No. COA21-192 FIFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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DAVID SCHROEDER and PEGGY SCHROEDER Plaintiffs-Appellees, v. CITY OF WILMINGTON and CITY OF WILMINGTON BOARD OF ADJUSTMENT, Defendant-Appellant.	From New Hanover County

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BRIEF OF DEFENDANT-APPELLANT
CITY OF WILMINGTON

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BRIEF OF DEFENDANT-APPELLANT CITY OF WILMINGTON

****

ISSUES PRESENTED[1]

I. The General Assembly recently consolidated local government planning and development laws into a new Chapter 160D. This chapter adds clarifying language to several statutory provisions, but it "does not expand, diminish, or alter" existing law. The trial court determined that nine words added to an inspection statute by 160D not only granted local governments new permitting authority, but also preempted Wilmington's short-term rental zoning ordinance. Did 160D change the law in this way?

II. The statute at issue can reasonably be read two different ways. Under one reading, the statute does not have preemptive effect. Under the other reading, it does. Does this create an ambiguity that the trial court overlooked?

III. The trial court determined that state law preempts the registration provision in the City's zoning ordinance. Instead of severing this provision, the trial court rendered an entire section of the ordinance "void and unenforceable." Should the otherwise valid portions of the City's zoning ordinance remain in effect?

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[1] The City argued below that the Schroeders lack standing to challenge future registration requirements that do not apply to their property. (R p 198). The City no longer pursues that argument based on the recent decision in *Committee to Elect Dan Forest v. Employees Political Action Committee*, 2021-NCSC-6, ¶ 82 (N.C. 2021) (clarifying that the "infringement of a legal right" standard supplants the "injury in fact" standard).

INTRODUCTION

This appeal turns on nine words that the General Assembly added to an inspection statute.

Local government planning and development laws were recently consolidated into a new Chapter 160D. As part of this consolidation, some statutes received clarifying updates.

The statute at issue here received one of those updates. Specifically, the General Assembly added the phrase "under Article 11 or Article 12 of this Chapter" to N.C. Gen. Stat. § 160D-1207(c) (previously, N.C. Gen. Stat. § 160A-424(c)) (the "inspection statute").

Due to the placement of this new text in the middle of the inspection statute, it can be read two ways. One reading preempts the registration provision of the City's short-term rental zoning ordinance; the other does not. Below, the trial court only considered the preemptive reading.

This not only overlooked the ambiguity in the inspection statute, but also disregarded the analysis and arguments that support the non-preemptive reading. First, the grammatical structure of the inspection statute—mainly, the absence of punctuation following the new text—supports the non-preemptive reading. Second, only the non-preemptive reading aligns with the General Assembly's pronouncement that 160D "does not expand, diminish, or alter" existing law. Finally, the preemptive reading leads to a senseless result.

Indeed, under that reading, the City could simply swap "permitting" for "registration" to cure its ordinance.

For these reasons, the decision below should be reversed.

STATEMENT OF THE CASE

This matter began in June 2019, when the Schroeders appealed a zoning decision regarding their rental property to the Wilmington Board of Adjustment. (R p 5). After the Board upheld the City's zoning decision, the Schroeders filed a joint complaint and writ of certiorari in New Hanover Superior Court. (R p 4).

In their complaint, the Schroeders raised several constitutional claims and a preemption claim. *See id.* Although the trial court dismissed the constitutional claims at the Rule 12 stage, (R p 42), the Schroeders prevailed on their preemption claim at summary judgment. (R p 153). Following a joint motion, the remaining certiorari petition was dismissed. (R pp 172, 178). This, in turn, also dismissed the Board as a party.

The trial court then entered final judgment, and the City filed a timely notice of appeal. (R pp 182, 186). The Schroeders cross-appealed. (R p 189).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This is an appeal from a final judgment of a superior court. This Court has appellate jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1).

STATEMENT OF THE FACTS

In June 2018, David and Peggy Schroeder purchased a second home in Wilmington. (R pp 7–8). The Schroeders intended to use the property primarily as a short-term rental.[2] (R p 8).

In February 2019, the Wilmington City Council adopted a new section of its zoning ordinance (the "ordinance"). (R pp 161–66). The ordinance authorized short-term rentals in specified zoning districts, subject to "cap and separation" requirements. (R p 164). The 400-foot separation requirement prevented an over concentration of short-term rentals—something that the City Council believed harmed residential neighborhoods. (R p 161). Significant here, the ordinance also required property owners to register short-term rentals with the City. (R p 163).

After this ordinance went into effect, the Schroeders attempted to register their property. (R p 9). Due to the cap and separation requirements, however, the property was ultimately deemed ineligible. *See id.* The

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[2] The availability of online platforms like Airbnb and Vrbo (the platform used by the Schroeders, *see* R p 147) have led to a drastic increase in short-term renting. *See* Thomas S. Walker, *Searching for the Right Approach: Regulating Short-Term Rentals in North Carolina*, 96 N.C. L. Rev. 1821, 1844 (2018). In 2016 alone, for example, roughly 17,000 guests stayed in Wilmington short-term rentals. *Id.* To account for this increase, local governments have been forced to adapt their ordinances.

Schroeders appealed this outcome to the Board of Adjustment, and the Board denied the appeal. (R p 10).

In October 2019, the Schroeders filed a joint petition for writ of certiorari and complaint naming the City and the Board as defendants. (R p 4). The complaint raised constitutional challenges to the City's ordinance, while also asserting that the ordinance was preempted by state law. *Id.* To that end, the Schroeders claimed that state law preempted the City's authority to include a registration mechanism in its zoning ordinance. *Id.* The certiorari petition raised similar arguments. *See id.*

On 6 February 2020, the trial court heard the City's motion to dismiss. (R p 42). After that hearing, the trial court entered an order dismissing all of the Schroeders' constitutional claims, but it did not resolve the preemption claim or address the certiorari petition. *Id.*

On 19 June 2020, Part II of Chapter 160D became law.[3] Because of this, the original statute underpinning the Schroeders' preemption claim, N.C. Gen. Stat. § 160A-424(c), was replaced by N.C. Gen. Stat. § 160D-1207(c) (the "inspection statute").

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[3] An Act to Complete the Consolidation of Land-Use Provisions into One Chapter of the General Statutes as Directed by S.L. 2019-111, as Recommended by the General Statutes Commission, S.L. 2020-25, § 51.(b), https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S720v4.pdf.

The relevant portion of the inspection statute provides that:

> In no event may a local government . . . adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission under Article 11 or Article 12 of this Chapter from the local government to lease or rent residential real property or to register rental property with the local government[.]

§ 160D-1207(c).

On 14 September 2020, the trial court heard the City's motion for summary judgment. (R p 153). Following that hearing, the trial court entered an order in favor of the Schroeders. *See id.* Based on the language in the inspection statute, the trial court found that "No local government may adopt or enforce any ordinance that would require any owner or manager of rental property to register rental property with the local government." (R p 183). Because the ordinance required property owners to register annually with the City, the trial court concluded that it was preempted by state law. (R p 184). The City appealed. (R p 186).

STANDARD OF REVIEW

On appeal, "issues of statutory construction are reviewed *de novo*." *King v. Town of Chapel Hill*, 227 N.C. App. 545, 549, 743 S.E.2d 666, 668 (2013).

ARGUMENT

I. The inspection statute does not preempt local government zoning authority.

When it was moved from Chapter 160A to Chapter 160D, the inspection statute received clarifying updates. First, the previously separate (yet essentially identical) provisions for cities and counties were consolidated into a single "local government" provision. *See* N.C. Gen. Stat. §§ 160A-424(c), 153A-364(c) *consolidated in* § 160D-1207(c). Second, internal cross-references to Article 11 and Article 12 were added:

160A-424(c)	160D-1207(c)
"In no event may a city . . . 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[.] N.C. Gen. Stat. § 160A-424(c)."	"In no event may a local government . . . adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission **under Article 11 or Article 12 of this Chapter** from the local government to lease or rent residential real property or to register rental property with the local government[.]" N.C. Gen. Stat. § 160D-1207(c) (emphasis added).

The inspection statute is now located in Article 12 of 160D, which is titled "Minimum Housing Codes." Article 11 of 160D is titled "Building Code Enforcement." Together, these portions of 160D authorize the regulation of buildings for safety and health-related purposes.

The issues in this appeal derive from the addition of the phrase "under Article 11 or Article 12 of this Chapter" to the inspection statute, as the placement of that language creates an ambiguity. This is because the text is susceptible to multiple constructions:

Non-preemptive reading
In no event may a local government . . . adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission ***under Article 11 or Article 12 of this Chapter*** from the local government**[:]** **[1]** to lease or rent residential real property or **[2]** to register rental property with the local government.

Preemptive reading
In no event may a local government . . . adopt or enforce any ordinance that would require any owner or manager of rental property**[:]** **[1]** to obtain any permit or permission ***under Article 11 or Article 12 of this Chapter*** from the local government to lease or rent residential real property or **[2]** to register rental property with the local government.

Under the non-preemptive reading, the "under Article 11 or Article 12" language added by 160D modifies both leasing and registration. This suggests that the General Assembly intended to clarify that the inspection statute did not have a preemptive effect on other local government authority—like, for instance, zoning authority under Article 7.

Under the preemptive reading, the "under Article 11 or Article 12" language only modifies the "permit or permission . . . to lease or rent" portion of the inspection statute. This converts the registration clause into a standalone provision—that is, the phrase "to register rental property with the local government" becomes isolated from the rest of the text, including the "under Article 11 or Article 12" limiting language. This reading would expand the otherwise narrow preemptive effect of the inspection statute beyond Article 11 and Article 12, prohibiting *any* type of registration requirement—even in the zoning context.

The preemption issue turns on which of these two readings is correct. As discussed below, the non-preemptive reading should prevail. This is true for three reasons. First, the grammatical structure of the inspection statute counsels in favor of the non-preemptive reading. Second, the non-preemptive reading aligns with the clarifying purpose of Chapter 160D. And third, there is no meaningful basis for the preemptive reading, as allowing zoning "permits" and "permission" but not allowing zoning "registration" accomplishes nothing.

A. The grammatical structure of the inspection statute supports the non-preemptive reading.

As noted above, the two readings of the inspection statute stem from an ambiguity created by the addition of the phrase "under Article 11 or Article 12 of this Chapter." § 160D-1207(c).

The grammatical structure of the inspection statute resolves this ambiguity in favor of the non-preemptive reading. Specifically, the absence of a comma or other punctuation before the registration clause shows that, like the lease-or-rent clause, it is modified by the preceding “under Article 11 or Article 12” limiting language. *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020) (“[T]he placement and use of punctuation aids in the process of statutory interpretation.”).

A hypothetical version of the statute illustrates this point:

Hypothetical Statute
In no event may a local government 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 under Article 11 or Article 12 of this Chapter from the local government to lease or rent residential real property**[,]** or to register rental property with the local government.

If the General Assembly intended the preemptive reading, it could have, like the hypothetical above, placed a comma before the registration clause. This comma, of course, is not present in the inspection statute, suggesting that the “under Article 11 or Article 12” limiting language modifies all of what follows. Simply put, there is nothing that quarantines the registration clause from the rest of the text.

One could argue that the lack of punctuation is the result of legislative oversight. But that argument falls short. Throughout the inspection statute—in fact, even in section 1207(c)—the General Assembly uses punctuation to

delineate sequential phrases and lists. So it is not as though the lack of punctuation here is emblematic of consistent omission elsewhere. The General Assembly knows how to use punctuation and elected not to do so. That decision has interpretive value.[4] *See Winkler*, 374 N.C. at 730, 843 S.E.2d at 210.

In sum, the grammatical structure of the inspection statute counsels in favor of the non-preemptive reading.

B. The non-preemptive reading is the only reading that aligns with 160D's legislative directive.

The "primary goal of statutory construction is to ensure that the purpose of the legislature is accomplished." *In re Miller*, 357 N.C. 316, 324, 584 S.E.2d 772, 780 (2003) (citations omitted). The question of preemption heightens this purpose-based inquiry, leading courts to consider not only "the spirit" of an act, but also what an act "seeks to accomplish." *See Lamar Outdoor Advert., Inc. v. City of Hendersonville Zoning Bd. of Adjustment*, 155 N.C. App. 516, 519, 573 S.E.2d 637, 640 (2002). To this end, courts often consult a statute's

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[4] The rule of broad construction also supports the non-preemptive reading. *See* N.C. Gen. Stat. § 160A-4. Under that rule, ambiguous statutes are broadly construed to include "any additional and supplementary powers that are reasonably necessary" for a local government to execute its authority. *Id.*; *see also Lanville Properties, LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 155, 731 S.E.2d 800, 810 (2012). This tool of statutory construction was expressly incorporated into Chapter 160D. *See* N.C. Gen. Stat. § 160D-110. The non-preemptive reading allows local governments to register short-term rentals. To be sure, that authority is "reasonably necessary" in the context of zoning.

prefatory language: a "passage that precedes the text's operative terms" and sets forth "certain facts and purposes." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) (discussing the "Prefatory-Materials Canon"). When the language of a statute is ambiguous, these prefatory materials "should be considered." *See id.* at 219–20 (citations omitted); *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 19–20 (2004) (noting that when a statute is ambiguous "judicial construction must be used to ascertain the legislative will").

Here, the language of the inspection statute is ambiguous because, as shown above, one can reasonably read it two different ways. *State v. Conley*, 374 N.C. 209, 214, 839 S.E.2d 805, 808 (2020). Consulting the statute's prefatory materials, therefore, is appropriate. *See Rhyne*, 358 N.C. at 188, 594 S.E.2d at 19–20.

Those prefatory materials convey a repeated message: "This Chapter does not expand, diminish, or alter the scope of authority for planning and development regulation authorized by other Chapters of the General Statutes." N.C. Gen. Stat. § 160D-101(d); *see also* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, § 2.1(f) (noting that Part II of 160D does not "materially alter the scope of local authority to regulate development"). These statements support the view that

160D was meant to "clarify existing provisions without making substantive changes."[5]

A preemptive reading of the inspection statute does not align with this no-substantive-changes purpose. This is because the preemptive configuration of the inspection statute cannot be reconciled with its pre-160D counterpart:

Analogous preemptive configuration of 160A-424(c)[6]
In no event may a city . . . adopt or enforce any ordinance that would require any owner or manager of rental property[:] [1] to obtain any permit or permission to lease or rent residential real property or [2] to register rental property with the local government.

As depicted above, the pre-160D version of the inspection statute (160A-424(c)) lacked the "under Article [x] or Article [y]" limiting language.[7] This omission, considered with the no-changes directive, creates a logic problem:

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[5] Adam Lovelady, David W. Owens, Ben Hitchings, *Planning and Development Regulation: What is Chapter 160D?*, UNC School of Government, https://perma.cc/582L-FJ49.

[6] Although this example is titled "Analogous preemptive configuration of 160A-424(c)," the City maintains—as it has throughout this matter—that pre-160D iterations of the inspection statute, notwithstanding their configuration, did not have a preemptive effect on zoning authority.

[7] N.C. Gen. Stat. § 160A-424 was located in Article 19 of Chapter 160A, the same article that contained the zoning enabling statutes. The zoning enabling statutes are now located in Article 7 of Chapter 160D, further clarifying that the inspection statute does not alter local government zoning authority.

How can the current version of the inspection statute go beyond Article 11 and Article 12 to preempt just "registration," when the previous version contained no language to distinguish between "permits or permission" and "registration"? Asked another way: If Chapter 160D did not "expand, diminish, or alter" existing law, how did adding the "under Article 11 or Article 12" limiting language to just subsection [1] of the preemptive configuration not do just that?

A non-preemptive configuration of the previous inspection statute does not suffer from this version-to-version dissonance:

Analogous non-preemptive configuration of 160A-424(c)
In no event may a city . . . adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission[:] [1] to lease or rent residential real property or [2] to register rental property with the city.

Because the non-preemptive reading applies the "permit or permission" language to both [1] and [2], 160D adding the "under Article 11 or Article 12" limiting language immediately after "permit or permission" does not imbalance the statute; instead, the added language clarifies that nothing in the inspection statute reaches beyond the housing and code enforcement realm to "expand, diminish, or alter" existing law. § 160D-101(d).

Below, the trial court would not consider this no-changes directive: "Given that the language of the statute is clear and unambiguous,

determination of legislative intent is unnecessary and improper." (R p 183). This led the trial court down the wrong analytical path, resulting in an incorrect finding on preemption—a finding that the trial court used to render an entire section of the City's zoning ordinance "void and unenforceable."

What's more, the trial court's order destabilizes all of Chapter 160D. 160D represents a multi-year collaborative effort to streamline local government planning and development laws. If not reversed, the decision below will cause considerable mischief to those efforts. After all, the trial court did more than find that the recodified inspection statute preempts the City's zoning ordinance; it also found that Chapter 160D *removed* a "prohibition on permits and permissions." (R p 183 ¶ 7). By finding that 160D *grants* local governments new authority, the decision below transforms that chapter into a legislative reset: A new statute with a new meaning. Future litigants will not overlook this.

In sum, the non-preemptive configuration aligns with the General Assembly's no-changes directive. The preemptive configuration does not. Because the non-preemptive reading "ensure[s] that the purpose of the legislature is accomplished," *In re Miller*, 357 N.C. at 324, 584 S.E.2d at 780, it is correct.

C. The preemptive reading leads to a senseless result.

Practical considerations further support a non-preemptive reading. Under the preemptive reading, a local government may not require "registration" through zoning regulations, but, as discussed above, could require "permits" or "permission." The trial court embraced this:

> The amendments made to G.S. 160A-424 in [160D] *limit the prohibition on permits and permissions* to Articles 11 and 12 of that chapter *but no such limiting language was made applicable to* the prohibition on the *registration* requirement.

(R p 183 ¶ 7) (emphasis added).

As this portion of the trial court's order illustrates, the preemptive reading "limit[s] the prohibition on permits and permissions to Articles 11 [Building Code Enforcement] and 12 [Minimum Housing Code]." *Id.* In other words, local governments are free to use permitting and permission requirements for, among other things, zoning.

The lack of any meaningful distinction between requiring a "permit and permission" and requiring "registration" reveals why this view of the inspection statute leads to an impractical result. If it were the intent of the General Assembly to preclude zoning-based registration requirements, why would the General Assembly not also preclude the similar, yet potentially more cumbersome, process of obtaining a zoning permit?

Indeed, to avoid the preemptive reading, Wilmington could simply rewrite their ordinance:

Current Ordinance	Hypothetical Ordinance
• "The property owner shall register each establishment annually with the city of Wilmington." (R p 163). • "[A]ll property owners shall renew registration on an annual basis." *Id.*	• "The property owner **shall obtain a permit for** each establishment annually with the city of Wilmington." • "[A]ll property owners shall renew **permits** on an annual basis."

As this illustrates, the preemptive reading leads to what is, in essence, a meaningless distinction: It would allow the City to simply swap "permitting" for "registration" to cure its ordinance.[8] Said another way, the preemptive reading is a means to no end: It requires a specific configuration of the text to reach an outcome (preempting registration in the context of zoning), but that same configuration prevents its outcome from having any practical effect.

The inspection statute should be construed in a way that avoids this absurd result. *See Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 225, 261 S.E.2d 882, 891 (1980) ("Statutes should be construed so as to avoid absurd results."). And the non-preemptive reading does just that.

In sum, the inspection statute has never preempted local government zoning authority, and 160D did not change the law to mean otherwise.

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[8] This should not be read as an easy solution for Wilmington, as such a change would face implementation challenges and questions of fairness to those who relied on the original ordinance.

II. The inspection statute is not "unambiguous."

The trial court concluded that the inspection statute preempts the City's short-term rental ordinance because that ordinance requires registration. (R pp 183–84). The issues with this approach are discussed above: grammatical error, version-to-version dissonance, and senseless results. *See supra* at 7–18. Those problems support fully reversing the decision below.

But if the Court decides on a different outcome, it should still address the question of ambiguity. The trial court found that the language of the inspection statute "is clear and unambiguous even with the amendments made in [160D]." (R p 183). This finding could expose the City—and, by extension, its taxpayers—to an award of attorneys' fees. N.C. Gen. Stat. § 6-21.7 ("In any action in which a city or county is a party, upon a finding by the court that the city or county violated a statute or case law setting forth *unambiguous limits on its authority*, the court *shall award* reasonable attorneys' fees and costs[.]")[9] (emphasis added).

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[9] When the City enacted its ordinance, the language of the attorneys' fees provision in N.C. Gen. Stat. § 6-21.7 was permissive: "[T]he court may award reasonable attorneys' fees and costs[.]" (later modified by S.L. 2019-111, § 1.11, https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S355v6.pdf). Because this amendment occurred after Wilmington adopted its ordinance, it is uncertain which version of the attorneys' fees provision would apply.

An ambiguity exists when a statute's "grammatical structure could reasonably be construed" in multiple ways. *Conley*, 374 N.C. at 214, 839 S.E.2d at 808; *see also Winkler*, 374 N.C. at 732, 843 S.E.2d at 212 (describing an ambiguous statute as one "equally susceptible of multiple interpretations"). Specifically, under § 6-21.7's own definition, a statute is ambiguous when it is "reasonably susceptible to multiple constructions." *See id.*

Here, as detailed above, *see supra* at 8, ambiguity is undeniable: the inspection statute is "reasonably susceptible to multiple constructions"—i.e., either the preemptive or the non-preemptive configuration. *Id.* To find otherwise, as the trial court did below, was an error with significant consequences.

Worse, the ordinance's severability clause could have mitigated those consequences, but it was not used. (R p 184) ("Wilmington City Code § 18-331 is declared void and unenforceable.").

When an ordinance "could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone." *King v. Town of Chapel Hill*, 367 N.C. 400, 410, 758 S.E.2d 364, 372 (2014); *see also In re Springmoor, Inc.*, 348 N.C. 1, 14, 498 S.E.2d 177, 185 (1998) (noting that severability is available even in the absence of a severability clause).

The City sought to "maintain the residential character" of its neighborhoods. (R p 161). And by reducing the abundance of short-term rentals, the constitutionally upheld cap and separation requirements—with or without registration—achieved that objective. (R p 42). If nothing else, the rest of the ordinance should have been saved.

CONCLUSION

The nine words added to the inspection statute clarified what the General Assembly meant to convey: The inspection statute "does not expand, diminish, or alter" local government zoning authority. The City respectfully requests that the Court reverse the decision below.

Respectfully submitted the 19th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel certifies that the foregoing brief, which is prepared using a proportional font no smaller than 12-point and no larger than 14-point, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

s/ N. Cosmo Zinkow
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CERTIFICATE OF SERVICE

I certify that, in accordance with Appellate Rule 26(c), I have served a copy of the foregoing document by e-mail to the following:

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