

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF
JUSTICE SUPERIOR DIVISION
FILE NO. 19-CVS-4028

DAVID SCHROEDER and)
PEGGY SCHROEDER)
)
Plaintiffs/Petitioners,)
)
v.)
)
)
CITY OF WILMINGTON and)
CITY OF WILMINGTON)
BOARD OF ADJUSTMENT,)
)
Defendants/Respondents.)
)

**AMENDED COMPLAINT
AND PETITION FOR WRIT
OF CERTIORARI**

Plaintiffs/Petitioners David and Peggy Schroeder (the “Schroeders”) hereby file this amended complaint and petition for writ of certiorari against Defendants/Respondents City of Wilmington and the City of Wilmington Board of Adjustment (collectively “Defendants/Respondents”), and allege as follows:

INTRODUCTION

1. On February 5, 2019, the City of Wilmington amended its Code of Ordinances to strictly regulate the manner in which certain homeowners may rent property they own. This change (effective on March 1, 2019) has and will continue to cause many property owners, including Plaintiffs/Petitioners, economic injury. Even though the ordinance at issue is preempted by state law and unconstitutional, both facially and as applied, the City continues to enforce it.

2. Husband and wife David and Peggy Schroeder, own a townhouse located at 1800 Eastwood Road, Unit #130, Wilmington, North Carolina 28403 (the

“Townhouse”), which is within a community known as Lions Gate located near the eastern end of Wilmington’s city limits.

3. Prior to purchasing the Townhouse, the Schroeders investigated whether whole house rentals for periods of fewer than 30 days (hereinafter, “vacation rentals”) were permitted by local law as well as by the covenants, restrictions, and rules of their would-be homeowners’ association. They found no restrictions on vacation rentals applicable to the Townhouse.

4. After their purchase on June 6, 2018, the City enacted an ordinance covering the Schroeders’ property that strictly caps the number of properties that may be used for vacation rentals, distributes the limited number of vacation-rental permits using a lottery system, and limits the proximity of one vacation-rental property to another.

5. The Schroeders did not receive a permit under this process and thus will be precluded from using their property as they intended and still wish to do if Defendants are not enjoined from enforcing the City’s ordinance.

6. The Schroeders pursued a challenge through the City’s Board of Adjustment to no avail. They now timely seek relief from this Court, invoking both its original and appellate jurisdiction.

PARTIES

7. Plaintiffs/Petitioners David and Peggy Schroeder are a married couple, both of whom are citizens and residents of the State of North Carolina. They own real property—the Townhouse—located at 1800 Eastwood Road, Unit #130, Wilmington, North Carolina 28403.

8. As the owners of the Townhouse and the individuals seeking to engage in vacation rentals of said Townhouse, the Schroeders have suffered an injury from application of the City of Wilmington's ordinance restricting such rentals, as well as from the denial of their appeal, and have standing to bring this amended complaint and petition for writ of certiorari.

9. Defendant/Respondent City of Wilmington (hereinafter, "City") is a municipal corporation established under North Carolina law. It is located within New Hanover County, North Carolina. The Wilmington City Council enacted the ordinance at issue in this case.

10. Defendant Respondent City of Wilmington Board of Adjustment (hereinafter, "BOA") is the duly designated body to hear and decide appeals arising out of the administration of zoning ordinance by the City of Wilmington, including the ordinance at issue here.

JURISDICTION AND VENUE

11. This Court may issue and hear a petition for writ of certiorari to the City of Wilmington pursuant to North Carolina law, specifically from the Board of Adjustment matter identified as File No. BACEO-3-819.

12. The Schroeders' claims for declaratory and injunctive relief as well as damages, both compensatory and nominal, are properly brought within this Court's original jurisdiction pursuant to N.C. Gen. Stat. § 7A-245 and otherwise.

13. The requests for relief in the nature of certiorari are properly joined with the claims alleged herein that are brought within this Court's original jurisdiction.

14. Defendants/Respondents enjoy no lawful immunity for the claims alleged herein.

15. As the Schroeders' original complaint and petition for writ of certiorari were filed on or before October 25, 2019, this case was timely filed within any time limits prescribed by law.

16. Venue for the Schroeders' original action is properly laid in the Superior Court for New Hanover County under N.C. Gen. Stat. § 1-82.

FACTUAL ALLEGATIONS

17. The Schroeders purchased the Townhouse on or about June 6, 2018, as a second home.

18. To afford the Townhouse, the Schroeders sold two other properties they owned at 125 Elisha Drive and 645 Julia Drive in Wilmington.

19. On June 6, 2018, the Schroeders purchased the Townhouse for \$ 257,000.

20. Soon after purchasing, the Schroeders began to renovate the Townhouse to make it suitable for vacation rentals.

21. The Schroeders hired contractors to do substantial renovations including plumbing, electrical, flooring, and general repair.

22. The Schroeders also did some improvements themselves, including reflooring a bathroom and bedroom, doing drywall repairs, installing kitchen cabinets, stocking supplies, and painting.

23. The Schroeders also made specific renovations for vacation rentals including modifying the main bedroom's closet by building a wall with a locked door

to section off an owner's closet, putting a locked handle on the pantry in the kitchen, buying a mini fridge, and installing shelving for their own separate provisions in the locked pantry.

24. Between June 2018 and February 2019, the Schroeders spent over \$75,000 renovating the Townhouse to make it suitable for vacation rentals.

25. Virtually all of these renovations were completed before the passage of City Code § 18-331, which capped the number of vacation rentals in Wilmington, imposed 400-foot proximity requirements under that cap, and created a lottery system to determine which properties would be permitted to offer vacation rentals.

26. Following their renovations, in early 2019, the Schroeders began conducting vacation rentals of their Townhouse: Their first listing on HomeAway (a vacation rental marketplace now rebranded as Vacation Rentals by Owner (VRBO)) was on February 7; their first booking was on February 12; and their first renter arrived on March 18.

27. In July 2019, the Schroeders began an annual membership with VRBO to continue listing their Townhouse as a vacation rental through the VRBO website. The Schroeders still have this membership.

28. From day one, the Schroeders have operated their vacation-rental business in a very professional manner and have received no complaints from either neighbors or local officials about the individuals to whom they have rented.

29. On February 5, 2019, the City amended the Wilmington Code of Ordinances to regulate whole-house vacation rentals. The new ordinance went into effect on March 1, 2019.

30. The new ordinance defines “Whole-house lodging” as “[a] business engaged in the rental of an entire dwelling unit that provides lodging for pay for a maximum continuous period of twenty-nine (29) days and does not include the serving of food. Whole-house lodging uses are exempt from the definition of ‘family.’” Wilmington Code § 18-812.

31. The new ordinance amended Article 6, Chapter 18 of the City Code to cap and regulate whole-house vacation rentals in the City—including the Schroeders’—with an elaborate permitting and lottery system. Wilmington Code § 18-331.

32. Specifically, individuals who wish to operate a whole-house vacation rental under the ordinance must register with the City. The number of permits that can be issued is capped by the City at 2% of residentially-owned properties, whole-house vacation rentals must be at least 400-feet apart, and a lottery system was used to award permits. *Id.*

33. As a result of this cap and separation requirement, a property owner who was already exercising her right to legally offer vacation rentals could lose the right to do so.

34. The City conducted its lottery under City Code § 18-331 on or about April 15, 2019. The Schroeders had registered for a permit and were placed in the lottery by the City.

35. Based on the City’s prior representations to the Schroeders, the City deems all of the Lions Gate subdivision to be “one property,” and thus the City will

only issue a permit to one unit within Lions Gate, regardless of another unit's distance from the one permitted property.

36. According to the City, there were two other properties within 400-feet of the Schroeders' Townhouse entered into the lottery. The winner of the lottery was located at Unit #135.

37. Because the Schroeders lost the lottery, they cannot use their Townhouse in the manner they had intended when they purchased it prior to the enactment of the specific ordinance at issue here.

38. The City informed the Schroeders that the lottery is a one-time event and if a current permit holder gives up their right to rent then another permit "may" open up.

39. Had the ordinance been in effect when the Schroeders were shopping for a property, they would not have bought within 400-feet of another vacation-rental property. But the ordinance was not in effect at that time, nor were they aware that the City had plans to strip certain property owners of their right to rent, so they felt comfortable purchasing the Townhouse.

40. After they lost the lottery, the City informed the Schroeders that they could "continue to operate as an amortized registration until April 22, 2020."

41. The Schroeders timely appealed to the BOA, which held a hearing on August 15, 2019.

42. The BOA upheld the decision of the City staff to deny issuance of a permit to the Schroeders.

**FIRST CLAIM FOR RELIEF
(Petition for Writ of Certiorari)**

43. The allegations of the preceding paragraphs are hereby re-alleged and incorporated herein by reference as if alleged in full.

44. On September 26, 2019, the BOA entered an order upholding the City staff determination that denied the Schroeders the right to engage in vacation rentals of their Townhouse. The order was mailed and emailed to the Schroeders on that same day.

45. The Schroeders hereby petition for a writ of certiorari to review the BOA order, which they contend has prejudiced their rights, and here challenge the findings, inferences, conclusions, and/or decisions of the BOA, including but not limited to, Finding of Fact No. 24 and Conclusion of Law No. 2.

46. The Schroeders assert that the findings, inferences, conclusions, and/or decisions of the BOA were in violation of constitutional provisions, including those protecting procedural due process rights. These violations include use of a lottery system to adjudicate property rights, imposing unreasonable caps on permits and unreasonable separation requirements, and taking property without just compensation.

47. The Schroeders assert that the findings, inferences, conclusions, and/or decisions of the BOA were unlawful because, at the time the Schroeders bought, renovated, and started renting their Townhouse, this type of regulation of vacation rentals was preempted by state law. Thus, the BOA's findings, inferences, conclusions, and/or decisions are *ultra vires*, preempted, and in excess of the statutory authority conferred upon Defendants/Respondents by law.

48. Because vacation rentals in North Carolina are not properly subject to regulation in the manner here sought, the Schroeders assert that the findings, inferences, conclusions, and/or decisions of the BOA were inconsistent with applicable procedures specified by statute or ordinance.

49. Due to the illegality of City Code § 18-331, the Schroeders assert that the findings, inferences, conclusions, and/or decisions of the BOA were arbitrary and capricious. Moreover, the City's cap, separation, and lottery requirements are themselves an arbitrary and capricious exercise of authority.

50. Therefore, the Schroeders respectfully pray that this Court issue a writ of certiorari to Defendants/Respondents and ask that this Court further reverse, vacate, and/or otherwise modify the September 26, 2019 decision of the BOA as appropriate, including directing that the BOA cease applying City Code § 18-331 and further directing that the Schroeders be permitted to continue engaging in vacation rentals of their Townhouse, without any time limit by which they must cease, and that they be permitted to engage in vacation rentals of any other similar property they may acquire in the future within the City of Wilmington.

SECOND CLAIM FOR RELIEF
(Declaratory and Other Relief: *Ultra Vires*,
In Excess of Powers, and Preempted by State Statute)

51. The allegations of the preceding paragraphs are hereby re-alleged and incorporated herein by reference as if alleged in full.

52. Except in limited respects, at the time the City enacted City Code § 18-331, state law conferred no authority upon Defendants/Respondents to regulate

vacation rentals. Thus, City Code § 18-331 is *ultra vires* and in excess of the powers granted to a municipal corporation under North Carolina law.

53. Moreover, City Code § 18-331 is both implicitly and explicitly preempted by state statute.

54. The authority to regulate vacation rentals is exercised by the state pursuant to the Vacation Rental Act, N.C. Gen. Stat. §§ 42A-1 *et seq.*

55. Part of the Vacation Rental Act, in particular N.C. Gen. Stat. § 42A-3(a), as amended by Session Law 2019-73 (S.B. 483), expressly provides that, “[t]he provisions of G.S. 160A-424 and G.S. 153A-364 shall apply to properties covered under this Chapter.” Section 160A-424(c) in turn states, in relevant part:

In no event may a city do any of the following: (i) adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission from the city to lease or rent residential real property or to register rental property with the city, except for those individual rental units that have either more than four verified violations in a rolling 12-month period or two or more verified violations in a rolling 30-day period, or upon the property being identified within the top ten percent (10%) of properties with crime or disorder problems as set forth in a local ordinance; (ii) require that an owner or manager of residential rental property enroll or participate in any governmental program as a condition of obtaining a certificate of occupancy; (iii) levy a special fee or tax on residential rental property that is not also levied against other commercial and residential properties, unless expressly authorized by general law or applicable only to an individual rental unit or property described in subdivision (i) of this subsection and the fee does not exceed five hundred dollars (\$500.00) in any 12-month period in which the unit or property is found to have verified violations; (iv) provide that any violation of a rental registration ordinance is punishable as a criminal offense; or (v) require any owner or manager of rental property to submit to an inspection before receiving any utility service provided by the city.

56. City Code § 18-331 violates N.C. Gen. Stat. § 160A-424(c) and is thus both clearly and unambiguously preempted by express state law, rendering the ordinance void and of no effect.

57. Section 160A-424(c) was in effect when the City enacted City Code § 18-331.

58. On July 1, 2019, Session Law 2019-73 (S.B. 483) was enacted to make clear what was already true—that the preemption language of N.C. Gen. Stat. § 160A-424(c) applied to vacation rentals. This law was active upon its enactment on July 1, 2019, and these provisions are still in effect today.

59. On July 11, 2019, the Legislature passed Session Law 2019-111 (S.B. 355), an act which simply relocated N.C. Gen. Stat. § 160A-424(c) to § 160D-12-7. The relevant legislative language remained the same, with an effective date of January 1, 2021. In the meantime, the original (and identical version) of § 160A-424(c)—the basis of the Schroeders preemption claim—remained in effect.

60. On May 4, 2020, the Legislature passed Session Law 2020-3 (S.B. 704) which changed the effective date of Session Law 2019-111 (S.B. 355) to August 1, 2021.

61. The Vacation Rental Act, as amended to include the preemption language discussed above, is still the law today.

62. Session Law 2019-111 (S.B. 355), as amended by Session Law 2020-3 (S.B. 704), is not in effect until August 1, 2021, and although it “applies to ordinances adopted before, on, and after the effective date” it does not take effect *until* the effective date.

63. The purported result of S.B. 355 and S.B. 704, in light of all of these legislative changes, is to retroactively strip vacation rentals of the protections previously provided under the Vacation Rental Act. But S.B. 355 does not take effect until August 1, 2021. To give Session Law 2019-111 (S.B. 355) effect now would be to frustrate the will of the Legislature.

64. The reason to delay the effective date of a statutory clarification of land-use statutes is to protect investment-backed expectations in property incurred under the previous governing law.

65. Prior to the passage of the new ordinance, the Schroeders made substantial investments to renovate their property to rent.

66. Current law prohibits the City of Wilmington from passing the ordinance codified as City Code § 18-331.

67. To the extent there is any ambiguity in existing law, it is resolved in favor of the Schroeders' free use of their property.

68. The Legislature indicated its understanding that there was an ambiguity in the existing law by passing a statutory clarification. *See* Session Law 2019-11 (S.B. 355) (purporting to "Clarify Statutes Regarding Local Planning And Development Regulation").

69. On information and belief, the purpose of delaying the effective date of the statutory clarification until August 1, 2021, is to respect the vested rights and settled expectations of property owners.

70. City Code § 18-331 is especially void and unenforceable as to the Schroeders since their property has had no "verified violations," as that term is

defined, and it is not within the top 10% of properties with crime or disorder problems as set forth in a local ordinance.

71. Defendants/Respondents nevertheless have enforced, and likely will enforce in the future, City Code § 18-331.

72. Therefore, an actual controversy exists between the parties.

73. A declaratory judgment is necessary and appropriate as it would serve a useful purpose in clarifying and settling particular legal issues between the parties and thereby afford relief from the uncertainty and controversy giving rise to this proceeding.

74. Accordingly, under N.C. Gen. Stat. §§ 1-253 *et seq.*, and Rule 57 of the North Carolina Rules of Civil Procedure, the Schroeders pray for declaratory and related relief declaring that City Code § 18-331 is *ultra vires*, in excess of statutory authority, and preempted and thus void and unenforceable.

75. The Schroeders are also entitled to damages, both nominal and compensatory, for the violation of their rights by Defendants/Respondents through enforcement of City Code § 18-331.

**THIRD CLAIM FOR RELIEF
(Declaratory and Other Relief:
Facial and As Applied Unconstitutionality
under the North Carolina Constitution)**

76. The allegations of the preceding paragraphs are hereby re-alleged and incorporated herein by reference as if alleged in full.

77. Both facially and as applied, City Code § 18-331, violates several provisions of the North Carolina Constitution, including provisions that recognize specifically enumerated rights. The restrictions in City Code § 18-331 are not only

unconstitutional, but the process established by City Code § 18-331 is itself constitutionally infirm and invalid.

78. The system established by the City under City Code § 18-331 violates the Schroeders' rights to substantive and procedural due process under Article I, § 19, of the North Carolina Constitution.

79. North Carolina's Law of the Land Clause, N.C. Const. Article I, § 19, protects an individual's rights to procedural and substantive due process.

80. The vested rights doctrine is rooted in North Carolina's Law of the Land Clause.

81. The vested rights doctrine is a constitutional limitation on the state's ability to restrict private property uses through the enactment of zoning ordinances.

82. The vested-rights doctrine prohibits municipalities from retroactively depriving a person of a vested property right.

83. If the Legislature did remove the Schroeders' preemption claim through legislative recodification, purportedly clarifying that the City has the power to require permits to rent contrary to plain statutory text, then such an interpretation of the statute improperly empowers the City to retroactively divest the Schroeders of a vested property right—the right to rent their property.

84. A property owner has a vested right in a property use if they can show (1) substantial expenditures, (2) made in good faith reliance, (3) on valid governmental approval or at a time when no government approval was required, (4) resulting in the party's detriment.

85. The Schroeders have a vested right in the use of their Townhouse for vacation rentals.

86. They made substantial expenditures by purchasing and renovating their Townhouse to use for vacation rentals.

87. They made these expenditures in good-faith reliance on vacation rentals being a lawful use of their property at the time they made the investments.

88. Vacation rentals were a lawful use of the Schroeders' property when the Schroeders made substantial expenditures to use their Townhouse as a vacation rental.

89. They listed their Townhouse as a vacation rental on VRBO before City Code § 18-333 went into effect.

90. If the City is allowed to strip the Schroeders of their right to use their property as a vacation rental, the Schroeders will lose their substantial investments in renovating the Townhouse for vacation rentals.

91. If the City is allowed to strip the Schroeders of their right to use their property as a vacation rental, the Schroeders will lose their substantial investments in renovating the Townhouse for vacation-rental use.

92. If the City is allowed to strip the Schroeders of their right to use their property as a vacation rental, then the Schroeders will be deprived of a use that was lawful both before and during the period of time in which they made substantial investments to make their property suitable for such lawful use.

93. If the City is allowed to take the Schroeders right to engage in vacation rentals retroactively then the Schroeders will be deprived of the ability to use their Townhouse for vacation rentals.

94. Without the right to use their property as a vacation rental, the Schroeders cannot afford to keep the Townhouse as a place for their family to gather and they will be forced to sell the Townhouse.

95. The system established by the City under City Code § 18-331 also treats equally situated individuals differently without adequate justification for that disparate treatment and violates the Schroeders' rights to equal protection under Article I, § 19, of the North Carolina Constitution.

96. The system established by the City under City Code § 18-331 grants exclusive or separate emoluments or privileges from the community in violation of Article I, § 32, of the North Carolina Constitution.

97. The system established by the City under City Code § 18-331 creates a monopoly in violation of Article I, § 34, of the North Carolina Constitution.

98. The system established by the City under City Code § 18-331 violates the general laws provision of Article XIV, § 3, of the North Carolina Constitution.

99. The system established by the City under City Code § 18-331 violates the Schroeders' long-recognized fundamental right under the North Carolina Constitution to conduct a lawful business and earn a livelihood.

100. Defendants/Respondents nevertheless have enforced, and likely will enforce in the future, City Code § 18-331.

101. Therefore, an actual controversy exists between the parties.

102. A declaratory judgment is necessary and appropriate as it would serve a useful purpose in clarifying and settling particular legal issues between the parties and thereby afford relief from much of the uncertainty and controversy giving rise to this proceeding.

103. Accordingly, under N.C. Gen. Stat. §§ 1-253 *et seq.*, and Rule 57 of the North Carolina Rules of Civil Procedure, the Schroeders pray for declaratory and related relief declaring that City Code § 18-331 is violative of the North Carolina Constitution.

104. The Schroeders are also entitled to damages, both nominal and compensatory, for the violation of their rights by Defendants/Respondents through enforcement of City Code § 18-331.

**FOURTH CLAIM FOR RELIEF
(Request for Preliminary and
Permanent Injunctions)**

105. The allegations of the preceding paragraphs are hereby re-alleged and incorporated herein by reference as if alleged in full.

106. Enforcement of City Code § 18-331 will result in the loss of substantial sums of money by Plaintiffs/Petitioners due to lost rental income.

107. Enforcement of City Code § 18-331 substantially impairs the Schroeders' ability to utilize their property as they wish and to earn a living through the use of that property, and it frustrates the reasonable investment-backed expectations that the Schroeders had for their property.

108. Great harm will be suffered by the Schroeders without a permanent injunction.

109. The balance of equities weighs in favor of the Schroeders, and there is no just reason to delay an injunction.

110. Therefore, under Rule 65 of the North Carolina Rules of Civil Procedure, the Schroeders respectfully pray for permanent injunctive relief enjoining enforcement of City Code § 18-331 by Defendants/Respondents as well as their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs/Petitioners David and Peggy Schroeder respectfully pray that this Court grant the following relief:

1. Issue an appropriate writ of certiorari directing that, *inter alia*, the record of proceedings had below before the City of Wilmington Board of Adjustment be prepared and certified to this Court by a date to be specified in the writ issued by the Clerk;
2. Reverse, vacate, and/or otherwise modify the September 26, 2019 decision of the City of Wilmington Board of Adjustment, including directing that City Code § 18-331 no longer be applied by the BOA and directing that Plaintiffs/Petitioners David and Peggy Schroeder be permitted to continue engaging in vacation rentals of their Townhouse without any time limit by which they must cease engaging in such rentals (and directing that Plaintiffs/Petitioners David and Peggy Schroeder be permitted to engage in vacation rentals of any other

residential property they may acquire in the future in the City of Wilmington);

3. Enter a declaratory judgment finding that City Code § 18-331 is unlawful, preempted, and unconstitutional, both facially and as applied to Plaintiffs/Petitioners David and Peggy Schroeder;
4. Grant preliminary and permanent injunctive relief enjoining enforcement of City Code § 18-331 by Defendants/Respondents City of Wilmington and City of Wilmington Board of Adjustment as well as their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise;
5. Grant Plaintiffs/Petitioners David and Peggy Schroeder damages, both compensatory and nominal, as allowed by law;
6. Grant Plaintiffs/Petitioners David and Peggy Schroeder attorneys' fees and costs of the action, as allowed by law, including (but not necessarily limited to) N.C. Gen. Stat. § 6-21.7;
7. Grant Plaintiffs/Petitioners David and Peggy Schroeder pre-judgment and post-judgment interest, as allowed by law;
8. Tax costs of this action against Defendants/Respondents City of Wilmington and City of Wilmington Board of Adjustment; and
9. Grant Plaintiffs/Petitioners David and Peggy Schroeder such other and further relief, both at law and in equity, as this Court may deem them to be entitled.

Dated this 26th day of August 2020.

Respectfully submitted,

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