STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: November 12, 2021]

RHODE ISLAND SCHOOL OF DESIGN and RISD HOLDINGS, INC., ***Plaintiffs,***	:	
v.	:	**C.A. No. PC-2020-06584**
DENNIS BEGIN, in his capacity as a TOWN OF BARRINGTON ZONING OFFICER; TOWN OF BARRINGTON ZONING BOARD OF REVIEW; MARK FREEL, PAUL BLASBALG, THOMAS KRAIG, LADD MEYER, and DAVID RIZZOLO, in their capacities as members of the TOWN OF BARRINGTON ZONING BOARD OF REVIEW, ***Defendants*****.**	:	

DECISION

McGUIRL, J. Under G.L. 1956 § 45-24-69, Plaintiffs Rhode Island School of Design and RISD Holdings, Inc. (collectively, RISD) appeal a decision made by Defendants, Dennis Begin, in his capacity as a Town of Barrington Zoning Officer, and Mark Freel, Paul Blasbalg,[1] Thomas Kraig, Ladd Meyer, and David Rizzolo, in their capacities as members of the Town of Barrington Zoning Board of Review (collectively, the Zoning Board). (Compl. ¶ 1.) The Zoning Board affirmed the findings of Defendant Dennis Begin, which stated that RISD may not rent its property located at 15 Freemont Avenue in the Town of Barrington, Rhode Island (15 Freemont) through online short-term rental platforms unless they are renting to a single family related by blood or marriage or to

[1] In the caption of Plaintiffs' Complaint, they named one of the Defendants as "Paula Blasbalg." *See* Compl. In their Answer, Defendants clarified that there is no person named "Paula Blasbalg" on the Town of Barrington Zoning Board of Review. (Answer ¶ 5.) Instead, the Zoning Board of Review states that there was a "Paul Blasbalg." *Id.*

no more than three unrelated persons, pursuant to the definition of "household" under Section 185-5 of the Town Zoning Ordinance (Ordinance). *See* Zoning Board Decision, June 18, 2020 (Decision). Mr. Begin also stated that RISD may not use the property for "events." *Id.* The Court has jurisdiction under § 45-24-69.

I

Facts and Travel

A

Use of 15 Freemont

The Rhode Island School of Design is a Rhode Island non-profit corporation with its principal place of business at 2 College Street, in the City of Providence, Rhode Island, which owns RISD Holdings, Inc. as a wholly owned, non-profit subsidiary. (Compl. ¶¶ 2-3.) Within the Town of Barrington (Barrington), RISD owns two properties: 239 Nayatt Road, known as the "Tillinghast Property" (Tillinghast Property) and 15 Freemont. *Id.* ¶¶ 8-9. RISD's two Barrington properties abut each other. (Compl., Ex. D (Colasanto Aff.), ¶ 2.) RISD Holdings, Inc. purchased 15 Freemont Avenue in December of 2017. (June 18, 2020 Barrington Zoning Board Hr'g Tr. (Tr.) 7:11-17.) The Tillinghast Property is located in the RE district, which is zoned for recreational and educational purposes. (Compl. ¶ 8.) 15 Freemont is located in the R-40 district, which is zoned for single-family residential use. (Barrington Code of Ordinances, (the Barrington Code) ch. 185, § 8(B) (2019); Tr. 55:10-11, June 18, 2020.) Section 185-5 of the Ordinance states that no more than one "household," consisting of either a family or no more than three unrelated persons, may occupy a single-family dwelling unit. (The Barrington Code, ch. 185, § 5 (1994).) RISD began listing 15 Freemont for short-term rentals on websites such as Airbnb during the summer of 2019. (Colasanto Aff. ¶ 4; Tr. 7:21-23, June 18, 2020.)

RISD does not host events at 15 Freemont except for monthly academic retreats during the academic year. (Colasanto Aff. ¶ 5; Tr. 9:12-20, June 18, 2020.) Anne Colasanto (Ms. Colasanto), who oversees communication with renters through Airbnb and takes care of the on-site management, testified that the Airbnb post for 15 Freemont indicated events were not permitted and that there was a noise restraint. (Tr. 37:4-9, June 18, 2020.) RISD instead encourages guests who seek to hold events to reserve the Tillinghast Property. (Colasanto Aff. ¶ 5; Tr. 9:12-20, June 18, 2020.) The description for 15 Freemont on the Airbnb site indicated, "[a] parcel of land [the Tillinghast Property] next to the house allows for wedding and formal events. The house is set in a quiet residential neighborhood so prior approval is required. The area is leveled for tent set up that can be used for an additional fee." (RISD's Mem. Supp. Appeal to the Zoning Board, Ex. B.) Should any large events occur at 15 Freemont, guests would have to get a special use permit. (Tr. 68:12-19, June 18, 2020.)

Guests have used 15 Freemont for a variety of purposes, including holding "dinner parties, birthday parties, college friends' reunions, and the occasional small-scale backyard wedding." (Pls.' Mem. 3.) Guests have also used 15 Freemont as a place to stay while their homes were being worked on and to hold religious celebrations such as bar mitzvahs. (Tr. 11:22-24, June 18, 2020.) If the guests ever used the property as a place to hold a party or other gathering, the fee for the rental would not change. (Tr. 12:2-7, June 18, 2020.)

Through Airbnb, RISD charges guests a reservation fee, in proportion to the guests' length of stay, based on a rental fee that does not change depending on the number of guests or the type of activity that the guests seek to conduct. (Colasanto Aff. ¶¶ 4-5; Tr. 12:2-7, June 18, 2020.) Ms. Colasanto testified at the Zoning Board Hearing that 15 Freemont was not available for large gatherings, meaning more than ten people. (Tr. 12:14-22; 16:5-11, June 18, 2020.) Per RISD, as

of April 2020, the sites Airbnb and Vrbo contained sixteen other short-term rentals within Barrington. (Colasanto Aff. ¶ 6.) Guests who stay at 15 Freemont typically do not stay for longer than a week. (Colasanto Aff. ¶ 9; Tr. 9:7-11, June 18, 2020.) They often stay for a weekend. (Colasanto Aff. ¶ 9; Tr. 9:7-11, June 18, 2020.) They do not use 15 Freemont in any way as a permanent residence, such as by having mail sent to 15 Freemont or by signing a long-term lease with a landlord. (Colasanto Aff. ¶ 9; Tr. 9:21-10:23, June 18, 2020.) When individuals rent the property at 15 Freemont, they receive a "limited license" and not a lease. (Tr. 10:16-23, June 18, 2020.) At the hearing, Ms. Colasanto identified Section 8.2 of Airbnb's Terms of Service. (Tr. 10:16-23, June 18, 2020.) The terms provided:

> "You understand that a confirmed booking of an Accommodation ('Accommodation Booking') is a limited license to you by the Host to enter, occupy and use the Accommodation for the duration of your stay, during which time the Host (only where and to the extent permitted by applicable law) retains the right to re-enter the Accommodation, in accordance with your agreement with the Host." (RISD's Mem. Supp. Appeal to the Zoning Board, Ex. J.)

Outside of short-term rentals, 15 Freemont is largely unoccupied for much of the year and normally has fewer than three unrelated persons staying at the property. (Colasanto Aff. ¶ 13; Tr. 7:18-20, June 18, 2020.)

RISD privately received one complaint regarding 15 Freemont on May 13, 2019, from a neighboring resident. (Pls.' Mem. Supp. Appeal, Ex. I; Colasanto Aff. ¶ 7.) The resident contacted Ms. Colasanto via e-mail and stated that he had been seeing "a lot of activity" at 15 Freemont and noted that he saw "tents being erected for large parties." (Pls.' Mem. Supp. Appeal, Ex. I.) The resident also mentioned that there was a wedding at 15 Freemont. *Id.* Although this neighbor's complaint is the only such complaint specifically identified in the record and the only one RISD is aware of, the Zoning Board alleges it received multiple complaints from RISD's neighbors.

(Defs.' Mem. 2.) The Zoning Board alleges that Dennis Begin (Mr. Begin), the Town Zoning Enforcement Officer, "received complaints from RISD's neighbors regarding the scope of the events held on [the Freemont] Property, the attendant noise from those events, [and] the number of people staying at the short-term rental." *Id.* However, the Zoning Board does not identify the source of those complaints, and RISD does not have any information regarding the substance of those complaints. *Id.*; *see also* Tr. 35:1-7, June 18, 2020. Barrington never *filed* any complaints, but it allegedly *received* complaints from residents. (Defs.' Mem. 2.) The alleged complaints by RISD's neighbors "prompted [Mr. Begin] to investigate" 15 Freemont, triggering the series of events that led to this lawsuit. *Id.*

B

The Zoning Officer's Letters to RISD

On October 1, 2019, in response to the complaints he received from RISD's neighbors, Mr. Begin sent a letter to Anne Colasanto, Director of Campus Conferences and Events, and Mitchell Edwards and John Pariseault, counsel for RISD. (Begin Letter, Oct. 1, 2019.) This was the first time the Zoning Board formally notified RISD of the alleged zoning violations. In this letter, Mr. Begin instructed RISD to "remove any on-line ads that indicate [15 Freemont] may be used for event space and shall post no other ad listing the house for event space." *Id.* Mr. Begin also indicated that while the Tillinghast Property may be used for events, "no event-related deliveries to or storage . . . may take place on 15 Freemont Ave. property." *Id.* "Further, no event parking is allowed at 15 Freemont (other than for a wedding party)." *Id.* Mr. Begin also stated that participants at an event at the Tillinghast Property are not permitted to use the bathrooms at 15 Freemont, and that any tents/chairs/activities related to events at the Tillinghast Property were to be set up "no closer than 100 feet to the south of [15 Freemont], or 150 feet to the north of [15

Freemont], whichever is greater." *Id.* 15 Freemont could be listed on Airbnb, Mr. Begin said, as long as the listing noted that it may only be rented to a single family related by blood or marriage or to no more than three unrelated persons. *Id.* On October 17, 2019, RISD responded in a letter to Mr. Begin. (RISD Letter, Oct. 17, 2019.) In this letter, Assistant General Counsel Joshua Grubman, Esq., requested further clarification, and the Town Solicitor, Peter Skwirz, Esq., responded via e-mail on October 23, 2019. (RISD Letter, Oct. 17, 2019; E-mail from Peter Skwirz to Joshua Grubman, Oct. 23, 2019.) In this e-mail, Attorney Skwirz reiterated that it was a zoning violation to rent out 15 Freemont to any group of people who were not either a single family related by blood or by a group of three or more related persons. (E-mail from Peter Skwirz to Joshua Grubman, Oct. 23, 2019.)

On May 4, 2020, Mr. Begin sent a subsequent letter listing the issues the parties had resolved. (Begin Letter, May 4, 2020.) The parties' mutual agreements included the following: (1) 15 Freemont is located in a residential zone and is to be used only for permitted uses and accessory uses in the residential zoning district; (2) 15 Freemont shall not be used for storage or deliveries to the Tillinghast Property and shall not be used as event parking for any event at the Tillinghast Property; (3) the participants in any event at the Tillinghast Property shall not use the bathrooms at 15 Freemont; (4) any accessory structures must meet the applicable setbacks in the zone; and (5) 15 Freemont may still be listed on Airbnb for short-term rentals. *Id.* The letter then reiterated two remaining issues of contention: (1) Although 15 Freemont could be listed on rental websites, it could only be occupied by a "household" as defined under Section 185-5 of the Ordinance, and (2) private gatherings are not allowed because 15 Freemont is in a R-40 district. *Id.* As to the latter issue, Mr. Begin stated:

> "[w]hile it is true, that other single family residences are occasionally used for such events as graduation parties or weddings.

> That word 'occasionally' is one of the two key distinctions in the nature of the use. Such events are accessory uses to the principle residential use only when they are not regularly or frequently held. The second key distinction is the monetary aspect. RISD would receive significantly more rent for the short term rentals with events such as weddings allowed, than for a short term rental without events . . . and that extra compensation is really to pay for the event rental cost as well. That creates a commercial use in a residential zoning district." *Id.*

C

RISD's Appeal and the Zoning Board's Decision

On January 15, 2020, RISD filed its Notice of Appeal. (Jan. 15, 2020 Notice of Appeal.) On June 18, 2020, the Zoning Board heard the parties' arguments.

1

The June 18, 2020 Hearing

At the hearing, RISD advanced several key arguments. They first argued that the Zoning Board was "erroneously claiming that short-term guests or visitors at 15 Freemont must be limited to a, quote, single family related by blood or marriage or to no more than three unrelated persons, close quote, using Section 185-5 of the zoning ordinance." (Tr. 29:22-30:1, June 18, 2020.) RISD then argued that the limitation is erroneous because the limitation applies only to "people who are living together . . . [and] not to visitors or guests of a residence." *Id.* at 30:2-5. The main theory on which RISD based its arguments was that they should be allowed to use 15 Freemont in the same manner as anyone else can use their residence in the R-40 District. *Id.* at 31:6-17.

RISD next argued that the Zoning Board's limitation is preempted by G.L. 1956 § 42-63.1-14, which states that municipalities shall not prohibit owners of residential property from offering their property for tourist or transient use on a hosting platform. *Id.* at 32:4-13. Ms. Colasanto was RISD's key witness. Ms. Colasanto testified that if she were to enforce the family or household

limitation that was advocated by Mr. Begin, it would dramatically reduce the number of rentals at 15 Freemont. *Id.* at 12:23-13:3. She stated that many renters are friends not related by blood, such that the limitation takes away "that which the general assembly has said RISD . . . [is] entitled to[:] . . . to have short-term rentals at the property." *Id.* at 13:5-14; 14:5-16. RISD further argued that the Zoning Board is selectively enforcing this limitation against RISD, and not against other short-term rentals in the same area. *Id.* at 34:23-35:1-25. Lastly, RISD argued that if other residents in the R-40 zone are permitted to hold events at their properties, then RISD should also be allowed to do so at 15 Freemont. *Id.* at 39:5-10.

The objections to RISD's appeal that were presented to the Zoning Board included arguments that the principal use of 15 Freemont was in violation of the zoning laws, and thus any visitors or guests are not proper uses. *Id.* at 43:5-7. In the alternative, counsel argued that if the use is residential, then 15 Freemont is bound by the "household" limitation. *Id.* at 43:9-14. They next argued that Barrington was not engaging in selective enforcement because its investigations are complaint-based. *Id.* at 45:1-5. Counsel further argued that Barrington's decision is not preempted by state law because it is not prohibiting RISD from renting out 15 Freemont. *Id.* at 45:21-46:2.

2

The Zoning Board's Decision

The Zoning Board, in making its Decision, made findings of both law and fact. *See* Decision. In its Decision, it found that 15 Freemont, "located in an R-40 Residential Zone, is by law bound to comply with the definition of a 'household' as found in Barrington Zoning Ordinance Sec. 185-5." *Id.* The Zoning Board also found that "the contention that the property at 15 Freemont may be used as an event space runs afoul of the definition of 'Accessory Use' as found

in the same Ordinance Sec. 185-5." *Id.* Further, the Zoning Board found that "15 Freemont has a principal use as a household residence[,]" and yet RISD's "evidence admits that no one uses it as a residence, and that the house is vacant most of the year. Thus, there is no 'principal use' of the premises to which a wedding or other event could be 'accessory.'" *Id.* Moreover, the Zoning Board stated that

> "any regular commercial use of the premises for events such as weddings necessarily runs afoul of the residential zoning restriction that does not permit commercial uses in the R-40 zone. Renting the property as event space is commercial use, and it does not matter if the monetary charge is attached to the event itself or to the rental charge for the property." *Id.*

The Zoning Board also found that, although § 42-63.1-14 permitted offering a residential unit for tourist and transient purposes, such units are still subject to the use and occupancy limitations of the Ordinance. *Id.*

The Zoning Board ultimately denied the appeal, in part, regarding the contested issues but approved and sustained the five agreements from the May 4 letter among the parties. *Id.*

D

RISD's Complaint

RISD filed their Complaint with this Court on September 21, 2020. *See* Compl. Count I of the Complaint alleges that the Zoning Board's Decision was in violation of constitutional, statutory, or ordinance provisions, that the Decision was erroneous in view of the evidence on the record, that the Decision was based upon unlawful procedures in violation of RISD's due process and equal protection rights, that the Decision was contrary to the law and evidence, and that the Decision was arbitrary and capricious and constituted an abuse of discretion under § 45-24-69. *Id.* ¶¶ 50-51. Count II of the Complaint requests that the Court enter declaratory judgment in RISD's favor, stating that § 42-63.1-2 preempts Section 185-5 of the Ordinance. *Id.* ¶¶ 52-55.

On June 16, 2021, this Court heard oral argument from both parties regarding the Plaintiffs' appeal. (June 16, 2021 Appeal Hr'g Tr. (Tr.)). Thereafter, both parties submitted supplemental memoranda to this Court.

II

Standard of Review

The standard of review for the Superior Court's appellate consideration of a zoning board's decision is governed by § 45-24-69. Under § 45-24-69, "[a]n aggrieved party may appeal a decision of the zoning board of review to the superior court[,]" which review "shall be conducted by the superior court without a jury." Sections 45-24-69(a), (c). Section 45-24-69(d) provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> > "(1) In violation of constitutional, statutory, or ordinance provisions;
> >
> > "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> >
> > "(3) Made upon unlawful procedure;
> >
> > "(4) Affected by other error of law;
> >
> > "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> >
> > "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d); *see also New Castle Realty Company v. Dreczko*, 248 A.3d 638, 642-43 (R.I. 2021).

The reviewing court gives deference to the decision of the zoning board, the members of which are presumed to have special knowledge of the rules related to the administration of zoning ordinances. *See Monforte v. Zoning Board of Review of City of East Providence,* 93 R.I. 447, 449, 176 A.2d 726, 728 (1962); *see also Braun v. Zoning Board of Review of Town of South Kingstown,* 99 R.I. 105, 109, 206 A.2d 96, 98-99 (1965). This deference, however, must not rise to the level of "blind allegiance." *Citizens Savings Bank v. Bell,* 605 F. Supp. 1033, 1042 (D.R.I. 1985) (citing *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983)). The court conducts a *de novo* review of questions of law. *Bernuth v. Zoning Board of Review of Town of New Shoreham,* 770 A.2d 396, 399 (R.I. 2001). Thus, this Court may remand the case for further proceedings or vacate the decision of the Zoning Board if it is "[c]learly erroneous in view of the reliable, probative and substantial evidence of the whole record" or otherwise affected by legal error. *Id.*

The Rhode Island Supreme Court has stated that, "[w]hen the language of a statute is clear and unambiguous, [the courts] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Raiche v. Scott*, 101 A.3d 1244, 1248 (R.I. 2014) (brackets and quotations omitted). "However, the plain meaning approach must not be confused with myopic literalism; even when confronted with a clear and unambiguous statutory provision, it is entirely proper for us to look to the sense and meaning fairly deducible from the context." *Id.* (internal quotations omitted). "Therefore, we must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." *Id.* (internal quotations omitted). Rhode Island law presumes "that the General Assembly intended every word of a statute to have a useful purpose

and to have some force and effect." *Curtis v. State*, 996 A.2d 601, 604 (R.I. 2010) (internal quotations omitted).

III

Analysis

The parties' main arguments are as follows. RISD argues that (1) § 42-63.1-14 preempts the Zoning Board's decision, as it directly and materially conflicts with the state statute; (2) the Zoning Board erroneously relies on the definition of "household" and interprets the term in a way that requires the guests of 15 Freemont be either a single family related by blood or marriage or no more than three unrelated persons; and (3) the Zoning Board improperly applied a blanket prohibition on "events" as accessory uses at 15 Freemont. *See* RISD's Mem. Supp. Appeal to the Zoning Board.

The Zoning Board responds that (1) its use of § 185-5 of the Ordinance is not preempted by § 42-63.1-14 because the Zoning Board is not prohibiting RISD from renting 15 Freemont; rather, it is regulating the number of people allowed to occupy 15 Freemont; (2) the occupants of 15 Freemont are living together, so the property must comply with the "household" limitation; and (3) the occupants at 15 Freemont are not permitted to host "events" because it would be an improper accessory use of the property. *See* Defs.' Mem. The Zoning Board further contends that RISD's request for declaratory judgment is not properly before the Court because RISD has not exhausted their administrative remedies under § 45-24-69. *Id.*

A

Declaratory Judgment

The threshold question before the Court is whether the Plaintiffs have exhausted their administrative remedies. Regarding Count II of the Complaint, RISD requests that this Court

declare that (1) § 42-63.1-1 was intended to supersede any contrary municipal action prohibiting short-term rentals; (2) § 185-5 of the Ordinance is in direct and material conflict with § 42-63.1-14; and (3) § 185-5 of the Ordinance is preempted by § 42-63.1-1. (Compl. ¶¶ 52-55.) The Zoning Board argues that "RISD is required to pursue and exhaust the administrative appeal provided for under § 45-24-69, rather than bringing a civil action seeking a declaratory judgment." (Defs.' Mem. 22.)

Section 45-24-69(a) states:

> "An aggrieved party may appeal a decision of the zoning board of review to the superior court for the county in which the city or town is situated by filing a complaint stating the reasons of appeal within twenty (20) days after the decision has been recorded and posted in the office of the city or town clerk." Section 45-24-69(a).

The Decision was posted on September 2, 2020, and the Complaint was filed with this Court on September 21, 2020.

The Uniform Declaratory Judgments Act (UDJA), G.L. 1956 § 9-30-1, provides:

> "The superior or family court upon petition, following such procedure as the court by general or special rules may prescribe, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Section 9-30-1.

"This power is broadly construed, to allow the trial justice to 'facilitate the termination of controversies.'" *Bradford Associates v. Rhode Island Division of Purchases*, 772 A.2d 485, 489 (R.I. 2001) (quoting *Capital Properties, Inc. v. State*, 749 A.2d 1069, 1080 (R.I. 1999)). The general rule is that a party must exhaust its administrative remedies under § 45-24-69 before requesting declaratory judgment from the court. *Bellevue-Ochre Point Neighborhood Association*

v. Preservation Society of Newport County, 151 A.3d 1223, 1231 (R.I. 2017); 3 Rathkopf's *The Law of Zoning and Planning* § 55:6 (4th ed.). However, the Rhode Island Supreme Court has held that our courts may use their discretion and that "persons whose rights are affected by an ordinance . . . are entitled to bring a declaratory judgment suit despite the possibility that administrative remedies might be available." *Taylor v. Marshall*, 119 R.I. 171, 180, 376 A.2d 712, 717 (1977); *see also* Super. R. Civ. P. 57 (stating "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate").

Thus far, RISD has not exhausted their administrative remedies under § 45-24-69 because they are in the process of litigating their appeal before this Court. *See* § 45-24-69.

Among several exceptions to the requirement that a party exhaust all administrative remedies before bringing an action for declaratory judgment is "when a complaint seeks a declaration that an ordinance or rule is unconstitutional or exceeds statutory powers or that the agency lacks jurisdiction." *Bellevue-Ochre Point Neighborhood Association*, 151 A.3d at 1226; *see also* 3 Rathkopf's *The Law of Zoning and Planning* §§ 55:7-55:17 (4th ed.). Generally, parties who facially challenge the constitutionality of a law are not required to exhaust their administrative remedies. *Bellevue-Ochre Point Neighborhood Association*, 151 A.3d at 1226. Our case law demonstrates that arguing preemption is not a facial challenge to the constitutionality of the ordinance. *See State ex rel. City of Providence v. Auger*, 44 A.3d 1218, 1231 (R.I. 2012) (using different and separate analyses for preemption argument and constitutional arguments).

Because the issues relevant to the declaratory judgment claim under § 45-24-69 and § 9-30-1 are addressed and resolved elsewhere in this Decision, there is no need for this Court to issue declaratory judgment in this matter.

B

Preemption of Barrington Zoning Ordinance § 185-5 by § 42-63.1-14

Before addressing the parties' arguments on this matter, the Court pauses for context to define "household" under § 185-5 of the Ordinance. A household is considered:

> "One or more persons living together in a single dwelling unit, with common access to, and common use of, all living and eating areas and all areas and facilities for the preparation and storage of food within the dwelling unit. The term 'household unit' shall be synonymous with the term 'dwelling unit' for determining the number of such units allowed within any structure on any lot in a zoning district. An individual household shall consist of any one of the following:
>
> "A. A family, which may also include servants and employees living with the family; or
>
> "B. A person, or group of unrelated persons living together, not to exceed three such persons." The Barrington Code, ch. 185, § 5.

RISD argues that, by imposing a family household limitation on a short-term rental, the Zoning Board's actions violate § 42-63.1-14, also known as the Rhode Island Tourism Development statute, which states that municipalities shall not prohibit property owners from offering their property for tourist or transient use. (Pls.' Mem. 2.) RISD asserts that 15 Freemont is a unit offered for tourist or transient use pursuant to the Tourism Development statute. (Pls.' Mem. 2, 9.) RISD relies on § 42-63.1-2(12), which defines "tourist or transient use" to include use of a residential unit for occupancy for less than thirty days, including occupancy by *employees and guests of businesses*. § 42-63.1-2. They argue that the definition of "tourist or transient" in the state statute is broader than Barrington's definition of "household" in the Ordinance, so the tourist or transient use of 15 Freemont should be allowed for more than three unrelated people despite the Ordinance. (Pls.' Mem. 8-9.) The Zoning Board rejects this contention on the basis

that RISD's interpretation would allow occupancy of short-term rentals by an unlimited number of people. (Defs.' Mem. 9-10.)

RISD states that the Zoning Board's Decision "contravenes the General Assembly's intention in enacting R.I. Gen. Laws § 42-63.1-14 to expand State tax revenue from short-term rentals like Airbnb." (Pls.' Mem. 12.) They further assert that, by interpreting "household" in a way that places limits on the type or number of people allowed to occupy short-term rentals, the Zoning Board is—*in effect*—prohibiting short-term rentals that are authorized by state law. (Pls.' Reply Br. 12.)

The Zoning Board argues that the unrelated persons limitation is expressly authorized by § 45-24-31(35)(ii) and is not subject to a preemption argument because 15 Freemont contains a single-family detached dwelling unit, which Barrington has the authority to regulate. (Defs.' Mem. 5, 7.) Section 45-24-31(35)(ii), also known as the Zoning Enabling Act of 1991, defines "household" in the same way as § 185-5 of the Ordinance, but allows Barrington to regulate the number of unrelated residential persons permitted to live together, which shall not be less than three. Section 45-24-31(35)(ii).

The Zoning Board acknowledges that § 42-63.1-14 prohibits Barrington from controlling whether an owner can offer their residence for tourist or transient use through hosting platforms. (Defs.' Mem. 13.) They responded that the statute does not prohibit Barrington from limiting the number of unrelated people allowed to use the residence for tourist or transient purposes. *Id.* at 10-11. Thus, the Zoning Board argues it is within its right to regulate the number of unrelated people allowed at 15 Freemont without violating § 42-63.1-14. *Id.* at 9-13.

"[Preemption] works as a limitation on the exercise of inherent police powers by a governmental body when the purported regulation relates to subject matter on which superior

governmental authority exists." *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 109 (R.I. 1992). "'[M]unicipal ordinances are inferior in status and subordinate to the laws of the state.'" *Id.* (quoting *Wood v. Peckham*, 80 R.I. 479, 482, 98 A.2d 669, 670 (1953)). "[A]n ordinance inconsistent with a state law of general character and state-wide application is invalid." *Id.* The issue of preemption "requires an analysis of whether the issue is implicitly reserved within the state's sole domain." *Amico's Inc. v. Mattos*, 789 A.2d 899, 908 (R.I. 2002).

"In general, '[a] local ordinance or regulation may be preempted in two ways.'" *Amico's Inc.*, 789 A.2d at 907 (quoting *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999). "First a municipal ordinance is preempted if it conflicts with a state statute on the same subject." *Id.* "Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject." *Id.*; *see generally* 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 30:1 (7th ed., Nov. 2020 Update).

1

Direct and Material Conflict

"An ordinance is invalid when it is 'in direct and material conflict with a state law.'" *Auger*, 44 A.3d at 1229 (quoting *Town of Glocester v. R.I. Solid Waste Management Corp.*, 120 R.I. 606, 607, 390 A.2d 348, 349 (1978)). What the Legislature intended when it enacted the state statute indicates whether such a conflict exists. *Id.*

Section 42-63.1-14 states:

> "For any residential unit offered for *tourist or transient use* on a hosting platform that collects and remits applicable sales and hotel taxes in compliance with § 44-18-7.3(b)(4)(i), § 44-18-18, and § 44-18-36.1, cities, towns or municipalities *shall not prohibit the owner of such residential unit from offering the unit for tourist or transient use through such hosting platform*, or prohibit such hosting platform

> from providing a person or entity the means to rent, pay for or otherwise reserve a residential unit for tourist or transient use." Section 42-63.1-14 (emphasis added).

Section 42-63.1-2 defines "tourist or transient use" as:

> "[A]ny use of a residential unit for occupancy for *less than a thirty (30) consecutive day* term of tenancy, or occupancy for less than thirty (30) consecutive days of a residential unit leased or owned by a business entity, whether on a short-term or long-terms basis, including *any occupancy by employee or guests of a business entity for less than thirty (30) consecutive days* . . . ." Section 42-63.1-2(12) (emphasis added).

Section 185-8 of the Ordinance states that land in districts zoned R-40 are to be used for single-family detached dwellings, and § 185-5 defines household as (1) a family or (2) group of unrelated people not to exceed three persons who live together in a dwelling unit. The Barrington Code, ch. 185, §§ 5, 8.

On one hand, the Zoning Enabling Act, which delegates authority to municipalities to enact local ordinances, expressly states what Barrington *can* do: Barrington may regulate the number of unrelated people living together in a household. *See* § 45-24-31(35). This is what it is doing through the enactment of ordinances, such as §§ 185-5 and 185-8. On the other hand, § 42-63.1-14 states what Barrington *cannot* do: Barrington shall not prohibit the offering of such residences on hosting platforms.

RISD's argument that the definition of "tourist or transient use" is broader than "household," and thus that the household limitation is automatically preempted, is not correct. "When interpreting an ordinance, [the court] employ[s] the same rules of construction that [the court] appl[ies] when interpreting statutes." *Ruggiero v. City of Providence,* 893 A.2d 235, 237 (R.I. 2006); *see Raiche*, 101 A.3d at 1248 (stating that courts "must give the words of the statute their plain and ordinary meanings"). A preemption issue does not arise between § 45-24-31(35)

and § 42-63.1-14, or between § 42-63.1-14 and the Ordinance, because they clearly address different things. Section 45-24-31(35) and § 185-5 of the Ordinance plainly deal with households and § 42-63.1-14 plainly deals with the rights of owners to offer their properties as short-term rentals. The terms "transient or tourist use" and "household" are not like terms, and one does not preempt the other. "Household" defines who can live together in a residence where the dwelling is used as a residence. "Tourist or transient use" defines a separate use to which the owner may put a dwelling, irrespective of whether it is used as a residence. Thus, statutory interpretation of the clear and unambiguous language of both § 42-63.1-14 and the Ordinance present no direct or material conflict here.

According to RISD, the Zoning Board's Decision has the effect of prohibiting RISD from offering 15 Freemont as a short-term rental. This argument is without merit for the same reason. *See generally Brindle v. Rhode Island Department of Labor & Training by and through its Director*, 211 A.3d 930, 935 (R.I. 2019) (holding that, although a state law could have a forbidden significant effect on federal law, a preemption argument may not be successful where the effect occurs in "too tenuous, remote, or peripheral a manner"). This Court recognizes that the Zoning Board can validly put a household limitation on and regulate the use of a household. *See* § 45-24-31(35) (granting Barrington authority to regulate household limitation); § 45-6-1 (granting municipalities the power to "make and ordain all ordinances and regulations for their respective towns and cities . . . ."). The Zoning Board is not prohibiting RISD from offering 15 Freemont for short-term rental; however, it is ignoring § 42-63.1-14 by placing the household limitation on something that does not fit the definition of a "household" under § 185-5.

Conflict preemption can also exist where "it is impossible for a private party to comply with both" requirements or where an ordinance may "'stand[] as an obstacle to the accomplishment

and execution of the full purposes and objectives of'" the state law. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This is also not a concern here. The Zoning Board can comply with § 42-63.1-14 by not prohibiting RISD from renting out 15 Freemont while also imposing limitations on households, and neither would be an obstacle to the accomplishment of the other because they are concerned with two different legal uses of a property. Where a state statute does not expressly preempt a municipal action but rather states specifically what a municipality may not do, that statute serves as a floor rather than a ceiling so that any subsequent municipal action will not be preempted by it. *Amico's Inc.*, 789 A.2d at 907 (citing *Gara Realty, Inc. v. Zoning Board of Review of Town of South Kingstown*, 523 A.2d 855, 857 (R.I. 1987) (holding that Legislature did not intend to preempt municipal regulation by enacting minimum standards)).

The Zoning Board has a valid right to limit the number of unrelated persons in a household, and it is both equally able and required to comply with § 42-63.1-14. Thus, § 42-63.1-14 and Barrington Zoning Ordinance § 185-5 may be read harmoniously and there is no preemption issue under the first analysis.

2

Occupying the Field of Regulation

"To determine whether state law preempts a municipal ordinance, we must also consider 'whether the General Assembly intended that its statutory scheme completely occupy the field of regulation on a particular subject.'" *Auger*, 44 A.3d at 1230 (quoting *Grasso Service Center, Inc. v. Sepe*, 962 A.2d 1283, 1289 (R.I. 2009)). In *Amico's Inc.*, cited *supra*, the East Greenwich council adopted an ordinance requiring restaurants either to ban smoking or to provide separate, enclosed areas for smokers. *Amico's Inc.*, 789 A.2d at 902. A state statute provided that eating

facilities that held fifty or more people had to have separate seating for nonsmokers and smokers. *Id.* at 907. The ordinance expanded the requirements of the state statute requiring restaurants of any size to comply with the seating rules. *Id.* In that case, the Supreme Court of Rhode Island held that the General Assembly did not intend to occupy the field of regulation. *Id.* In doing so, the court noted that, first, there was no express reservation of power over such regulation. *Id.* Second, there was no indication the General Assembly impliedly intended to occupy the field because the state statute "purports to regulate smoking only 'in certain public areas.'" *Id.* Further, the Legislature had recognized the municipality's authority to regulate smoking in other areas. *Id.* Finally, the court noted that G.L. 1956 § 23-20.6-2(e) allows municipalities to adopt ordinances "provid[ing] stricter controls on smoking." *Id.* at 907-08.

Here, the General Assembly did not indicate that they intended to occupy the entire field of the regulation of residential units, just the use of those units for short-term rental purposes, for periods no longer than thirty days for a single rental. In fact, § 45-24-31 specifically grants Barrington the authority to regulate the number of unrelated persons *in a household*, thus indicating that Barrington can exercise discretionary authority in situations where the persons in the dwelling comprise a household. Section 45-24-31 states, "the following words have the following meanings. Additional words and phrases may be used in developing local ordinances under this chapter; however, the words and phrases defined in this section are controlling in all local ordinances created under this chapter . . . ." Under § 45-24-31, a household consists of "(ii) A person or group of unrelated persons living together. The maximum number may be set by local ordinance, but this maximum shall not be less than three (3)." Section 45-24-31(35). Therefore, it is clear the General Assembly did not intend to occupy the field of regulation of *households* here.

The Zoning Board, however, does not recognize the above distinction between short-term rentals and households; it treats them as the same. This is not appropriate. The General Assembly, through § 42-63.1-14, has constrained the ability of an owner to offer a dwelling, not a household, as any type of short-term rental.

In conclusion, the Zoning Board's Decision is not preempted by state law; there is no preemption conflict between the Ordinance or the Zoning Board's ability to enforce § 185-5, and state law here. A reading of the plain language of § 42-63.1-14 and the Ordinance demonstrates that they address separate situations.

C

Interpretation of "Household" in Barrington Zoning Ordinances §§ 185-5 and 185-8 and its Application to 15 Freemont

This case presents issues of first impression for this Court. The world of Airbnbs, Vrbos, and other short-term rental platforms is growing rapidly and requiring municipalities to reassess their zoning codes. *See generally* 5 *Rathkopf's The Law of Zoning and Planning* § 81.11 (4th ed., Sept. 2021 Update). The advantages of short-term residential rentals include generating billions of dollars in revenue, supporting thousands of jobs, and encouraging travel. *See* Roberta A. Kaplan, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. Chi. L. Rev. Dialogue 103, 104-05 (2015). Despite these advantages, short-term residential rentals, such as Airbnbs, can cause "increased traffic and crime" and competition between the rentals and hotels. Patricia E. Salkin, 3 *American Law of Zoning* § 18:72.50 (5th ed., May 2021 Update). "[J]urisdictions have attempted[,]" like Barrington, "to deal with short term vacation rentals using their existing residential zoning restrictions." *Id.* They either deem the rentals illegal because they are no longer occupied by a "family" or commercial as prohibited under their zoning laws. *Id.*

However, "most zoning codes[,]" such as Barrington's Code of Ordinances, "lack specific regulations for home sharing rentals and good reasons can be found to support the argument that short-term rentals" are distinguishable from other residences and "do not violate single-family housing restrictions." *Id.*

Here, the Zoning Board has interpreted § 185-5 and § 185-8 of the Ordinance to conclude that 15 Freemont is required to comply with the definition of "household" as found in the Ordinance: one or more people living together, consisting of either a family related by blood or marriage, or no more than three unrelated persons. *See* Defs.' Mem. 13-14; *see also* the Barrington Code, ch. 185, § 5. RISD argues that, by using this definition, the Zoning Board has improperly limited the short-term rental of 15 Freemont. (Pls.' Mem. 13.)

This is so, RISD argues, because the Ordinance applies only to people who are living together for an extended period of time, not to short-term visitors or guests in a residence. (Pls.' Mem. 3, 13.) During the Zoning Review Board hearing, RISD explained that the people who stay at 15 Freemont typically stay for just a weekend and, as such, are not tenants. (Tr. 30:6-11, June 18, 2020.) Further, RISD has identified similarly situated short-term rentals in Barrington that offer more rooms than 15 Freemont offers and that are used in a similar fashion to 15 Freemont. (Pls.' Mem. 11-12.)

The Zoning Board argues that the renters who occupy 15 Freemont should be considered as "living together" based on the dictionary definitions of "living" (being alive) and "together" (in one place). (Defs.' Mem. 15-16.) The Zoning Board argues that the "household" definition does not include a minimum period of time for occupancy. (Defs.' Suppl. Mem. 6.) It further argues that § 185-5 specifically defines "living together" as "common access to, and common use of, all living and eating areas and all areas and facilities for the preparation and storage of food within

the dwelling unit" and that anything not included in this definition should be excluded. *Id.* In response, RISD states that, despite the Zoning Board's argument that "living together" has no temporal requirement, the General Assembly explicitly included a limit on the period of occupancy in order to be considered a "tourist or transient" use in § 42-63.1-2, which is thirty days or less. (Pls.' Second Suppl. Mem. 6.)

After hearing from both parties, this Court finds that the occupants of 15 Freemont do not "live together" as a household. Thus, the Ordinance does not apply to 15 Freemont.

The Zoning Board certainly has a right to regulate the use and development of land and real estate. It is authorized to enact and enforce ordinances that preserve and protect the municipality:

> "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds. 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 . . . 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." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *see also* § 45-6-1 (explaining, "[t]own and city councils may, from time to time, make and ordain all ordinances and regulations for their respective towns and cities, not repugnant to law, which they deem necessary for the safety of their inhabitants").

The constitutionality of the Ordinance is not in dispute. Barrington has the right to limit the number of unrelated people who may comprise a household in its town. *See generally Federal Hill Capital, LLC v. City of Providence ex rel Lombardi*, 227 A.3d 980, 996 (R.I. 2020) (holding a similar ordinance constitutional). In fact, out of Rhode Island's thirty-nine municipalities, thirty-

two of them have ordinances that also put limits on the number of unrelated people who make up a "household" for purposes of zoning limitations, like Barrington.[2]

Here, however, the Zoning Board is attempting to expand the term "household" in an already-enacted ordinance to include short-term rentals. The Zoning Board applies the "household" limitation to 15 Freemont in the following way: 15 Freemont is zoned in an R-40 zone, which provides for single-family dwellings; 15 Freemont is a single-family dwelling; a single-family dwelling under § 185-5 is defined as "[a] building used exclusively for occupancy by one family"; the definition of "family" under § 185-5 refers to "household"; "household" is defined in the Ordinance as "[o]ne or more persons living together in a single dwelling unit, with common access to, and common use of, all living and eating areas and all areas and facilities for the preparation and storage of food," consisting of either a family related by blood or marriage or not more than three unrelated persons; therefore, 15 Freemont can only be used by a family or no more than three unrelated persons.

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 effect this transformation. What the Zoning Board refuses to recognize here is the importance of the limited

[2] Seventeen municipalities have a three-person limit, including Central Falls, Charlestown, Cranston, Cumberland, East Greenwich, Jamestown, Johnston, Lincoln, Little Compton, North Providence, North Smithfield, Providence, Smithfield, South Kingstown, Warren, West Warwick, and Westerly. Six have a four-person limit, including Bristol, East Providence, Hopkinton, Narragansett, Portsmouth, and Warwick. Five have a five-person limit, including Coventry, Foster, Newport, Pawtucket, and Woonsocket. New Shoreham has a six-person limit. Burrillville has a two-person per bedroom limit, with a maximum limit of three.

amount of time that renters occupy 15 Freemont and the manner in which the premises are used while the renters are occupying them.

Short-term rental situations are distinguishable from the college housing issue. In *Village of Belle Terre,* cited *supra*, a village restricted land use to one-family dwellings. *Village of Belle Terre*, 416 U.S. at 2-4, 9-10. The local ordinance defined "family" as related by blood or marriage, or not more than two unrelated persons living together and cooking together. *Id.* The Court found that there was a violation of the ordinance by the owners of property where six unrelated people were leasing a house together for the duration of their school year. *Id.* In *McMaster v. Columbia Board of Zoning Appeals*, 719 S.E.2d 660 (S.C. 2011), an ordinance defined "family" as an individual or two or more persons related by blood or marriage living together, or not more than three unrelated persons living together as a single housekeeping unit. *McMaster*, 719 S.E.2d at 662-64. Again, the court found there was no due process violation when the owner of a house was found in violation of the ordinance where four unrelated undergraduate students were occupying the house. *Id.* at 662. All four occupants "shared meals and expenses, and operated as a single household." *Id.*

The 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. *See generally Lyng v. Castillo*, 477 U.S. 635, 636 (1986) (referring to the definition of "household" under the Food Stamp Act and recognizing it "generally treats parents, children, and siblings who live together as a single household, but does not treat . . . groups of unrelated persons who live together, as a single household unless they also customarily purchase food and prepare meals together"); *Peerless Insurance Co. v. Luppe*, 118 A.3d 500, 507 (R.I. 2015) (ruling that being a "resident in the context of insurance policies . . . implies more than being a mere transient guest . . . [rather]

someone who has a home in a particular place . . . where he or she lives, sleeps, and carries on life with regularity"); *Barricelli v. American Universal Insurance Co.*, 583 A.2d 1270, 1271 (R.I. 1990) (explaining someone who is a resident of a household is determined under a totality of the circumstances "'that person maintains a physical presence in the household with the intent to remain there *for more than a mere transitory period*, or that person has a reasonably recent history of physical presence together with circumstances that manifest an intent to return to the residence within a reasonably foreseeable period'") (quoting *Aetna Life & Casualty Co. v. Carrera*, 577 A.2d 980, 985 (R.I. 1990)) (emphasis added); *see also Federal Hill, LLC v. City of Providence*, No. PC 2016-0808, 2018 WL 986284, at *5, *6, *9 (R.I. Super. Feb. 12, 2018) (finding that "living together" can be used interchangeably with "cohabitating"). In *183 Eustis Ave. LLC v. City of Newport*, No. NC-2018-0207, 2018 WL 5087259, at *4 (R.I. Super. Oct. 1, 2019), the court held that the town ordinance did not apply to plaintiffs' short-term rentals of residential property and plaintiffs did not have to comply with the provision requiring transient guest facilities to register with the town because the short-term rentals did not fit the definitions of (1) guest house, (2) historic guest house, (3) transient guest facility, or (4) vacation guest facility as defined in the town's ordinances.

In these cases, the courts seem to define "living together" by reference to time. In *Village of Belle Terre* and *McMaster*, the unrelated persons became a single household under the law by the act of intentionally living together for a period of many months during the school year in a common shared living space. *Village of Belle Terre*, 416 U.S. at 2-4, 9-10; *McMaster*, 719 S.E.2d at 661-64. Similarly, § 42-63.1-2 specifically defines tourist or transient use of a residential unit as occupancy for less than thirty days. Section 42-63.1-2.

The facts here are significantly different from the facts of those cases, however, in that the occupiers of an Airbnb rent the premises for a *brief* period of time and do not identify the property as their "home" to the exclusion of other residences; they can rent premises and create a household somewhere else. As stated previously, guests who stay at 15 Freemont typically stay for a weekend. They do not list 15 Freemont as a mailing address or sign a lease. They receive only a limited license to use the property, per Airbnb's Terms of Service.[3] Therefore, transient and tourist guests do not live together for purposes of operating as a single household.

The Zoning Board is using a definition (household) that is inapplicable to short-term rentals, which are clearly defined by length of time. Therefore, the Court finds that the Zoning Board has demonstrated no clear rational basis supporting such application, and the basis it does use is arbitrary.

Further, the fact that other properties in the Barrington area are being used in a similar fashion demonstrates to this Court that the Zoning Board is abusing its discretion and acting arbitrarily and capriciously with regard to this one property. (Colasanto Aff. ¶ 6; RISD's Mem. Supp. Appeal to the Zoning Board, Ex. C.) In April 2020, at least sixteen other properties were listed on Airbnb and Vrbo, including a house with fourteen bedrooms that could host twenty-eight people, and other houses that could host two to eight people. (RISD's Mem. Supp. Appeal to the Zoning Board, Ex. C.) An Airbnb listing for a fourteen-bedroom mansion contained a comment from a renter that stated, "A great place to throw a REALLY big party!" *Id.* According to RISD, none of these other properties have been investigated. (Tr. 35:8-16; 35:21-25, June 18, 2020.) The Zoning Board admitted that even if other properties were being used in a similar fashion as 15

[3] RISD's Memorandum in Support of Appeal to Zoning Board of Review, filed with the Zoning Board contains an Exhibit J, which provides Airbnb's Terms of Service.

Freemont, the Zoning Board investigates on a complaint-based basis and it did not indicate whether they were investigating any similar situations. (Tr. 44:17-45:5, June 18, 2020.) Zoning codes should apply equally to everyone. *See generally Mill Realty Associates v. Crowe*, 841 A.2d 668, 674-75 (R.I. 2004) (indicating possibility of selective enforcement if there is enough evidence to show purposeful discrimination); *Santini v. Lyons*, 448 A.2d 124, 127 (R.I. 1982) (same).

Four municipalities in Rhode Island have specifically addressed short-term rentals in their zoning ordinances.[4] Chapter 98 of Middletown's Code of Ordinances addresses Short-Term Residential Leases. The stated intent behind Chapter 98 was to eliminate the adverse conditions of short-term residential rentals in Middletown, including "noise, congestion, pollution, and rowdy and disorderly behavior," and to protect residents and preserve the right to rent out properties without undue restrictions. (Middletown Code of Ordinances, ch. 98, § 98.01 (2019)). Section 98.09, which addresses the occupancy limits, states:

> "(A) The maximum occupancy for the dwelling unit shall be *two persons per bedroom*. The maximum occupancy may be further limited by the requirements of division (B) below. For the purpose of establishing occupancy, a person is defined as an individual at least 12 years of age; provided however, *that in no event shall the occupancy of a dwelling exceed the occupancy load as defined in the current version of the Rhode Island Building Code SBC-1, which requires a floor area of 200 gross square feet per occupant*; . . . and provided further, that in no event shall the occupancy of a dwelling exceed the design load of the property's septic system, if applicable." *Id.* § 98.09 (emphasis added).

This provision specifically regulates the number of persons allowed to occupy a short-term rental and can be read harmoniously with § 42-63.1-14.

[4] Middletown (Middletown Code of Ordinances, ch. 98 (2019)), Portsmouth (Portsmouth Code of Ordinances, ch. 314 (2018)), Newport (Newport Code of Ordinances, ch. 17.100 (2000)), and Providence (Providence Code of Ordinances, ch. 27, art. XII (2019)).

Chapter 314 of Portsmouth's Code of Ordinances also addresses the Short-Term Rental of Residential Dwellings. (Portsmouth Code of Ordinances, ch. 314, § 314-8 (2018)). The ordinance was enacted to address the negative effects of short-term rentals in residential neighborhoods, including those mentioned in Chapter 98 of Middletown's Code of Ordinances. *Id.* § 314-1(B)-(C). In addition, the Town Council of Portsmouth found that regulation of short-term rentals of dwellings "can have a positive effect on the health, safety and welfare of the community by providing a flexible housing stock that allows travelers safe accommodations while contributing to the local economy and providing homeowners an opportunity to hold property in difficult economic circumstances or as an investment." *Id.* § 314-1(D). Section 314-8, which addresses the occupancy limits, states:

> "(A) The maximum occupancy for the dwelling unit shall be *two persons per bedroom*. The number of bedrooms *shall not exceed the number of bedrooms supported by the design load of the property's septic system* (on-site wastewater treatment system, or 'OWTS') . . . The maximum occupancy may be further limited by the requirements of Subsection B below. For the purpose of establishing occupancy, a person is defined as an individual at least 12 years of age." *Id.* § 314-8(A) (emphasis added).

This provision also specifically regulates the number of persons allowed to occupy the short-term rental and can be read harmoniously with § 42-63.1-14.

Both municipalities regulate the occupancy of a dwelling based on the number of bedrooms the dwelling has, and not based on relationship. "[I]t is the legislatures, not the courts, that make the law." *Federal Hill Capital, LLC.*, 227 A.3d at 984. Since Barrington has no specific ordinance addressing short-term rentals, the Zoning Board is attempting to regulate them in an arbitrary manner. It would benefit Barrington to address the specific issue of short-term rentals, rather than attempting to shoehorn a preexisting ordinance into a unique situation.

D

The Prohibition Against "Events" and Accessory Uses

Finally, RISD argues that the Zoning Board's "blanket" prohibition on "events, parties, and private gatherings" is arbitrary and unconstitutionally vague. (Pls.' Mem. 3.) RISD states that any "events" occurring at 15 Freemont were small, private gatherings, such as birthday parties and college reunions. (Pls.' Mem. 16.) As with their first argument, RISD argues short-term renters should be permitted to "host dinner parties, birthday parties, and other small gatherings . . . that are typically allowed at single-family dwellings." (Pls.' Reply Br. 28.) RISD also argues that when the Zoning Board provided that no one at 15 Freemont shall hold "events," the term "events" was never defined nor did the Zoning Board provide any standards. (Pls.' Mem. 3-4.)

The Zoning Board asserts that, because 15 Freemont is vacant for much of the year, it is not principally used as a residence. (Defs.' Mem. 19-20.) Rather, the Zoning Board argues that the principal use of 15 Freemont is as a commercial short-term rental; thus, any small wedding or party held at 15 Freemont, and any person who visits 15 Freemont for this purpose, is "not accessory to any principal use of a household in a single-family residential zone." (Tr. 56:6-10, June 18, 2020.) Therefore, the property can have no additional accessory uses, such as events or gatherings. (Defs.' Mem. 14, 20; Tr. 56:3-10, June 18, 2020.)

The principal use of a piece of land or of a building is the use permitted in the zoning ordinance. E.C. Yokley, 2 *Zoning Law and Practice* § 8-1 (2021 Update). Section 45-24-31(3) defines an "accessory use" as:

> "A use of land or of a building, or portion thereof, customarily incidental and subordinate to the principal use of the land or building. An accessory use may be restricted to the same lot as the principal use. An accessory use shall not be permitted without the principal use to which it is related." Section 45-24-31(3).

The definition of "accessory use" in Barrington's Town Ordinance mirrors that of § 45-24-31(3). An accessory use is one that is incidental and secondary to the principal use of property, such that it makes sense, under an objective standard, that the primary use of the property would also include the accessory use. 83 Am. Jur. 2d. *Zoning and Planning* § 133 (2021). An accessory use is not "expressly permitted by the zoning ordinance itself," but is allowed as a right once it is established. *Id.*

By arguing it can enforce a prohibition on events because the principal use of 15 Freemont is commercial, the Zoning Board is tacitly authorizing an unapproved code violation because the area where 15 Freemont is located is zoned for residential purposes, not commercial. Further, its argument that the principal use of 15 Freemont is commercial has the effect of giving the Zoning Board the authority to prohibit any and all types of events associated with short-term rentals since commercial use of a property is not allowed in a residential zone. This theory, however, conflicts with the Zoning Board's previous assertion that RISD *can* rent out 15 Freemont—albeit only to a single family or no more than three unrelated persons, as discussed *supra*. If the principal use of 15 Freemont was in fact a commercial use, then the Zoning Board would not have told RISD that they could continue renting out the property.

Under both of the Zoning Board's inconsistent arguments, RISD is left without an answer as to how 15 Freemont can be used and what types of events its renters can hold. If the principal use of short-term rentals is considered commercial, then no use is permitted. On the other hand, if the principal use is residential, guests can occupy the rentals, but the Zoning Board says they cannot enjoy the regular accessory uses of a residence that other homeowners enjoy. This demonstrates how the Zoning Board is pigeonholing the Ordinance as being applicable to short-term rentals.

Hosting small events at a residence is just as customarily incidental to the principal use of a residence as is offering the residence as a short-term rental.[5] Since the Zoning Board has previously conceded that RISD may offer 15 Freemont for short-term rental, the blanket prohibition on events runs counter to § 45-24-31(3). The Zoning Board is prohibiting the renters from hosting any events, even small events commonly permitted to other dwellings zoned in Barrington's R-40 district, which are subject to reasonable noise and time restrictions.[6] The Zoning Board cannot permit events for some dwellings but not for others. That is an arbitrary and capricious use of its discretion and, as such, is strictly prohibited by § 45-24-69(d).

The Zoning Board's prohibition on all events at 15 Freemont has no clear rational basis. It has acted in an arbitrary manner with its blanket prohibition. Again, Barrington can certainly define and regulate these events for short-term rentals in the same manner that it regulates events for all properties zoned R-40 pursuant to its municipal authority, but it may not prevent such events at 15 Freemont while allowing them for other dwellings in the same district.

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[5] *See generally Samar v. Zoning Board of Upper Merion Township*, No. 922 C.D. 2018, 2019 WL 1749038, at *7 (Pa. Commw. Ct. Apr. 16, 2019) (finding homeowner could rent out property on Airbnb and encouraging Township to update zoning code to address Airbnb use of property); *Heef Realty & Investments, LLP v. City of Cedarburg Board of Appeals*, 861 N.W.2d 797, 798 (Wis. Ct. App. 2015) (finding board erred in interpreting ordinances to preclude short-term rentals in single family zoning district because such restriction must be done clearly and unambiguously); *Matter of Fruchter v. Zoning Board of Appeals of the Town of Hurley*, 20 N.Y.S.3d 701, 702-03, slip op. 08689 (N.Y. App. Div. 2015) (holding property owner's rental of single-family residence did not fit into town code's definitions of bed and breakfast or hotel and thus was not expressly prohibited); *In re Toor*, 59 A.3d 722, 723 (Vt. 2012) (holding renting out single-family home for short-term vacations did not constitute change in use and did not require permit); *Allen v. City of Key West*, 59 So. 3d 316, 317-18 (Fla. Dist. Ct. App., Third District 2011) (property owners' use of properties for short-term rentals was lawful nonconforming use, where locality attempted to change definition of "transient housing" to include short-term rentals).

[6] *See* Barrington Code of Ordinances, ch. 130, §§ 1-12 (2003).

IV

Conclusion

The Court finds that § 185-5 of the Ordinance and the Zoning Board's decision are not preempted by § 42-63.1-14 of the Rhode Island General Laws.

The issues raised in RISD's request for declaratory judgment were addressed in the Court's review of the Zoning Board's decision; therefore, the Court declines to issue declaratory judgment in this matter.

The Zoning Board's decision, applying the language and definitions of the Ordinance to a short-term rental, was arbitrary and capricious and without a rational basis.

For the reasons set forth herein, the Court reverses the Decision of the Zoning Board.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Rhode Island School of Design and RISD Holdings, Inc. v. Dennis Begin, et al.**

CASE NO: **PC-2020-06584**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **November 12, 2021**

JUSTICE/MAGISTRATE: **McGuirl, J.**

ATTORNEYS:

For Plaintiffs: **Mitchell Edwards, Esq.; Timothy M. Zabbo, Esq.**

For Defendants: **Michael DeSisto, Esq.; Kathleen M. Daniels, Esq.; Peter F. Skwirz, Esq.**