STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DKT. NO. KEN-20-134

KIMBERLY (Houle) LAMARRE
and
ANTHONY LAMARRE
Plaintiffs – Appellees
v.
TOWN OF CHINA
and
NICHOLAS NAMER and
MARIE BOURQUE-NAMER
Defendants – Appellants

ON APPEAL FROM THE KENNEBEC SUPERIOR COURT
Law Court Docket No. Ken-20-134

BRIEF OF APPELLEES

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Introduction

This case is about whether new owners of a nonconforming lot may relocate a nonconforming individual private campsite that was the occasional site of a camper from the Southeasterly corner of that lot to the undeveloped Southwesterly corner, and permanently place on that site a "Park Model" trailer that has a pitched roof, measures 40' 9" long by 12' wide, has a shipping weight of 20,016 pounds, and requires a permit to travel on a public way ("Park Model Trailer"). The issue now on appeal is whether the Code Enforcement Officer ("CEO") erred in determining the Park Model Trailer is a "recreational vehicle" under the Town of China Land Use Ordinance (the "Ordinance").

Relocation of Nonconforming Private Campsite and Placement of Park Model Trailer

Nicholas Namer and Marie Bourque-Namer (collectively, the "Namers"), and Kimberly (Houle) and Anthony LaMarre (collectively, the "LaMarres"), own camps abutting one another within the Shoreland Zone on China Lake in the Town of China. (App. 20.) The LaMarre property has been in the family since at least 1969. (R. 232.) The Namers acquired their lot in 2018. (*See* R. 116, 121). The Namers' lot is approximately 1.35 acres and consists of five buildings. (App. 22.)

Additionally, the prior owners of the Namers' lot occasionally located a camper in the Southeasterly corner. (App. 22, 161-62; R. 119;)

In early July 2018, without a permit, the Namers cleared trees and vegetation from the Southwesterly corner, erected a gravel pad, and installed a Park Model Trailer. (App. 22, 149, 160, 141; R. 116, 119, 212-222.) That structure has a pitched roof; measures 40' 9" long by 12' wide; has a shipping weight of 20,016 pounds; and consists of a bedroom, bathroom, kitchen, and living area, for a total footprint of 399 square feet. (App. 155-59.) Although it has a trailer hitch and sits on six wheels, this structure cannot be easily moved, requiring at least a one-ton truck or "riggers" and a permit. (App. 22; R. 116-119, 149-150, 212-22, 234.) The Namers intend to locate the Park Model Trailer on the lot permanently to serve as seasonal accommodations for Ms. Namer so that she may provide oversight of the commercial rental of the other rental cabins. (App. 139).

CEO Permit

Immediately after the Park Model Trailer appeared, the LaMarres complained to then CEO Paul Mitnick.[1] (R. 120-128, 226-28.) The CEO initially issued a Notice of Violation on July 26, 2018 (the "NOV"). (App. 22.) But on August 7, 2018, he approved the Namers' application and issued them a permit to

[1] CEO Mitnick issued the original written decision. The current CEO, William Butler, subsequently affirmed that decision. As the parties now agree the operative decision before this Court is the written decision of CEO Mitnick, the brief refers to the singular CEO and decision. *See supra* text on page 11.

relocate the nonconforming individual private campsite to the Southwesterly corner and permanently locate the Park Model Trailer there. (App. 22.) The CEO concluded the Namers' use of the nonconforming campsite, which had been abandoned when the prior owner sold the property and removed the camper, could be resumed and relocated because the different location meets the 100-foot setback requirement from China Lake's high-water mark. (App. 22.) The CEO further concluded that the Park Model Trailer may be placed on that location year round and occupied no more than 120 days per year because the Park Model Trailer meets the definitions of "recreational vehicle." (App. 22.) He reached this conclusion based on the following findings: (i) it can be towed by a motor vehicle (a one-ton pickup is a motor vehicle); (ii) it is built on a single chassis; (iii) it is less than 400 square feet (actual size is 399 square feet); (iv) its wheels are placed on the ground; (v) it is registered with the State Dept. of Motor Vehicles; and (vi) it will be used as temporary living quarters (no more than 120 days per year). (App. 23.) Additionally, the CEO found that "[a]lthough the current structure moved unto the lot has the appearance of a mobile home, the state regulations would not consider this a manufactured home due to the fact that it was not constructed in compliance with HUD standards." (App. 22.) The CEO opined that the Park Model Trailer could be placed on the lot for greater than 120 days without complying with lot size, setback, and dimensional requirements for residential structures pursuant

to Section 2(P) of the Ordinance because "[p]laced is being interpreted as meaning occupied since most RV are parked on a lot for more than 120 days when not being used." (App. 21.) The CEO further stated that nonconformity is allowed to continue, as long as conditions do not become more nonconforming, but did not determine whether relocating the campsite and permanently erecting this Park Model Trailer resulted in a greater nonconformity. (App. 22.)

Board of Appeals Proceedings

The LaMarres filed an administrative appeal before the Board on August 6, 2019.[2] Although 30-A M.R.S. § 2691 (3)(C) requires a board of appeals to conduct a *de novo* hearing unless the municipal charter or ordinance requires otherwise, the parties agree that the Board conducted an appellate review. New evidence accepted at the hearing before the Board pertained only to the issue of timeliness. After a public hearing, the Board held that the appeal was timely but denied it "because the permitees have established the use and hold a valid permit as issued on 8/21/2018." (App. 20-21.)

Superior Court Proceedings

The LaMarres timely appealed this decision pursuant to M.R. Civ. P. 80B, raising three issues: (1) the Park Model Trailer is not a "Recreational Vehicle" under the Ordinance and, therefore, may not be located on an individual private

[2] Because the Appellants have not appealed the timeliness of the LaMarres' appeal, facts concerning this issue have been omitted from this section of Appellees' brief.

campsite or satisfy the applicable lot size and frontage requirements for a structure; (2) even if the Park Model Trailer is a "recreational vehicle," it may not be physically placed on the lot for more than 120 days; and (3) the CEO unlawfully allowed a nonconformity to become more nonconforming.[3]

The Superior Court concluded the LaMarres appeal was timely and held that the CEO committed legal error in concluding that the Park Model Trailer was a "recreational vehicle" under the Ordinance, reversed the Board's decision, and vacated the permit issued by the CEO. (App. 6, 8, 12.) The Town and the Namers appealed the Superior Court's decision to reverse the CEO and vacate the permit.

[3] Neither the Appellants nor the Superior Court addressed the other two issues. (App. 11-12.) In its brief before the Superior Court, the Town appears to acknowledge that further findings by the Board of Appeals are necessary to address the second issue, but does not address the third issue. The Superior Court concluded the CEO "did not set forth any reasoning as to whether placement of the much larger Park Model trailer at a different location on the lot would result in more conformity, and if not, why not." (App. 11-12.)

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether the Town of China Code Enforcement Officer erred in interpreting the Town of China Land Use Ordinance's definition of "recreational vehicle" to include a Park Model Trailer, which has pitched roof, measures 40' 9" long by 12' wide, and weighs 20,016 pounds.

SUMMARY OF THE ARGUMENT
(With Incorporated Standard of Review)

In a Rule 80B appeal, the Court reviews directly the record of the last decision-maker with *de novo* fact-finding authority for "'error of law, abuse of discretion or findings not supported by substantial evidence on the record." *Fryeburg Trust v. Town of Fryeburg*, 2016 ME 174, ¶ 5 n.1, 151 A.3d 933 (quoting *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024). Here, CEO Mitnick's decision is the operative decision because the Superior Court and Board acted in their respective appellate capacities and CEO Butler merely affirmed the findings of CEO Mitnick.

The central issue now on appeal is the CEO's interpretation of the Ordinance's definition of "recreational vehicle." This Court reviews *de novo* as a question of law issues concerning the interpretation of an ordinance. *Id* ¶ 5. The Court must "examine the plain meaning of the language of the ordinance" and "construe its terms reasonably in light of the purposes and objectives of the ordinance and its general structure." *Stewart v. Town of Sedgwick*, 2002 ME 81, ¶ 6, 797 A.2d 27. If an ordinance is clear on its face, the Court should look no further than its plain meaning. *Town of Minot v. Starbird*, 2012 ME 25, ¶ 14, 39 A.3d 897. Nonetheless, an ordinance must be construed “to avoid absurd, illogical or

inconsistent results." *Kurlanski v. Portland Yacht Club*, 2001 ME 147, ¶ 9, 782 A.2d 783.

The CEO erred as a matter of law in concluding the Park Model Trailer is a "recreational vehicle." The Ordinance's definition includes only a narrow class of vehicles or vehicle attachments designed to be towed, "which may include a pickup camper, travel trailer, tent trailer, camp trailer, and motor home." This phrase both modifies the other requirements of the definition and provides a helpful picture of the type of accommodations the drafters intended to be allowed on individual private campsites. The Park Model Trailer is not a "recreational vehicle." This is true even if it is not a "manufactured home" or subject to state or federal mobile home regulations. Appellants' contrary interpretation in effect allows the Namers' nonconforming property to become more nonconforming, in abrogation of common sense and the policy favoring the gradual elimination of nonconformities. *Forest City, Inc. v. Payson*, 239 A.2d 167 (Me. 1968) ("A zoning ordinance, like any other statute which is in derogation of the common law, must be strictly construed.").

ARGUMENT

I. The CEO Clearly Erred When He Determined that the Namers' Park Model Trailer is a "Recreational Vehicle" Under the Ordinance

The question on appeal is whether the Park Model Trailer is a "recreational vehicle" under the Ordinance. An "individual private campsite" may provide "temporary accommodation in a *recreational vehicle* or tent and [be] used exclusively by the owner of the property and his or her family and friends." (App. 125 (emphasis added).) For the following reasons, the Superior Court correctly held that the Park Model Trailer is not "recreational vehicle." Therefore, the it is not permitted on an individual private campsite on the Namers' property.

A. Under the Plain Language of the Definition, the Park Model Trailer is Not a "Recreational Vehicle"

An interpretation of an ordinance begins with its plain language. *Banks v. Maine RSA # 1*, 1998 ME 272, ¶ 4, 721 A.2d 655. The Ordinance defines "recreational vehicle" as follows:

> A vehicle or *an attachment to a vehicle designed to be towed*, and designed for temporary sleeping or living quarters for one or more persons, *and which may include a pick-up camper, travel trailer, tent trailer, camp trailer, and motor home*. In order to be considered as a vehicle and not as a structure, the unit must remain with its tires on the ground, and must be registered with the State Division of Motor Vehicles."

(App. 131 (emphasis added).) There is no dispute the Park Model Trailer is designed for temporary sleeping or living quarters for one or more persons, is

registered with the State Division of Motor Vehicles, and has tires that remain on the ground. Rather, the parties dispute the meaning of the two portions emphasized above.

Appellants' argue something is a "recreational vehicle" so long as it has a trailer hitch or a motor, is registered, and has wheels on the ground. The Appellants' treatment of this definition as a mere collection of elements obscures a purposeful structure that narrows the class of things that may be considered a "recreational vehicle." The definition consists of two sentences. The first sentence consists of three characteristics, all of which must be satisfied, proceeding from most general—"vehicle or attachment to a vehicle designed to be towed"—to most specific—"and which may include a pick-up camper, travel trailer, tent trailer, camp trailer, and motor home." (App. 131.) Even if the Court determines this definition is unambiguous, it can and should attribute significance to this structure. *Stewart*, 2002 ME 81, ¶ 6, 797 A.2d 27 (explaining that the Court must "construe [an ordinance's] terms reasonably in light of the purposes and objectives of the ordinance *and its general structure*" (emphasis added)). It should not, as Appellants do, dismiss an entire clause of the first sentence as a mere permissive list of examples with no apparent bearing on the preceding two clauses or the definition as a whole. *See Stromberg-Carlson Corp. v. State Tax Assessor*, 2001

ME 11, ¶ 9, 765 A.2d 566 (in construing a statute, “[w]ords must be given meaning and not treated as meaningless and superfluous”).

B. It is Appropriate to Apply the Maxim of *Ejusdem Generis*, Which Further Illustrates that a Park Model Trailer is Not a "Recreational Vehicle"

The statutory cannon of e*jusdem generis* provides that a category defined by a non-exhaustive list of examples may be interpreted to include other items that are of the same type as those items listed. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983); *see also State v. Ferris*, 284 A.2d 288, 290 (Me. 1971) ("when words of enumeration are immediately followed by words of general import the general words, when their use is unclear, should be governed by the specific."). As the Superior Court remarked, the "list of examples explicitly mentioned in the Ordinance provides a helpful insight into what the enactors of the definition intended." (App. 8.) [4]

Ejusdem generis is applicable here because the definition of "recreational vehicle" is reasonably susceptible to different interpretations. *Young v. Greater Portland Transit Dist.*, 535 A.2d 417, 418 (Me. 1987). As the Superior Court

[4] The interpretation of this definition is a matter of law. But even if this was a mixed question of law and fact entitled to "substantial deference," *Bizier v. Town of Turner*, 2011 ME 116, ¶ 8, 32 A.3d 1048, the CEO still erred because his decision is not supported by substantial evidence. Substantial evidence exists "when a reasonable mind would rely on that evidence as sufficient support for a conclusion.” *Griswold v. Town of Denmark*, 2007 ME 93, ¶ 9, 927 A.2d 410. There is insufficient evidence to support a reasonable conclusion that a Park Model Trailer is similar to any of the examples provided. The CEO himself concluded the Park Model Trailer did not look like an RV. (*See* R. 126, 149, 236.) It is far larger, cannot be readily towed from one place to another, and is constructed in a manner far more like a house than a pop-up tent or Airstream trailer.

noted, "an attachment to a vehicle designed to be towed," could be read to include a trailer designed so it technically can be towed, regardless of whether it could really be towed as a practical matter. (App. 9-10.) But it is equally if not more reasonable to arrive at a more ordinary meaning: an attachment to a vehicle designed for the very purpose of being towed from place to place with ease, like a pick-up camper, travel trailer, tent trailer, or camp trailer.

Appellants argue the definition is not ambiguous and, therefore, *ejusdem generis* is not applicable because the use of "may include" in the third clause of the first sentence of the definition signifies permission, rendering the application of the specific items an optional exercise. (Town's Blue Br. 11; Namers' Blue Br. 3.) First, as noted above, these arguments ignore the sequential structure of the definition, whereby each part modifies the next. Second, the cases the Town cites in support of this argument are inapposite. In *Fogerty v. Fantasy, Inc.*, the U.S. Supreme Court held that the use of the word "may" in a federal statute that authorizes courts to award attorney's fees clearly denotes discretion and, therefore, attorney's fees are not automatic. 510 U.S. 517, 533 (1994). "May" is distinct from "and which may include," and the use of "may" in a statute authorizing endowing courts with one specific function is different than the use of "may" in an ordinance providing a list of items as one part of a multi-part definition. *State v. Wilson*, 264 S.E.2d 414 (S.C. 1980), and *Carey v. Comm'r of Corr.*, 95 N.E.3d 220 (Mass.

2018), are also fundamentally different from this case. In *Wilson*, the Court did not reject the maxim only because the statute used the word "may," but also because the statute authorized the court to impose conditions of prohibition that "may include among them any of the following *or any other* condition not prohibited." *Wilson*, 264 S.E.2d at 415 (emphasis added). In *Carey*, the court held that a prison superintendent's authority to establish search procedures did not preclude the use of canine searches just because the regulation specifically allowed other searches but did not mention canine searches. *Carey*, 95 N.E.3d at 224. In both cases, the authority granted was broad and subject only to explicit limitations. Here, there is no issue of authority and the list is a core part of a definition, both modifying and illustrating the other parts of that definition.

Here, the "vehicle or an attachment to a vehicle designed to be towed," that is designed for temporary sleeping, is more general than the specific examples of recreational vehicles that follow.[5] Such a structure is a recreational vehicle only if it is a or is similar to a "pick-up camper, travel trailer, tent trailer, camp trailer, and motor home." (App. 131.) Taken together, these examples suggest that the drafters had a specific kind of "look" in mind for what structures should be considered recreational vehicles. The provided examples are all temporary shelters that can be

[5] The Namers argue *ejusdem generis* does not apply because the other parts of the definition are specific, not general. Quantity is not quality. Just because the definitions have multiple parts does not necessarily make the definition and each of its parts specific. Moreover, the Namers enumerate each of the so-called specific things required by the definition but conveniently omit the clause listing the examples.

readily moved frequently and conveniently. It is undisputed that the Park Model Trailer structure cannot be moved readily. (App. 22; R. 116-19, 212-22, 234.) Each of the examples are generally either capable of being hitched to an average-sized pickup and legally driven down a public way, or, in the case of a travel trailer, can itself be driven. Because it is 12-feet wide, the Park Model Trailer cannot be operated on a public way or bridge without a permit. 29-A M.R.S. § 2380 ("A vehicle that is wider than 102 inches over all may not be operated on a public way or bridge.") (*see also* R. 234.) Lastly, sometimes pictures are worth more than legal briefs. The pictures of the Park Model Trailer stand in stark contrast that of the prior owner's camper. (*Compare* App. 161 and 162 to App. 160.)[6]

C. The Ordinance Must Be Construed to Avoid Absurd Results and Be Consistent with State and Local Policy

The Appellants' interpretation leads to an absurd result: it allows a structure to be considered a "recreational vehicle" even though it is of an entirely different nature than a list of examples included in the definition, so much so that even the CEO originally believed the Park Model Trailer was a mobile home. *Kurlanski*, 2001 ME 147, ¶ 9, 782 A.2d 783 (holding that an ordinance must be construed to "avoid absurd, illogical or inconsistent results"); *see also Dickau v. Vermont Mutual Ins. Co.*, 2014 ME 158, ¶ 20, 107 A.3d 621 ("A plain language

[6] The table of contents to the Appendix mismatches the page numbers and the descriptions of the pictures. App. 160 is a picture of the Park Model Trailer. App. 161 and 162 depict the original camper.

interpretation should not be confused with a literal interpretation"); *Jordan v. City of Ellsworth*, 2003 ME 82, ¶ 10, 828 A.2d 768 ("[W]e are not required to disregard common sense when we interpret municipal ordinances.").

This interpretation also conflicts with the general policy of zoning to abolish nonconforming uses "as swiftly as justice will permit." *Oliver v. City of Rockland*, 1998 ME 88, ¶ 9, 710 A.2d 905. This policy is echoed by the second purpose statement of Section 2 of Chapter 2 of the Ordinance, which states that nonconforming conditions shall not be permitted to become more nonconforming, except as otherwise provided. (App. at 26.) To that end, provisions that would allow for nonconformities to continue or become even more nonconforming must be strictly construed. *Forest City, Inc.*, 239 A.2d at 169.

D. Whether the Park Model Trailer Complies with State or Federal Regulations Concerning Manufactured Homes is Not Dispositive

For the reasons stated in the LaMarres' Superior Court briefs, the Namers' structure is more aptly defined under the Ordinance as a "manufactured home." However, as the Superior Court concluded, that issue is not dispositive. The question before the Court is whether the Park Model Trailer is a "recreational vehicle."

Even if it is true that industry standards and government regulatory schemes recognize that (i) new recreational vehicles may not look like recreational vehicles,

and (ii) these new vehicles or trailers remain 'recreational vehicles' so long as they are constructed in accordance with standards developed specifically for temporary living quarters, that does not necessarily mean a Park Model Trailer is a "recreational vehicle." These standards and regulations do not preempt local zoning law. How land is used within a town is an issue that is fundamentally within the scope of a town's home rule authority, subject to specific statutory limitations on that authority. 30-A M.R.S. § 4352; *see also Pike Indus., Inc. v. City of Westbrook*, 2012 ME 78, ¶ 17, 45 A.3d 707 (discussing a municipality's home rule authority over land use). While it appears industry and federal government may accommodate the park model trailers that look more like manufactured housing, the Town has not yet to follow down that legislative path. If the Town wants to treat park model trailers just like pop-up tents and motor homes, that is a decision that must be made by the Town's legislative body, not by the CEO through a strained and clearly erroneous interpretation of an ordinance that predates such products.

CONCLUSION

The CEO clearly erred as a matter of law when he concluded the Park Model Trailer was a "recreational vehicle." That interpretation renders meaningless an entire list of common examples of recreational vehicles that both modifies the other remaining definition and provides helpful insight into what the Ordinance

drafters had in mind for the types of structures allowed on campsites. It also ignores the Ordinance's plain meaning and intent, common sense, and the State's policy of eliminating nonconformities as swiftly as justice will permit. For the reasons stated above, the Superior Court's decision should be affirmed.

Dated: September 15, 2020

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Stephen W. Wagner, certify that I served two copies of this Brief of Appellees upon Alton C. Stevens, Esq., attorney for Nicholas Namer and Marie Bourque-Namer, by regular U.S. mail, postage paid, to his office at 44 Elm Street, Waterville, ME 04901; upon Amanda Meader, Esq., attorney for the Town of China, by regular U.S. mail, postage paid, to her office at P.O. Box 26, East Winthrop, ME 04343; and upon Theodore Small, Esq., attorney for Town of China, by regular U.S. mail, postage page, to his office at 95 Main Street, Auburn, ME 04210.

Dated: September 15, 2020

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