STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

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 APPELLANT TOWN OF CHINA

Attorneys for Appellant Town of China:

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STATEMENT OF THE FACTS OF THE CASE

At issue in this appeal is whether a recreational vehicle that more closely resembles a traditional cabin than it does a recreational vehicle that one might find parked at a campground, but which falls squarely within the definition of a "recreational vehicle" under the governing ordinance, is in fact a recreational vehicle, or something else.

Appellees Kimberly Lamarre and Anthony Lamarre (the "Lamarres") are owners of property located on Gilman Drive in China, Maine (Appellant Town of China, hereinafter, the "Town"). (App. at 20.) The Lamarres' property abuts property owned by Nicholas and Jodi Namer (the "Namers"). (*Id.*)

The Namers' property is a non-conforming lot that includes five structures and a private campsite. (*Id.* at 20, 22.) A recreational vehicle that had been located on the property's original campsite was removed from the property prior to the Namers' purchase in April 2018. (*Id.* at 22.)

In July 2018, the Namers sought to re-locate the campsite, placing a PMRV-park model trailer (the "Namer RV") at a different location on the property. (*Id.*; *id.* at 139, 155 (stating the type of RV).) The Namer RV has a bedroom, a bath, a kitchen, and a living area, with a total area of 399 square feet. (*Id.* at 155, 157.) It has its tires on the ground, is registered with the Bureau of Motor Vehicles, can be moved by a pickup truck, and was constructed for use as, and is in fact used for, temporary

living quarters. (*Id.* at 22-23; *id.* at 155 (indicating trailer has tow hitch), 156 (citing construction to ANSI A119.5), 158; Town's 80B Brief at 8 and citations therein.)

After the Namers located the trailer on their property, the Town's Code Enforcement Officer ("CEO") issued a Notice of Violation because the Namers had not obtained a permit. (App. at 22.) The Namers then submitted an application to re-locate the campsite on their property, and to have the Namer RV located on the new campsite. (*Id.* at 137.)

On August 7, 2018, the CEO approved the Namers' application. (*Id.* at 139-58.) The CEO issued a building permit to the Namers on August 21, 2018. (*Id.* at 159.) The CEO concluded that the Namers' property was legally non-conforming, that placement of the Namer RV on the property would be a timely resumption of a non-conforming use, and that the Namer RV met the definition of a "recreational vehicle," as that term is defined in the Town's Zoning Ordinance (the "Ordinance"). (*Id.* at 22-23.) This conclusion was based in part on the CEO's determination that the Namer RV (i) "was not constructed in accordance with HUD standards," meaning it could not be considered a manufactured home, (ii) could be towed by a one-ton pickup truck, (iii) had its wheels on the ground, (iv) was registered with the Bureau of Motor Vehicles, and (v) was being used for temporary living quarters. (*Id.*)

One year later, on August 6, 2019, the Lamarres appealed the CEO's decision to the Town's Board of Appeals (the "Board"). (*Id.* at 20.) The Board held that the appeal was timely based on the Lamarres' argument that they delayed filing the appeal due to the timing of the Town's response to their inquiries regarding the Namer RV. (*Id.*) The Board also upheld the CEO's determination that the Namer RV was a recreational vehicle. (*Id.* at 20-21.)

The Lamarres then filed an appeal pursuant to M.R. Civ. P. 80B. In that appeal, the Lamarres raised two grounds for challenging the Namers' permit. First, they argued that Namer RV was a structure, not a Recreational Vehicle ("RV"). Second, they argued there was no record evidence that the CEO made the requisite findings for permitting the relocation or replacement of a non-conforming structure. Although the Town argued on appeal that the Namer RV was a recreational vehicle, it also acknowledged, to the extent requirements for structures had to be met, that the administrative record did not reflect the bases of the CEO's determination in that regard and that the matter should be remanded to the Board to make any necessary findings.

The Superior Court held that the Namer RV did not meet the Ordinance definition of a recreational vehicle, reversed the Board's decision, and vacated the permit issued by the CEO. This appeal ensued.

ISSUES PRESENTED FOR REVIEW

1. DID THE CODE ENFORCEMENT OFFICER ERR IN DETERMINING THAT THE NAMER RV IS A RECREATIONAL VEHICLE WHEN IT CAN BE TOWED BY A PICKUP TRUCK, WAS BUILT IN ACCORDANCE RECREATIONAL VEHICLE STANDARDS FOR USE AS TEMPORARY LIVING QUARTERS ONLY, HAS ITS TIRES ON THE GROUND, AND IS REGISTERED WITH THE BUREAU OF MOTOR VEHICLES?

SUMMARY OF THE ARGUMENT

The Ordinance defines a 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. at 131.) In their 80B appeal, the Lamarres argued that the *ejusdem generis* maxim required the conclusion that the Namer RV did not fall within this definition, and that the Namer RV was in fact a manufactured home or manufactured housing.

The Superior Court agreed that it was appropriate to interpret the Ordinance by resort to *ejusdem generis*. In so doing, the Superior Court interpreted the phrase "vehicle or an attachment to a vehicle designed to be towed" to include only the items expressly mentioned in the Ordinance, namely pick-up campers, travel trailers, tent trailers, camp trailers, or motor homes.

As the evidence before the CEO reflected, the Namer RV could be towed and was designed for temporary living quarters. That renders the Namer RV a recreational vehicle under the Ordinance. Resort to the doctrine of *ejusdem generis* is improper because the Ordinance is not ambiguous and the ordinance language precludes its application. For these reasons, as explained in more detail below, the

Superior Court's decision should be reversed, and the CEO's decision with regard to the definition of a recreational vehicle should be affirmed and re-instated.

STANDARD OF REVIEW

Where, as is the case hear, the Superior Court acted in an appellate capacity, this Court reviews directly the operative decision of the municipality for "error of law, abuse of discretion or findings not supported by substantial evidence on the record." *Yates v. Town of Southwest Harbor,* 2001 ME 2 ¶ 10, 763 A.2d 1168, 1171 (internal quotations and citations omitted).

Where the local Board of Appeals acted as a tribunal of original jurisdiction, its decision is reviewed directly. *Id.* (internal quotation and citation omitted). If the Board acted only as an appellate body, the decision of the CEO is reviewed directly. *Id.*

Pursuant to 30-A M.R.S.A. § 2691(3)(C), a Board of Appeals is to conduct a *de novo* hearing unless the municipal charter or ordinance requires otherwise. Here, the Town's Ordinance gives the Board authority to hear an appeal from the CEO's determination, and to reverse the CEO's decision if any finding of fact is "unsupported by the evidence," or if any conclusion of law was clearly erroneous. (App. at 108, 110.) Moreover, the CEO is required to provide the Board with "the record of the proceeding on the original application." (*Id.* at 110.) This at least suggests the Board was acting in an appellate capacity, which would make the

CEO's decision the operative decision on review. *See Yates,* 2001 ME 2 ¶ 13, 763 A.2d at 1172.

In any event, this appeal turns on interpretation of the Ordinance, which is a question of law for this Court. *E.g., Putnam v. Town of Hampden,* 495 A.2d 785, 788 (Me. 1985). For the reasons set forth below, the CEO's interpretation of the definition of recreational vehicle under the Ordinance was not in error, and was properly supported by the evidence.

ARGUMENT

I. The Code Enforcement Officer Did Not Err In Determining That The Namer RV Is Not A Recreational Vehicle When It Can Be Towed By A Pickup Truck, Was Built In Accordance Recreational Vehicle Standards For Use As Temporary Living Quarters Only, Has Its Tires On The Ground, And Is Registered With The Bureau Of Motor Vehicles.

A. The Namer RV Is A Recreational Vehicle Under The Plain Terms Of The Ordinance.

Under the Ordinance, the Namer RV must be considered a recreational vehicle so long as it is 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." (App. at 131.) The evidence before the CEO was that the Namer RV could be towed by a pickup truck and was designed for and would be used as temporary living quarters. (*Id.* at 22-23, 155.) A straightforward application of these facts to the Ordinance demonstrates that the CEO's determination was proper. At a minimum, it was not clearly erroneous.

That the Namer RV can be towed by a pickup truck satisfies the first element of the definition of a recreational vehicle. The second element is met because the evidence before the CEO established that the trailer was "designed for temporary sleeping or living quarters."

In approving the Namers' permit application, the CEO referenced the fact that the Namer RV was "not constructed in compliance with HUD regulations." (*Id.* at

22.) In recent years, HUD has recognized the fact that "RV manufacturers have begun to produce larger products that include more features . . . and that resemble manufactured homes." 83 FR 57677. For this reason, HUD clarified its rules to make clear that RVs are exempt from HUD regulations for manufactured homes even though it is becoming more common for them to "look like" such homes. *See id.* Specifically, HUD defines a recreational vehicle to be exempt from its manufactured housing regulations when, *inter alia,* it is constructed in accordance with ANSI standard A119.5. 24 CFR § 3282.15. Similarly, under Maine regulations, "park trailers as defined in ANSI A119.5, *Park Model Recreational Vehicle Standard*" are exempt from mobile home installation regulations. Code of Regulations 02-385 chapter 890 (I). The ANSI A119.5 standard was developed for the purpose of providing standards for construction of seasonal, or temporary, living conditions. (Ex. 1 to the Town's 80B Appeal Brief.)

Thus, 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. Even more pertinent is the fact that the Namer' RV, described as a "Park Model," and sold and marketed as a recreational vehicle, was built in

accordance with the ANSI A119.5 Park Model Recreational Vehicle Standard. (App. at 157.)

This means that, regardless of what the Namer RV "looks like," it can be towed and was built only for temporary, not permanent, accommodations in accordance with standards developed for recreational vehicles. At the same time, because its wheels are on the ground and it is registered with the Maine Bureau of Motor Vehicles, it further qualifies as a vehicle, rather than a structure, under the Ordinance. Given these facts, the CEO committed no error – and certainly no clear error – in determining that the Namer RV is a recreational vehicle as that term is defined in the Ordinance.

B. Ejusdem Generis Should Not Be Applied To Interpret The Ordinance.

The Lamarres argued below, and the Superior Court agreed, that the Ordinance should be interpreted through the lens of *ejusdem generis*. Taking this approach, the Superior Court held that reference in the Ordinance to pick-up campers, travel trailers, tent trailers, camp trailers, or motor homes meant that the Ordinance intended to define recreational vehicles as units that could be towed more "easily" than the Namer RV, and that were "intended to be placed on a private campsite." (App. at 12.)

When applying the principle of *ejusdem generis*, the meaning of general words of a phrase are "limited to things or items of the same general class as those

expressly mentioned." *New Orleans Tanker Corp. v. Department of Transp.,* 1999 ME 67, ¶ 7, 728 A.2d 673, 675. As the Superior Court acknowledged, *ejusdem generis* has "no application to an unambiguous" ordinance. *See Young v. Greater Portland Transit Dist.,* 5 35 A.2d 417, 418 n.2 (Me. 1987). An ordinance is unambiguous where it is not reasonably susceptible to different interpretations. *See, e.g., State v. Kendall,* 2016 ME 147, ¶ 22, 148 A.3d 1230, 1236. Moreover, *ejusdem generis* is not to be applied where its application would be contrary to the drafters' intent. *Helvering v. Stockholms Enskilda Bank,* 293 U.S. 84, 89 (1934). If "the general words were not used in the restricted sense suggested by the rule," the Court must "give effect to the conclusion afforded by the wider view in order that the will of the [drafters] shall not fail." *Id.*

Where an ordinance provides that general terms "may include" specific items, the term "may include" signifies permission, and that the application of the specific items is optional or discretionary. *See, Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion."); *State v. Wilson,* 264 S.E.2d 414, 416 (S.C. 1980) (use of the term "may" in a statute rendered the *ejusdem generis* doctrine inapplicable); *Carey v. Commissioner of Correction,* 95 N.E.3d 220, 223-24 (Mass. 2018) (*ejusdem generis* doctrine inapplicable where regulation stated that procedures "may include" specific items).

Here, the Ordinance defines a recreational vehicle in unambiguous terms – a "vehicle" or "attachment" to a vehicle that is "designed to be towed and designed for temporary living." However, the Superior Court found the definition to be ambiguous. Specifically, the Superior Court held that, although the definition could be read – as its plain terms suggest – to refer to any vehicle or attachment to a vehicle that could be towed, it might also be interpreted to describe only such units as might be "towed from place to place with relative ease." (App. at 12.)

The problem with this interpretation is that it ignores the plain terms of the Ordinance. There simply is no support in the Ordinance for the Superior Court's finding that the definition of recreational vehicle is ambiguous.[1] Given the lack of ambiguity, there was no basis for resort to *ejusdem generis*. *Young,* 535 A.2d at 418 n.2.

In addition, the language of the Ordinance demonstrates that the inclusion of examples of recreational vehicles in the Ordinance was not meant to be restrictive. The Ordinance provides that the term recreational vehicle "may include" the examples provided therein. The phrase "may include" is permissive; it is not – and cannot be read as – restrictive. Yet the Superior Cour read it to be that latter, not the

[1] It also begs the question of who is to determine if a vehicle or an attachment to a vehicle may be towed with "relative ease," and how such a determination is made. The Superior Court's analysis renders the Ordinance vague and of questionable value in guiding either Town residents, or Town officials engaged in the permitting process.

former. Applying *ejusdem generis* in such a manner is contrary to the plain terms of the Ordinance. *See Helvering,* 293 U.S. at 89.

Finally, even if application of *ejusdem generis* were proper, any determination that the Namer RV is not similar to a pick-up camper, travel trailer, tent trailer, camp trailer, or motor home would be misplaced. The Superior Court determined that the Namer RV is less easily moved than the vehicles/attachments referenced in the Ordinance, and noted that it requires a permit for transportation. But, like the campers and trailers expressly referenced in the Ordinance, the Namer RV can be moved by a pickup truck. (App. at 22.) That a trailer must be "more easy" to move, as the Superior Court held, finds no support in the Ordinance. And the fact that a permit is needed for transportation does not render the Namer RV of a different class than the items enumerated in the Ordinance. *See New Orleans Tanker Corp.,* 1999 ME 67, ¶ 7, 728 A.2d 673, 675. To the contrary, Namer's RV is of the same class as those enumerated items, meaning that it qualifies as a recreational vehicle under any reading of the Ordinance. *Id.* Accordingly, the CEO's determination that the Namer RV is a recreational vehicle was correct, and application of the *ejusdem generis* rule of construction to vacate that determination was in error.

Conclusion

For the reasons set forth above, the Superior Court's decision should be reversed and Town of China's Code Enforcement Officer's determination that the Namer RV is a recreational vehicle should be affirmed and re-instated.

Dated: July 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theodore Small, Esq. Attorney for Appellant Town of China, hereby certify that I have made due service of the within Brief of Appellant and Appendix by mailing two conformed copies of the Brief and one conformed copy of the Appendix by regular course of the United States mail, postage prepaid, to counsel for Appellees at the following address:

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as well as two conformed copies of the Brief and one conformed copy of the Appendix by regular course of the United States mail, postage prepaid, to counsel for Appellants Nicholas Namer and Marie Bourque-Namer, at the following address:

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Dated: July 28, 2020

Theodore Small, Esq.

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I. The Code Enforcement Officer Did Not Err In Determining That The Namer RV Is Not A Recreational Vehicle When It Can Be Towed By A Pickup Truck, Was Built In Accordance Recreational Vehicle Standards For Use As Temporary Living Quarters Only, Has Its Tires On The Ground, And Is Registered With The Bureau Of Motor Vehicles.

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Where an ordinance provides that general terms "may include" specific items, the term "may include" signifies permission, and that the application of the specific items is optional or discretionary. *See, Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion."); *State v. Wilson*, 264 S.E.2d 414, 416 (S.C. 1980) (use of the term "may" in a statute rendered the *ejusdem generis* doctrine inapplicable); *Carey v. Commissioner of Correction*, 95 N.E.3d 220, 223-24 (Mass. 2018) (*ejusdem generis* doctrine inapplicable where regulation stated that procedures "may include" specific items).

Here, the Ordinance defines a recreational vehicle in unambiguous terms – a "vehicle" or "attachment" to a vehicle that is "designed to be towed and designed for temporary living." However, the Superior Court found the definition to be ambiguous. Specifically, the Superior Court held that, although the definition could be read – as its plain terms suggest – to refer to any vehicle or attachment to a vehicle that could be towed, it might also be interpreted to describe only such units as might be "towed from place to place with relative ease." (App. at 12.)

The problem with this interpretation is that it ignores the plain terms of the Ordinance. There simply is no support in the Ordinance for the Superior Court's finding that the definition of recreational vehicle is ambiguous.[1] Given the lack of ambiguity, there was no basis for resort to *ejusdem generis*. *Young*, 535 A.2d at 418 n.2.

In addition, the language of the Ordinance demonstrates that the inclusion of examples of recreational vehicles in the Ordinance was not meant to be restrictive. The Ordinance provides that the term recreational vehicle "may include" the examples provided therein. The phrase "may include" is permissive; it is not – and cannot be read as – restrictive. Yet the Superior Cour read it to be that latter, not the

[1] It also begs the question of who is to determine if a vehicle or an attachment to a vehicle may be towed with "relative ease," and how such a determination is made. The Superior Court's analysis renders the Ordinance vague and of questionable value in guiding either Town residents, or Town officials engaged in the permitting process.

former. Applying *ejusdem generis* in such a manner is contrary to the plain terms of the Ordinance. *See Helvering,* 293 U.S. at 89.

Finally, even if application of *ejusdem generis* were proper, any determination that the Namer RV is not similar to a pick-up camper, travel trailer, tent trailer, camp trailer, or motor home would be misplaced. The Superior Court determined that the Namer RV is less easily moved than the vehicles/attachments referenced in the Ordinance, and noted that it requires a permit for transportation. But, like the campers and trailers expressly referenced in the Ordinance, the Namer RV can be moved by a pickup truck. (App. at 22.) That a trailer must be "more easy" to move, as the Superior Court held, finds no support in the Ordinance. And the fact that a permit is needed for transportation does not render the Namer RV of a different class than the items enumerated in the Ordinance. *See New Orleans Tanker Corp.,* 1999 ME 67, ¶ 7, 728 A.2d 673, 675. To the contrary, Namer's RV is of the same class as those enumerated items, meaning that it qualifies as a recreational vehicle under any reading of the Ordinance. *Id.* Accordingly, the CEO's determination that the Namer RV is a recreational vehicle was correct, and application of the *ejusdem generis* rule of construction to vacate that determination was in error.

Conclusion

For the reasons set forth above, the Superior Court's decision should be reversed and Town of China's Code Enforcement Officer's determination that the Namer RV is a recreational vehicle should be affirmed and re-instated.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theodore Small, Esq. Attorney for Appellant Town of China, hereby certify that I have made due service of the within Brief of Appellant and Appendix by mailing two conformed copies of the Brief and one conformed copy of the Appendix by regular course of the United States mail, postage prepaid, to counsel for Appellees at the following address:

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