th ed. 2019) (defining “household” as “[a] group of people who dwell under the same roof.”). 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.<sup>4</sup> 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. See 555 S.W.3d 339, 350 (Tex. App. 2018). The Schack court equated the word “living” in the phrase “living as a household unit” to the phrase “residential purposes.” Id. Importantly, the Schack court found that a property is used for “living purposes” or “residential purposes” so long as the “renters continue to relax, eat, sleep, bathe, and engage in other incidental activities.” Id. To that end, the Schack court concluded that the phrase “living as a household unit” did not “prohibit short-term rentals,” so long as the rental is used for “living purposes” or “residential purposes” and not “commercial purposes.” Id.

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<sup>4</sup> The court rejects the plaintiff’s antiquated definition of “household” as requiring the occupants to be “living as a family.” See Katharine Silbaugh, Distinguishing Households from Families, 43 Fordham Urb. L.J. 1071, 1105 (2016). The definition of residential/dwelling unit requires that only that “one or more persons” live as a “household,” not as a family. See Def.’s Mot. ¶ 13; Pl.’s Cross Mot. 5. If the drafters of the Ordinance sought to draw permitted occupancy lines based on familial relationships they could have done so, see, e.g., Town of Durham v. White Enterprises, Inc., 115 N.H. 645, 649 (1975) (citing Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)), but choose not to, see N.H. Ctr. for Pub. Int. Journalism v. N.H. Dep’t of Just., 173 N.H. 648, 652 (2020) (noting that court’s “will neither consider what the legislature might have said nor add words that it did not see fit to include.”). Moreover, the plaintiff’s definition creates a practical problem in the application of the Ordinance: 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.

In short, the phrase “living as a household” within the Ordinance’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. The fact that the defendant may rent his properties to families or groups of unrelated persons makes no difference so long as the use is residential. Likewise, the fact that the defendant may rent his properties for one-day (or one-week or one-year) makes no difference so long as the use is residential. The Ordinance’s definition of residential/dwelling unit does not draw a distinction along durational or familial lines—as the plaintiff contends—but rather the nature of the use (i.e., residential purposes). See Def.’s Mot. ¶ 13; Pl.’s Cross Mot. 5 (defining residential/dwelling unit as 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.”)

With that framework in mind, the court concludes the defendant’s properties meet the Ordinance’s definition of residential/dwelling unit. First, they possess “complete and independent living facilities . . . including provisions for living, sleeping, eating, cooking, and sanitation.” (See Def.’s Obj. ¶ 4, 25.) Second, they are intended to be used (rented) by “one or more persons living as a household,” i.e., by a group of people living together in the same dwelling place for residential, as opposed to commercial, purposes. See Schack, 555 S.W.3d at 350. Importantly, the definition makes no reference to the duration of the occupancy and the court refuses to read such a requirement into the definition here. See N.H. Ctr. for Pub. Int. Journalism v. N.H. Dep’t of Just., 173 N.H. 648, 652 (2020) (noting that court’s “will neither consider what the legislature might have said nor add words that it did not see fit to include.”).<sup>5</sup>

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<sup>5</sup> The plaintiff suggests that such an expansive definition of residential/dwelling unit would also permit hotels and motels that provide cooking facilities in each room in residential districts. (See Pl.’s Cross Mot. ¶ 10; Pl.’s Reply ¶

Lastly, the court will address how the Supreme Court’s decision in Working Stiff Partners relates to the instant action. In that case, the Supreme Court addressed a similar issue arising in Portsmouth related to proliferation of short-term rentals within the city. Working Stiff Partners, 172 N.H. at 614–15 (brackets omitted). Importantly, the Portsmouth Zoning Ordinance’s definition of “dwelling unit” expressly excludes “transient occupancies.” Id. at 620 (brackets omitted). However, the Portsmouth Ordinance did not define “transient” or the phrase “transient occupancies.” Id. at 617. Therefore, the Supreme Court applied the common usage of the term, based its dictionary definition. See id. (noting that these “definitions suggest[ed] that short or brief stays at the property constitute ‘transient occupancies,’ and further suggest that, insofar as the plaintiff is using the property for rentals as short as one day, the plaintiff is not using the property as a ‘dwelling unit.’” (brackets omitted)). Thus, the Supreme Court concluded that the “definition’s use of ‘transient’ addresses the duration of the occupancy rather than the permanence of the occupancy.” Id. at 621. Ultimately, the Supreme Court determined that “the plaintiff’s use of the property, i.e., providing short-term rentals to paying guests on a daily basis, [was] not a ‘dwelling unit’ use as that phrase is defined in the ordinance.” Id. (brackets omitted).

The court, however, finds the facts of Working Stiff Partners sufficiently distinguishable from the instant action. Unlike the Portsmouth Ordinance, the Ordinance does define the phrase “TRANSIENT ACCOMMODATIONS” as “[l]iving quarters which do not have a kitchen as defined in ‘residential unit.’” (See Def.’s Obj. ¶ 25; Def.’s Ex. 2.) Therefore, the Supreme Court’s definition of “transient” is immaterial because the court must apply the Ordinance’s

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5.) This contention, however, is squarely rejected by the Ordinance. The Ordinance, by its express terms, does not permit hotels and motels in residential districts. (See Pl.’s Atch. 2; Def.’s Ex. 1.) Moreover, it still requires other uses, such as boardinghouses, lodging houses, rooming houses, and tourist houses, to be owner-occupied in residential districts. (See Pl.’s Atch. 2; Def.’s Ex. 1.)



definition of transient accommodations. See Working Stiff Partners, 172 N.H. at 616 (noting that “where the ordinance defines the terms in issue, those definitions will govern.”). Here, none of the defendant’s properties fall within the Ordinance’s definition of transient accommodations because they each have a kitchen. (See Def.’s Obj. ¶ 25.) For that reason, the Working Stiff Partners case is inapplicable to the instant action.<sup>6</sup>

With the advent of the “sharing economy,” platforms such as Airbnb have become an increasingly popular way to secure short-term rentals. Such platforms have greatly expanded the possible uses of single-family housing. These short-term rentals can provide a cost-effective option for travelers and supplemental income for homeowners. They are, however, subject to lesser regulation than commercial rental properties and their widespread use raises concerns among some regarding safety and municipal oversight. In a number of cases the behavior of particular tenants rather than the use of the property for short-term rentals itself appears to be a driving concern. Many municipal zoning ordinances, however, were written before anyone contemplated such platforms, and the ordinances are not well structured to address these new possibilities. In this county and elsewhere in the State there are similar cases, brought by municipal authorities who oppose such rentals or homeowners who want to use their property in this way. The court’s rulings often depend on the particular language of a municipality’s ordinance, as is evident by the careful attention to the definitions in Conway compared to those

---

<sup>6</sup> The plaintiff’s contention that Working Stiff Partners is still useful because it stands for the proposition that short-term rentals and hotels, motel, and the like share the “unifying feature” that each is a “short-term lodging accommodation[] to paying guests for as little as one day,” (see Pl.’s Cross. Mot. ¶ 10; Pl.’s Reply ¶ 2), is equally unavailing. As noted above, the Portsmouth Ordinance’s definition of dwelling unit’s express exclusion of “transient accommodations,” instilled a durational requirement. See Working Stiff Partners, 172 N.H. at 621. In fact, the Supreme Court specifically noted that when considering the definition of “dwelling unit” as a whole, “even if a building would otherwise qualify as a ‘dwelling 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 ‘dwelling unit.’” Id. at 620 (brackets omitted). However, the Ordinance contains no such mention of “transient” or any durational requirements, it only requires that the use be residential.

adopted in Portsmouth. For the general public, individual homeowners, and even municipalities, the results may seem baffling – they want to know if short term rentals are allowed in New Hampshire. The answer, unfortunately, is “it depends” based on the specific language of each municipality’s ordinance. As the undersigned has said to litigants in this and other short-term rental cases, it is a question that cries out for legislative direction, based on statewide policies promoting commerce, competition, regulatory control, and municipal oversight. Until such a legislative policy determination is made, or until municipalities adopt new ordinances that clearly address this new form of residential rental, the Court will make decisions based on the language of the ordinances in effect, even if the results vary from one municipality to the next.

The court must apply the terms of the Ordinance as written, see Working Stiff Partners, 172 N.H. at 616, and not rely on uncodified interests of the Town as to what new uses should be prohibited. As outlined above, short-term rentals fit within the Conway Ordinance’s definition of residential/dwelling unit and, thus, need not be owner-occupied in residential districts. Because short-term rentals are residential/dwelling units that need not be owner-occupied, the defendant is entitled to judgment as a matter of law. See Sivalingam, No. 2020-0216 (slip. op. 4).

### Conclusion

For the foregoing reasons, the defendant’s motion for judgment on the pleadings is **GRANTED**; and the plaintiff’s cross motion for judgment on the pleadings is **DENIED**.

SO ORDERED.

Date: January 25, 2022



---

Amy L. Ignatius  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 01/25/2022

STATE OF NEW HAMPSHIRE

CARROLL COUNTY

SUPERIOR COURT

#212-2021-cv-00074

Town of Conway, New Hampshire

v.

Scott Kudrick, Individually and as  
Representative of a Class of Similarly Situated Defendants

**AFFIDAVIT OF THOMAS HOLMES**

Thomas Holmes, having been duly sworn, hereby deposes and says:

1. I am the Town Manager for the Town of Conway, and have personal knowledge of the facts set forth in this affidavit.

2. The complete and current Conway Zoning Ordinance is found at <https://ecode360.com/29477326>.

3. Scott Kudrick is the owner, through various trusts, of the following properties in Conway, located in the indicated residential zoning district:

- a. 180 Intervale Crossroads  
Map 202-48 Zone: RA One Unit  
180 Intervale Realty Trust, Scott Kudrick, Trustee  
500 Market Street, 11R, Portsmouth, NH 03801
- b. 92 Seavey Street  
Map 219-68 Zone: VR Two Units  
92 Seavey Realty Trust, Scott Kudrick, Trustee  
500 Market Street, 11R, Portsmouth, NH 03801
- c. 94 Seavey Street  
Map 219-69 Zone VR One Unit  
92 Seavey Realty Trust, Scott Kudrick, Trustee  
500 Market Street, 11R, Portsmouth, NH 03801

92 and 94 Seavey Street are owned by the same Trust. One is a two family and the other a single.

4. Each of these properties is marketed and reserved for rental through websites, screenshots of which are appended to the affidavit.

Subscribed and sworn to under the pains and penalties of perjury this 7th day of September, 2021.

/s/ Thomas Holmes  
Thomas Holmes



Start your search

Become a host



# The Overlook/Cozy 2 bed/Hot Tub/Wood Stove/Firepit

★ 4.86 · 278 reviews · 📍 Carroll County, New Hampshire, United States · 🏠 6 guests · 2 bedrooms · 3 beds · 2 baths

📌 Share 📖 Save



## Meet your Host, Scott

Superhost · Hosting since October 2015

\$186 / night

★ 4.86 (278 reviews)

CHECK-IN Add date	CHECKOUT Add date
GUESTS 1 guest	

Check availability

🚩 Report this listing

### Why you'll love it here



#### Scott is a Superhost

Superhosts are experienced, highly rated hosts who are committed to providing great stays for guests.



#### Great location

90% of recent guests gave the location a 5-star rating.



#### Great check-in experience

90% of recent guests gave the check-in process a 5-star rating.

### Good to know

Entire cabin to yourself

Self check-in



Committed to Enhanced Clean

### All about Scott's place











Great location! .5 mile to scenic overlook! Central to all attractions, private yard, fire pit, wood stove, out door space, hot tub, new furniture, cozy mattresses & linens. Walk to ice cream & scenic overlook, less than 5 mins to Saco river path, Golf, North Conway Village,

Whitaker Woods, scenic train station, coffee shops, shopping, skating, nightlife, restaurants, kayaking, skiing, adventure parks, sleigh rides (discounts available), skiing, storyland hiking, Outlets snowshoeing, etc. m  
[Show more](#) >

**Where you'll sleep**

 <p><b>Bedroom 1</b> 1 king bed, 1 single bed, 1 air mattress</p>	 <p><b>Bedroom 2</b> 1 queen bed</p>
--	---

**What this place offers**

-  Kitchen
-  Wifi
-  Free parking on premises
-  Hot tub
-  Pets allowed
-  TV with standard cable
-  Washer
-  Dryer
-  Air conditioning
-  Security cameras on property

[Show all 58 amenities](#)

**Select check-in date**  
**Add your travel dates for exact pricing**

August 2021							September 2021						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7				1	2	3	4
8	9	10	11	12	13	14	5	6	7	8	9	10	11
15	16	17	18	19	20	21	12	13	14	15	16	17	18
22	23	24	25	26	27	28	19	20	21	22	23	24	25
29	30	31					26	27	28	29	30		

 [Clear dates](#)

★ **4.86 · 278 reviews**

Cleanliness	4.8	Accuracy	4.9
Communication	4.9	Location	4.9

**Ashlyn**  
**August 2021**

Scott was very responsive to our questions

**Dorian**  
**August 2021**

Scott was a great host to have! Very responsive during the renting period! The house was very clean and a great spot to stay in.

**Christine**  
**August 2021**

This place is all it is advertised to be and then some. The house was clean and welcoming, set in a quiet neighborhood. When we needed to reach the host he responded in a timely manner. We would definitely book this house again and recommend it to our friends.

[Show more >](#)

**Tim**  
**July 2021**

Amazing place, beautiful design elements, incredibly close to everything and anything to do in the area, amazing fire pit, seating area, and hot tub, everything was incredibly clean and fresh, 10 for 10 would recommend and will be back for future stays

[Show more >](#)

**Julia**  
**July 2021**

It's a well equipped house and very convenient to everywhere. And it's a sweet and wonderful living place for 3-4 people family. We had a nice night experience here. I believe we must go back again.

[Show more >](#)

**Laura**  
**July 2021**

We really enjoyed staying here and it's a beautiful space. There are a lot of rules so come prepared to follow them - maybe not a good place for a large group/party group.

**Show all 278 reviews**

---

**Where you'll be**





Carroll County, New Hampshire, United States

Intervale is centrally located to all attraction in the heart of Mt Washington valley. 5 minutes to village shop, stores, story land, restaurants, ice cream, the river, golf, skiing, hiking, and less than 10 minutes to jackson center

[Show more >](#)

### Meet your Host, Scott

Hosting since October 2015

  3,333 Reviews  Identity verified  Superhost

We enjoy renovating Real Estate and sharing them with our guests. Our places our carefully renovated and outfitted to provide a memorable and enjoyable experience during your ...

[Show more >](#)

#### Scott is a Superhost


Superhosts are experienced, highly rated hosts who are committed to providing great stays for guests.

#### How you'll be hosted

Surveillance Camera's of the exterior entrances







Scott usually responds within an hour.

[Ask Scott a question](#)

 **To protect your payment, never transfer money or communicate outside of the Airbnb website or app.**






#### Things to know

##### House rules

-  Check-in: 4:00 PM - 1:00 AM
-  Checkout: 11:00 AM
-  Self check-in with keypad
-  No smoking
-  No parties or events
-  Pets are allowed

[Show more >](#)

##### Health & safety

-  Committed to Airbnb's enhanced cleaning process. [Show more](#)
-  Airbnb's social-distancing and other COVID-19-related guidelines apply
-  Security camera/recording device [Show more](#)
-  Carbon monoxide alarm
-  Smoke alarm

[Show more >](#)

##### Cancellation policy

Add your trip dates to get the cancellation details for this stay.

[Add dates >](#)

#### Explore other options in and around Carroll County

More places to stay in Carroll County:

Apartments · Houses · Bed and breakfasts · Lofts · Villas

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Lake Winnepesaukee

Stowe

Ottawa

The Hamptons

Montreal

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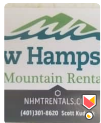
Become a host



## Otter Ski Club in Village Cozy 1 Bedroom- Hot Tub

★ 4.93 · 99 reviews · 📍 Conway, New Hampshire, United States · 🏠 4 guests · 1 bedroom · 1 bed · 1 bath

📌 Share 📖 Save



### Meet your Host, Scott

Superhost · Hosting since October 2015

#### Why you'll love it here



##### Scott is a Superhost

Superhosts are experienced, highly rated hosts who are committed to providing great stays for guests.



##### Great location

95% of recent guests gave the location a 5-star rating.



##### Great check-in experience

95% of recent guests gave the check-in process a 5-star rating.

#### Good to know

Entire residential home to yourself

Self check-in

Committed to Enhanced Clean

#### All about Scott's place

PLEASE DO NOT BOOK SUMMERS, HOLIDAYS AND WEEKENDS IN ADVANCE. I use this listing to fill gaps when the entire 8 bedroom home isn't booked, so mid week, non summers, and last minute weekends and holidays. Directly In the village, Fmr Ski Club,

\$120 / night

★ 4.93 (99 reviews)


CHECK-IN Add date	CHECKOUT Add date
GUESTS 1 guest	

Check availability

🚩 [Report this listing](#)











restored & renovated. Steps to restaurants, rec ctr, Golf, Village green, scenic train station, coffee, shopping, skating, SACO RIVER, snow shoeing, hiking. Kayaking, adventure parks, skiing, story land, etc all nearby. Cozy bed, with electric fireplace  
[Show more](#) >

**Where you'll sleep**



**Bedroom**  
1 king bed

**What this place offers**

-  Public or shared beach access
-  Kitchen
-  Wifi
-  Free parking on premises
-  Shared hot tub
-  Pets allowed
-  TV with standard cable
-  Washer
-  Dryer
-  Security cameras on property

[Show all 62 amenities](#)

**Select check-in date**  
Add your travel dates for exact pricing

< August 2021							September 2021 >						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa
+	2	3	4	5	6	7				1	2	3	4
8	9	10	11	12	13	14	5	6	7	8	9	10	11
15	16	17	18	19	20	21	12	13	14	15	16	17	18
22	23	24	25	26	27	28	19	20	21	22	23	24	25
29	30	31	26	27	28	29	30						

 [Clear dates](#)

★ **4.93 · 99 reviews**

Cleanliness	4.9	Accuracy	4.9
Communication	5.0	Location	5.0

**Amanda**  
**June 2021**

This place is amazing! Smack dab in the middle of the action. Upscale and comfortable. Really everything you need and want. We had a fantastic time and I'm already counting down the days until I can return! Stop thinking about it and book this place!

[Show more >](#)

**Marisa**  
**June 2021**

Perfect in town location! Amazing view of the mountains! Extremely clean and spacious. Host is extremely responsive and accommodating. For larger parties host has several rooms to accommodate bigger families!

[Show more >](#)

**Patti**  
**June 2021**

Very comfy bed. Nice walk to town. The cable was not working when I arrived tried to switch out cable box but still no luck. Overall great accommodations.

**Linda**  
**June 2021**

The apartment is wonderful! Beautiful inside, very comfortable bed, super clean. My adult daughter and I stayed here for a few days of hiking and exploring the area on something other than skis for a change. We loved having the hot-tub after our drive up and hiking all day while there. The location is fantastic - just over a block behind the main street's shops and restaurants and close to all of the wonderful activities in the White Mountain National...

[Show more >](#)

**Sean**  
**May 2021**

..

**Courtney**  
**April 2021**

Great stay!

[Show all 99 reviews](#)

---

Where you'll be





Conway, New Hampshire, United States

Directly in the village

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## Meet your Host, Scott

Hosting since October 2015

  3,333 Reviews  Identity verified  Superhost

We enjoy renovating Real Estate and sharing them with our guests. Our places are carefully renovated and outfitted to provide a memorable and enjoyable experience during your ...

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Scott is a Superhost


Superhosts are experienced, highly rated hosts who are committed to providing great stays for guests.

Co-hosts

Amy


Scott usually responds within an hour.

[Ask Scott a question](#)

 **To protect your payment, never transfer money or communicate outside of the Airbnb website or app.**

### Things to know

#### House rules

 Check-in: 4:00 PM - 1:00 AM

 Checkout: 11:00 AM

 Self check-in with keypad


 No smoking


 No parties or events

 Pets are allowed

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#### Health & safety

 Committed to Airbnb's enhanced cleaning process. [Show more](#)

 Airbnb's social-distancing and other COVID-19-related guidelines apply

 Security camera/recording device [Show more](#)

 Carbon monoxide alarm

 Smoke alarm

[Show more](#) >

#### Cancellation policy

Add your trip dates to get the cancellation details for this stay.

[Add dates](#) >

### Explore other options in and around Conway

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Lake Winnepesaukee

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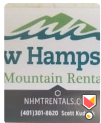
Become a host



## Private In Village, Hot Tub, Yard, Fire Place

★ 4.89 · [131 reviews](#) · Conway, New Hampshire, United States · 14 guests · 4 bedrooms · 10 beds · 3 baths

[Share](#) [Save](#)



### Meet your Host, Scott

Superhost · Hosting since October 2015

\$525 / night

★ 4.89 ([131 reviews](#))

CHECK-IN Add date	CHECKOUT Add date
GUESTS 1 guest	

[Check availability](#)

[Report this listing](#)

### Why you'll love it here



#### Scott is a Superhost

Superhosts are experienced, highly rated hosts who are committed to providing great stays for guests.



#### Great location

95% of recent guests gave the location a 5-star rating.



#### Great check-in experience

95% of recent guests gave the check-in process a 5-star rating.

### Good to know

Entire residential home to yourself

Self check-in

Committed to Enhanced Clean

### All about Scott's place

Directly in the village yet a tucked away with a large, private yard, fire pit, hot tub, outdoor space & lighting, newly renovated, new furniture, memory foam/cozy mattresses & linens, Webber Grill. WALK TO-restaurants, Coffee, Shops, Saco river, Golf, Village Green,

Rec Center, hiking/snow shoeing in Whitaker Woods, scenic train station, skating, & nightlife. Minutes to Kayaking, 5 skiing attractions (Cranmore <1 mile), adventure parks, story land, cults, etc. Must be a good neighbor  
[Show more](#) >

**Where you'll sleep**

1/2



**Bedroom 1**  
2 queen beds



**Bedroom 2**  
1 queen bed, 1 single bed

**What this place offers**

- Kitchen
- Wifi
- Free parking on premises
- Hot tub
- Pets allowed
- TV with standard cable
- Washer
- Dryer
- Air conditioning
- Bathtub

[Show all 45 amenities](#)

**Select check-in date**  
Add your travel dates for exact pricing

August 2021							September 2021						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7				1	2	3	4
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22	23	24	25	26	27	28	19	20	21	22	23	24	25
29	30	31					26	27	28	29	30		

[Clear dates](#)



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★ **4.89 · 131 reviews**

Cleanliness	4.9	Accuracy	4.9
Communication	4.9	Location	5.0
Check-in	4.9	Value	4.8

**Nancy**  
**August 2021**

Excellent location! Kids loved the basement and garage. Also freedom to come n go into town without parents driving them. Hot tub a plus! Lots of extra stuff at the house like laundry detergent, shampoo, kitchen spices and stuff. Much more than most houses we've stayed anywhere. Highly recommend!

[Show more >](#)

**Alexander**  
**August 2021**

Great house. Very private and relaxing. Scott is quick with communication so I knew I could always reach out.

**Alyssa**  
**July 2021**

Amazing location! Plenty of room for multiple families and very clean! The nice yard and fire pit give it a campy feeling if you're like me and that's what you like. Our second year staying here and can't wait for next year!

[Show more >](#)

**Danielle**  
**July 2021**

Great location, very clean, lots of sleeping space!

**Jennifer**  
**July 2021**

The location is amazing!

**Phillip**  
**July 2021**

Great location with the best of North Conway in short walking distance. Amenities are as advertised. Communication, instructions, etc were very smooth.

[Show more >](#)

[Show all 131 reviews](#)

---

**Where you'll be**

Conway, New Hampshire, United States

Directly in the village and walking distance to shop, stores, restaurants, ice cream, the river, golf, skiing, hiking, etc.

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## Meet your Host, Scott

Hosting since October 2015



★ 3,333 Reviews   Identity verified   Superhost

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Amy

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[Ask Scott a question](#)



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### Things to know

#### House rules

🕒 Check-in: 4:00 PM - 1:00 AM

🕒 Check-out: 11:00 AM

🔒 Self check-in with lockbox

🚭 No smoking

🎉 No parties or events

🐾 Pets are allowed

[Show more](#) >

### Health & safety

🧼 Committed to Airbnb's enhanced cleaning process. [Show more](#)

🛡️ Airbnb's social-distancing and other COVID-19-related guidelines apply

🚒 Carbon monoxide alarm

🚒 Smoke alarm

🔒 Security Deposit - if you damage the home, you may be charged up to \$500

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### Cancellation policy

Add your trip dates to get the cancellation details for this stay.

[Add dates](#) >

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Lake Winnepesaukee

Stowe

Portland

Old Orchard Beach

Manchester

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