No. COA21-192 FIFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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| DAVID SCHROEDER and<br>PEGGY SCHROEDER<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>CITY OF WILMINGTON and<br>CITY OF WILMINGTON BOARD OF ADJUSTMENT,<br><br>Defendant-Appellee. | From New Hanover County |

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**BRIEF OF DEFENDANT-APPELLEE**
**CITY OF WILMINGTON**

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DAVID SCHROEDER and
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v.

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Defendant-Appellee.

From New Hanover County

*******************************

# BRIEF OF DEFENDANT-APPELLEE CITY OF WILMINGTON

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## ISSUES PRESENTED[1]

I. An appellant must "obtain a ruling" on a constitutional issue to preserve it. N.C. R. App. P. 10(a)(1). At the Rule-12 hearing, counsel for the Schroeders told the trial court that they were "not asserting a takings claim." (App. 4). On appeal, however, the Schroeders challenge "amortization as an unconstitutional taking." Did the Schroeders preserve that issue?

II. The Schroeders filed a motion to amend the complaint six months after the trial court dismissed their constitutional claims. (R p 70). In that motion, the Schroeders sought to *add* a new "vested-rights claim" under the Law of the Land clause. (R pp 76, 78). The Schroeders did not appeal the denial of that motion. (R p 128). Now, the Schroeders argue that the trial court incorrectly dismissed their "vested-rights challenge." Does the complaint include this claim?

III. An ordinance bearing "some reasonable relation to the legitimate objectives" of the City satisfies rational-basis review. To restore the residential character of its neighborhoods, the City enacted an ordinance placing cap and separation requirements on short-term rentals. The Schroeders agree that rational-basis review applies here. Under that standard, is the ordinance constitutional?

IV. North Carolina authorizes local governments to zone buildings to promote the "health, safety, and general welfare" of the community. N.C. Gen. Stat. § 160D-701. At the same time, the North Carolina Constitution protects against local governments creating monopolies, granting exclusive privileges, and depriving individuals of the fruits of their labor. Do these constitutional provisions prevent the City from enacting zoning limits on short-term rentals?

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[1] The Schroeders acknowledge that "this Court has already considered and denied their Motion to Dissolve Stay by its order of 20 April 2021." Schroeders' Br. at 27 n.14. To "preserv[e] the issue," the Schroeders have resubmitted their stay arguments. Schroeders' Br. at 27–31. Logically, the resolution of the other issues in this case will negate the need for the Court to address the stay. For sake of brevity, therefore, the City relies on its 19 April 2021 response to the Schroeders' stay arguments.

## INTRODUCTION

This cross-appeal involves constitutional challenges to the City of Wilmington's short-term rental zoning ordinance.

Some of those challenges were addressed below. Others were not. Specifically, the Schroeders did not raise or obtain a ruling on the amortization issue before the trial court. On appeal, however, the Schroeders dedicate most of their brief to that issue.

They cannot do this under Appellate Rule 10(a)(1). To that end, the Schroeders split the amortization issue into a takings claim and a vested-rights based due process claim. But at the Rule-12 hearing, counsel for the Schroeders told the trial court that they were "not asserting a takings claim." (App. 4). And in a motion to amend the complaint—a motion that the trial court denied—the Schroeders failed to add a "vested-rights claim." (R pp 76, 128). Together, these portions of the transcript and record show that the amortization issue is not properly before the Court.

Nevertheless, the Schroeders fare no better on the merits. The North Carolina Supreme Court adopted amortization as a valid zoning tool over four decades ago. And there is no basis for limiting that precedent—or this Court's subsequent decisions—so the Schroeders can advance a "vested-rights theory."

Finally, the Schroeders' remaining arguments not only suffer from claim-specific deficiencies, but also cannot logically coexist with modern-day zoning.

## STATEMENT OF THE FACTS

In June 2018, David and Peggy Schroeder purchased a townhome in Lions Gate—a residential community located in the City. (R pp 7–8). At some point after their purchase, the Schroeders began operating that property as a short-term rental business. (R p 8). The City defines that use 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." City Code § 18-812 (defining "whole-house lodging").

In February 2019, the City amended its land development code with the ordinance at issue here. (R pp 161–66). That ordinance allowed short-term rentals in residential zoning districts subject to certain conditions. Three of those conditions are relevant to this appeal:

(1) the "separation and cap" provision, requiring a 400-foot separation between short-term rentals and capping the number of short-term rentals at two percent of the total number or residentially zoned parcels (R p 163 ¶ 2);

(2) the use of a one-time lottery for establishing initial compliance with the separation provision (R p 164 ¶ 4(h)); and

(3) an amortization period of one year for properties that were not successful under the lottery. (R p 165 ¶ 17).

The Schroeders submitted a short-term rental registration application under the ordinance. (R p 5). But the Schroeders were not the only property owners in their vicinity hoping to operate a rental business. (R p 9). Two other

property owners within 400 feet of the Schroeders also submitted applications. Because of this, the Schroeders' property and the two adjacent properties were entered into the ordinance's one-time lottery. (R p 9 ¶ 24).

The Schroeders lost that lottery. So under the ordinance's amortization provision, they had a one-year grace period to continue operating without a permit. (R p 9 ¶ 26).

The Schroeders appealed this outcome to the Board of Adjustment. (R p 5 ¶ 6). And the Board denied the appeal.

The Schroeders then filed this lawsuit, and the City filed a Rule 12(b)(6) motion to dismiss. (R p 25). At the motion hearing, the City explained that it was unclear whether the Schroeders were pursuing a takings claim: "We did brief the issue of taking because we were unclear of whether or not [the Schroeders] were raising a claim. It wasn't argued. Based on [a] conversation, we don't think that's an issue in this case. That's why I didn't address it, but it's in our brief." (App. 2–3).

In response, counsel for the Schroeders confirmed that they did not have a takings claim: "If I may, I can also confirm we are not asserting a takings claim, so that is not an issue." (App. 4). Following the hearing, the trial court issued an order dismissing the Schroeders' constitutional claims. (R p 42 ¶ 1).

Six months after the dismissal of their constitutional claims, the Schroeders retained new counsel. (R p 132).

This new counsel filed a motion to amend the complaint. (R p 70). The City opposed that motion. (R p 128). The City argued, among other things, that the Schroeders could not add new claims to their previously dismissed cause of action. The trial court agreed, and the motion to amend the complaint was denied—a decision that the Schroeders did not appeal. (R pp 129–30).

This matter then proceeded to a final judgment with the trial court ruling against the City on the remaining issue (i.e., preemption). (R p 182). The City appealed that final judgment. (R p 186). And the Schroeders cross-appealed the Rule-12 dismissal of their constitutional claims. (R p 189).

## STANDARD OF REVIEW

De novo review applies here. *Hinson v. City of Greensboro*, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014).

When reviewing the grant of a Rule 12(b)(6) motion, however, "this Court, like the trial court, cannot consider evidence outside the pleadings." *Assurance Grp., Inc. v. Bare*, No. COA15–386, 2016 WL 608098, at *2 (N.C. Ct. App. Feb. 16, 2016) (unpublished) (citing *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203, 652 S.E.2d 701, 707 (2007)). This includes affidavits, which "cannot be considered in reviewing a dismissal under Rule 12(b)(6)." *See id.* at *1.

## ARGUMENT

### I. The appellate rules, the record, and North Carolina precedent foreclose the amortization arguments.

The North Carolina Supreme Court approved amortization as a valid method of removing nonconforming uses over four decades ago. *See State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320 (1975). Amortization "allows a nonconformity to remain in use for a specified grace period after a regulation has been adopted or amended." *See* David. W. Owens, Land Use Law in North Carolina 225 (2d ed. 2011). This amortization grace period "cushions the economic shock of the restriction" by allowing the property owner to, in essence, recoup their investment. *Joyner*, 286 N.C. at 373, 211 S.E.2d at 324. And if the period is reasonable—i.e., long enough—a taking does not occur. *See id.*

Here, consistent with *Joyner*, the City allowed the Schroeders to continue operating their short-term rental for one year. After that point, the Schroeders could rent the property for terms of 30 days or more. But the Schroeders contend that the City cannot—under any circumstances—amortize their short-term rental use. Schroeders' Br. at 11.

In making this argument, the Schroeders challenge amortization on both a takings theory and a due process theory. As discussed below, the Court should reject these arguments for three reasons. First, under Appellate Rule

10(a)(1), the Schroeders waived the takings issue by telling the trial court that they were "not asserting a takings claim." (App. 4). Second, the complaint does not include a vested-rights based due process claim. Indeed, the Schroeders tried—and failed—to add this claim to the complaint six months *after* the constitutional claims were dismissed. (R p 129). Finally, on the merits, the amortization arguments still fail. There is no basis for reading *Joyner* in a way that limits it to the federal constitution. Schroeders' Br. at 20. And this defeats the Schroeders' amortization arguments as a matter of law.

**A. The Schroeders waived the takings issue under Appellate Rule 10(a)(1).**

To preserve an issue for appellate review, a party must satisfy the requirements of Appellate rule 10(a)(1). As one of those requirements, a party must "obtain a ruling" from the trial court. N.C. R. App. P. 10(a)(1). This requirement not only avoids unnecessary appellate review, but also safeguards against parties building errors into the record. *See State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983). These considerations justify the "refusal to consider" an unpreserved issue on appeal. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008); *see also Don't Do it Empire, LLC v. Tenntex*, 246 N.C. App. 46, 55, 782 S.E.2d 903, 908 (2016) ("It was only after plaintiff lost at the trial level that it has pursued the

argument on appeal . . . . We hold that plaintiff failed to preserve this issue for appellate review.").

Furthermore, when constitutional questions are involved, the underlying issues "must be raised *specifically* in the trial court." Elizabeth Brooks Scherer & Matthew Nis Leerberg, *North Carolina Appellate Practice and Procedure* § 4.04 (emphasis added). This heightened waiver scrutiny recognizes that "[c]onstitutional questions are of great importance and should not be presented in uncertain form." *Rice v. Rigsby*, 259 N.C. 506, 511, 131 S.E.2d 469, 472 (1963); *see also Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) ("To be properly addressed, a constitutional issue must be definitely drawn into focus by plaintiff's pleadings.").

Here, the Schroeders did not preserve the takings issue. Prior to the Rule-12 hearing, it was unclear whether the Schroeders alleged a takings-based amortization claim. As part of their writ of certiorari,[2] the Schroeders included a single reference to a "taking [of] property without just compensation." (R p 10 ¶ 32). But nothing specifying "amortization" or a "taking" appeared under the constitutional cause of action. (R pp 14–16). Instead, the Schroeders vaguely challenged the "process established by" the

[2] The Schroeders' first cause of action—i.e., certiorari—was dismissed before the appeal ensued. (R p 178).

ordinance, without identifying what part of that process was in question. (R p 15 ¶ 50).

Still, the City gave the Schroeders the benefit of the doubt. The complaint used the standard incorporated-by-reference language at the beginning of each cause of action. (R pp 12 ¶ 37, 14 ¶ 49). So it was possible that the Schroeders intended to include a takings-based amortization claim as part of their constitutional cause of action. Because of this, the City addressed amortization in its Rule-12 brief. The Schroeders, however, did not address the amortization issue—or anything else related to takings for that matter—in their opposition brief. (Doc. Ex. pp 95–109).

At the Rule-12 hearing, the City brought this omission to the trial court's attention: "We did brief the issue of taking because we were unclear of whether or not [the Schroeders] were raising a claim. It wasn't argued. Based on [a] conversation, we don't think that's an issue in this case. That's why I didn't address it, but it's in our brief." (App. 2–3).

In response, counsel for the Schroeders confirmed that they did not have a takings claim: "If I may, I can also confirm *we are not asserting a takings claim, so that is not an issue*." (App. 4) (emphasis added). Following the Rule-12 hearing, the Court issued an order dismissing the Schroeders' constitutional cause of action. (R p 42 ¶ 1).

On appeal, the Schroeders challenge "amortization as an unconstitutional taking." Schroeders' Br. at 19. Yet this is precisely what the Schroeders told the trial court they were "not asserting." (App. 4).

Under Appellate Rule 10(a)(1), the Schroeders cannot pursue the takings issue for the first time on appeal. As shown by the hearing transcript, the Schroeders did not "specifically raise" that issue, nor did they "obtain a ruling" on that issue. Instead, "it was only after [the Schroeders] lost at the trial level" that they pursued a takings-based amortization challenge. *Don't Do it Empire*, 246 N.C. App. at 55, 782 S.E.2d at 908. That issue has been waived.

### B. The record confirms that the Schroeders did not plead a vested-rights based due process claim.

The Schroeders contend that the ordinance's amortization period violates due process because it deprives them of a vested right to use their property as a short-term rental. The record confirms, however, that this "vested-rights claim" is missing from the complaint. (R p 76). Specifically, the motion to amend the complaint, the trial court's unchallenged order denying that motion, and the near-total reliance on affidavits throughout the Schroeders' brief confirm that they do not have a due process claim based on vested rights.

First, the Schroeders' motion to amend—a motion that the trial court denied—shows that the complaint does not include a vested-rights based due process claim.

The national law firm now representing the Schroeders did not join their legal team until months after the trial court dismissed the constitutional claims. (R p 132). It was only then that this case was identified online as a challenge to "North Carolina Amortization." https://perma.cc/PB2G-H3QP. But this basis for challenging the ordinance and the posture of the case did not align. After all, the Schroeders' initial counsel had unambiguously told the trial court that they were "not asserting a takings claim." (App. 4). And the only aspects of Wilmington's ordinance identified in the complaint with due-process-like language omitted amortization. (R p 11 ¶ 35).

Faced with this dilemma, the Schroeders new counsel decided to challenge amortization in a different way: on a vested-rights theory. But the Schroeders had not pleaded anything related to vested rights. Indeed, the complaint never uses the phrase "vested rights." Nor did the Schroeders argue anything related to vested rights in their Rule-12 brief or at the Rule-12 hearing. *See* Doc. Ex. pp 95–109, *and* Transcript of Proceedings at 1–48, *Schroeder v. City of Wilmington*, 19-CVS-4028 (N.C. Sup. Ct. Feb. 6, 2020).

In an attempt to fix this problem, the Schroeders filed a motion to amend the complaint: "[T]he Schroeders move to amend their complaint to allege that

the City's ordinance violates the Law of the Land Clause because it divests the Schroeders of a 'vested right' that they had acquired as a result of their reasonable reliance on the law as it existed before this series of statutory changes was completed." (R p 72). The motion then went on to explain that the proposed amendments were related to a "new" vested right claim not included in the original complaint:

- "These *new* Law of the Land allegations should not catch the City by surprise. The City was surely aware that the Schroeders' substantial investment in their property *might lead to* a vested-rights claim[.]" (R pp 75–76) (emphasis added).
- "The Schroeders, however, had a vested right in that use under North Carolina law and they therefore contend that the ordinance's potential stripping of their vested right is unconstitutional under the Law of the Land Clause. This argument *is borne of* the preemption defense offered by the City *in response to* the original complaint." (R p 72) (emphasis added).
- "Indeed, even if the City 'may not have anticipated' the vested-rights theory, it must nevertheless show that it is denied a fair opportunity to assert its defense." (R p 76) (citations omitted).
- "The City is not prejudiced by *adding a claim* in a case that has remained at the trial-court level since its filing." (R p 78) (emphasis added).[3]

[3] The first page of the Schroeders' motion to amend states that the "amended complaint does not add any new claims but merely details facts and previously alleged claims that are more salient in light of recent legislative changes." (R p 70). This no-new-claims declaration appears to be limited to the portion of the amended complaint involving the preemption issue, as the arguments throughout the motion continually discuss "adding a claim" for vested rights. (R pp 76, 78).

The desire to add a new "vested-rights claim" six months after the Rule 12 order shows that the Schroeders did not include that claim in the complaint.[4] After all, what would be the purpose of amending the complaint to bolster a claim that the trial court already dismissed? This logic reveals the chimera upon which the Schroeders now base their vested-rights argument: The trial court could not "err in dismissing" a "vested-rights challenge" that was never in the complaint. Schroeders' Br. at 2 (Issues Presented I).

Second, the trial court's order denying the motion to amend resolves any doubt on this point. That order discusses the "new allegations" related to "a claim for vested rights." (R p 129 ¶ 9). Then, in denying the motion, the order states that the Schroeders could not add that claim: "once the trial court enters its dismissal under Rule 12(b)(6), plaintiff's right to amend under Rule 15(a) is terminated." (R p 129 ¶ 2) (quoting *Johnson v. Bollinger*, 86 N.C. App. 1, 7–8, 356 S.E.2d 378, 382 (1987)).

By not appealing the denial of the motion to amend their complaint, the Schroeders relinquished their final opportunity to pursue their new vested-rights based amortization claim.

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[4] This also shows that the Schroeders failed to preserve the "vested-rights" issue under Appellate Rule 10(a)(1). (R p 15 ¶ 51). The Schroeders did not "specifically raise" or "obtain a ruling" on anything related to vested rights. How could they? By their own motion, they sought to raise that issue for the first time *after* the trial court dismissed their constitutional claims.

Finally, the Schroeders' continued reference to affidavits in the record expose the deficiency of the complaint. The cross-appeal derives from the Rule-12 dismissal of constitutional claims. Yet the Schroeders' brief extensively cites to post-dismissal affidavits.

The Schroeders must cite to these affidavits because they have nothing to cite to in the complaint. Remarkably, a form of the word "amortize" only appears in the complaint one time. (R p 9 ¶ 26). And the phrase "vested rights" is never used. Because of this, the Schroeders' brief only cites to the actual complaint twice. *See* Schroeders' Br. at 26. And neither of those references occur in the amortization section of their brief. By contrast, the Schroeders cite to the post-dismissal affidavits over fifty times. Schroeders' Br. at 3–8, 26.

The Schroeders cannot rely on these affidavits to argue why the trial court incorrectly dismissed their constitutional claims. *Weaver*, 187 N.C. App. at 203, 652 S.E.2d at 707. Yet they do just that—repeatedly. For instance, in making the vested-rights argument, the Schroeders state that they "expended over $75,000." Schroeders' Br. at 11. Nothing in the complaint references expenditures. This comes from an affidavit. (R p 137) ("[W]e spent over $75,000 renovating our townhouse[.]"). Similarly, the Schroeders assert that they "listed the Townhouse on VRBO" by "7 February 2019." Schroeders' Br. at 5. Again, however, nothing in the complaint specifically alleges that the Schroeders initiated their use before the ordinance took effect. This comes

from an affidavit. (R p 138) ("On February 7, 2019, we first listed our Townhouse for vacation renting[.]"). These affidavits—like many of the Schroeders constitutional arguments—are not properly before the Court. *See Weaver*, 187 N.C. App. at 203, 652 S.E.2d at 707.

In sum, the trial court could not err in dismissing that which was never in the complaint.

### C. On the merits, the amortization arguments still fail.

The Court should not engage the amortization issue because it was not preserved. *See supra* at 6–15. Nevertheless, if the Court reviews the issue, it should hold that the Schroeders' arguments fail on the merits.

The Schroeders have misconstrued the present state of North Carolina law. To that end, they have split their amortization challenge into two lines of analysis: one involving takings, and the other due process. Under North Carolina precedent, both approaches are foreclosed.

Over 40 years ago, the North Carolina Supreme Court held that phasing out nonconforming uses through amortization is a constitutionally available tool for local governments. *Joyner*, 286 N.C. at 374, 211 S.E.2d at 325. Faced with a challenge to an amortization period, the *Joyner* Court concluded that no due process violation occurred:

> The method used to terminate nonconforming uses was a legislative decision to be reached by balancing the burden on the

> individual with the public good sought to be achieved. [The ordinance] is not so arbitrary, unreasonable, or unrelated to the general welfare of the community as to be unconstitutional by its terms. To the contrary, it represents a conscious effort on the part of the legislative body of the city to regulate the use of land throughout the city and thus promote the health, safety, or general welfare of the community.

*Id.* at 372, 211 S.E.2d at 324.

Then, considering a takings claim, the *Joyner* Court stated: "We concur in the majority rule as above set out that the provisions for amortization of nonconforming uses are valid if reasonable, and reject the *per se* rule holding all amortization provisions unconstitutional." *Id.* at 375, 211 S.E.2d at 325. This holding essentially collapsed the amortization analysis into a single inquiry. And that inquiry turns on the duration of the amortization period.[5] *See* Owens, *supra*, at 227 (discussing the single test used by North Carolina courts).

The Schroeders acknowledge *Joyner*'s holding. Schroeders' Br. at 19–20. But they argue that it should be limited to the "*federal constitution*." Schroeders' Br. at 20. On this theory, the Schroeders maintain that "the question of whether amortization is unconstitutional under the North Carolina Constitution has not been resolved." Schroeders' Br. at 19.

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[5] The Schroeders have not challenged the durational sufficiency of the amortization period—in their brief or below. N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

There are two problems with this narrow reading of *Joyner*.

First, it overlooks that *Joyner* based its holding on cases involving the North Carolina Constitution. *See Town of Wake Forest v. Medlin*, 154 S.E. 29, 30 (N.C. 1930) (analyzing "the state and federal Constitutions"), *and State v. Moye*, 156 S.E. 130, 132 (N.C. 1930) (same). The Schroeders recognize that *Wake Forest* and *Moye* are "the cases [that] *Joyner* mainly relies on." Schroeders' Br. at 21 n.12. Yet they still contend that *Joyner* has nothing to do with the North Carolina Constitution. The Court should decline the invitation to limit *Joyner* in this way.

Second, the Schroeders' narrow reading of *Joyner* disregards the multiple cases—cases by this Court—that applied *Joyner* to challenges under the North Carolina Constitution. For example, in *Goodman Toyota, Inc. v. City of Raleigh*, a property owner challenged an ordinance amortizing a use. 63 N.C. App. 660, 662, 306 S.E.2d 192, 194 (1983). The plaintiff in *Goodman* raised a due process challenge to Raleigh's ordinance under the Law of the Land clause. *Id.* ("[Raleigh's ordinance] violates due process as guaranteed by the United States *and North Carolina Constitutions*.") (emphasis added). Citing *Joyner*, this Court noted that "amortization requirements are *presumed valid* if reasonable." *Id.* at 665, 306 S.E.2d at 195 (emphasis added).

As another example, in *Huntington Properties, LLC v. Currituck County*, this Court, discussing North Carolina's due process jurisprudence—

and citing *Joyner*—emphasized that "it is a legitimate interest, *as a matter of law*, to legislate against the expansion *or continuation* of nonconforming uses." 153 N.C. App. 218, 230, 569 S.E.2d 695, 703 (2002) (emphasis added); *see also Summey Outdoor Advert., Inc. v. Cnty. of Henderson*, 96 N.C. App. 533, 543, 386 S.E.2d 439, 446 (1989) (citing *Joyner* and holding that an ordinance's amortization provision was not a taking under the North Carolina Constitution).

As these cases show, our courts have resolved the due process and takings question under both the federal constitution *and* the state constitution. This defeats the Schroeders' argument that amortization provisions are per se unconstitutional under the Law of the Land clause.

Furthermore, the other North Carolina cases cited by the Schroeders do not change this analysis.

*Miracle v. North Carolina Local Government Employees Retirement System* is inapposite because it applies a non-zoning standard to a non-zoning issue. 124 N.C. App. 285, 292, 477 S.E.2d 204, 209 (1996). There, the Court addressed the constitutionality of a change to a law enforcement officer's vested retirement plan. The Court held that "[w]hether a state statute violates the law of the land clause is a question of degree and reasonableness in relation to the public good likely to result from it." *Id.* at 294, 477 S.E.2d at 210. Relying on *Miracle*, the Schroeders argue that they should have been "afforded

the opportunity 'to establish that the [City] has acted in an arbitrary and irrational way.'" Schroeders' Br. at 17 (quoting *Miracle*, 124 N.C. App. at 293, 477 S.E.2d at 209). But *Joyner* and its progeny jettisoned the need for conducting this additional analysis because "amortization requirements are *presumed valid* if reasonable"—i.e., long enough. *Goodman*, 63 N.C. App. at 665, 306 S.E.2d at 195.

*Williams v. Town of Spencer*, a case involving building permits, has no bearing on this appeal because the Schroeders have not challenged the durational sufficiency of the City's amortization period. 129 N.C. App. 828, 500 S.E.2d 473 (1998). While the general statement that "takings questions under North Carolina law are fact dependent inquiries" may be true, the Schroeders have never challenged the duration of the City's amortization period—the crux of the takings issue the Schroeders told the trial court they were "not asserting." (App. 4). As discussed above, after *Joyner*, North Carolina "joined most other states in ruling that amortization is not a taking in and of itself and is valid if the grace period is reasonable." Owens, *supra*, at 227. So it's unclear what additional facts could have been "fully developed through discovery" to change the outcome here. Schroeders' Br. at 19.

Finally, the cases cited in the Schroeders' brief do not support the proposed nuisance v. non-nuisance distinction. Schroeders' Br. at 20 n.12. That argument claims that "no court in this state has ever applied *Joyner* to

land uses that did not exhibit 'nuisance-like qualities.'" Schroeders' Br. at 20. Under their proposed nuisance-like-qualities test, the Schroeders posit that amortizing a billboard is constitutional, while amortizing their short-term rental—a use they deem "harmless"—is not. Schroeders' Br. at 21. This argument cannot logically withstand the harms associated with short-term rentals. *See infra* at 25–26. To be sure, when given the choice between driving past billboards on both sides of the interstate or losing sleep because of late-night parties on both sides of one's home, most would pick driving past signs.

The Schroeders may argue that they operate their short-term rental as "a harmless, harmonious use with a sparkling record," so this harm-based comparison should not apply. Schroeders' Br. at 21. But the validity of an ordinance "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989); *see also Indep. News, Inc. v. City of Charlotte*, 568 F.3d 148, 154 (4th Cir. 2009) (applying the same principle in a case involving amortized adult businesses); *Cnty. of Henderson*, 96 N.C. App. at 544, 386 S.E.2d at 446 (noting that an ordinance's "overall purpose"—not its case-specific applicability—guides the reasonableness analysis). So whether the Schroeders rent to "retired couples on vacation" or college fraternity members has no bearing on the constitutional analysis. (R p 8 ¶ 18).

In sum, amortizing non-conforming uses is a legitimate and constitutional tool for eliminating those uses under North Carolina law. And there is no basis for creating and applying a "nuisance-like-qualities" test when arguably less harmful uses have been amortized with the Court's approval. Instead, the constitutionally based reasonableness inquiry turns on the sufficiency of the amortization grace period—here, a one-year period the Schroeders have not challenged.

## II. The remaining claims fail as a matter of law.

### A. The Schroeders' equal protection claim fails under rational-basis review.

In support of their equal protection claim, the Schroeders raise two arguments related to the ordinance's one-time lottery. First, the Schroeders contend that the lottery "created an arbitrary distinction between who can and cannot" operate short-term rentals. Schroeders' Br. at 27. Second, the Schroeders argue that the outcome of the lottery was not "rationally related to the purpose of the City's ordinance." Schroeders' Br. at 27. As discussed below, both of these arguments lack merit.

First, the lottery system used by the City was a constitutional method of separating short-term rentals throughout the City. Courts have routinely upheld lottery systems as impartial, valid methods of allocation. The Schroeders losing the lottery, therefore, did not create an "arbitrary distinction" in violation of the North Carolina Constitution.

Second, the Schroeders, who concede rational-basis review applies here, cannot prevail under that standard. The City sought, among other things, to preserve the residential character of its neighborhoods. And the City achieved that end by limiting the concentration of short-term rentals based on the outcome of the lottery.

### 1. The ordinance's one-time lottery was a constitutional method of separating short-term rentals.

By definition, lottery systems are non-discriminatory. *Koppell v. New York State Bd. of Elections*, 108 F. Supp. 2d 355, 359 (S.D.N.Y. 2000). Selection by lottery "insures a fairer outcome" because it "eliminates the possibility that improper considerations will infect [a] decision." *Singh v. Joshi*, 152 F. Supp. 3d 112, 127 (E.D.N.Y. 2016). Courts routinely uphold government use of lottery systems.[6] As then-Judge Scalia explained, selection by lot is one of the "realities of government." *Id.* (quoting *United States v. Cohen*, 733 F.2d 128, 137 (D.C. Cir. 1984)).

Here, the same constitutional principles validate the City's lottery. Wilmington faced a situation where a number of short-term rentals were within 400 feet of one another. So the City had to develop a method for undoing these concentrations—i.e., the ordinance's one-time lottery.

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6 *See, e.g.*, *Singh*, 152 F. Supp. 3d at 127 (upholding lottery requiring 50 percent of taxi-medallion owners to make their vehicles wheelchair accessible); *see also Koppell*, 108 F. Supp. 2d at 359 (upholding lottery determining ballot position because of the City's interest in "efficient administration," coupled with the fact that lottery systems are "by definition, nondiscriminatory"); *Bennett v. City Sch. Dist. of New Rochelle*, 497 N.Y.S.2d 72 (N.Y. App. Div. 1985) (upholding lottery allocating limited spots in an early education program); *Yung-Kai Lu v. Tillerson*, 292 F. Supp. 3d 276 (D.D.C. 2018) (visa lottery system); *Danskine v. Miami Dade Fire Dep't*, 253 F.3d 1288 (11th Cir. 2001) (lottery system to limit pool of firefighter applicants); *Sitkovetskiy v. City of New London*, No. 3–06–cv–01893, 2007 WL 2422283 (D. Conn. Aug. 20, 2007) (lottery system used to allocate affordable housing).

This lottery complied with the equal protection clause because it treated its participants equally. As the Schroeders acknowledge, they were "initially unaware" of the lottery. Schroeders' Br. at 8. So had the City simply issued permits on a first-to-apply basis, they would have been disadvantaged. By contrast, under the lottery, everyone had "an equal opportunity of being benefitted or injured," including the Schroeders. *See Singh*, 152 F. Supp. 3d at 127. As the trial court recognized, this equal treatment made the lottery constitutional. *Id.*

**2. Reducing the concentration of short-term rentals through the lottery fulfilled a legitimate purpose of the ordinance.**

Rational-basis review is the "lowest tier" of review for an equal protection challenge. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 16 (2004). It requires that an ordinance bear "some reasonable relation to the legitimate objectives" of the City's authority. *Grace Baptist Church v. Oxford*, 320 N.C. 439, 443, 358 S.E.2d 372, 375 (1987). In applying this lowest tier of review, North Carolina courts use the "hypothetical purpose approach." *See City of Asheville v. State*, 369 N.C. 80, 96, 794 S.E.2d 759, 771–72 (2016). Under that approach, divining the "actual goal or purpose of the government action" in question is not required; rather, "any conceivable legitimate purpose" for an ordinance will overcome a constitutional challenge. *Id.* (quoting *In re R.L.C.*, 361 N.C. 287, 295, 643 S.E.2d 920, 924 (2007)).

Here, under rational-basis review,[7] legitimate reasons for reducing the total number and concentration of short-term rentals exist. In 2016 alone, over 17,000 guests stayed in Wilmington short-term rentals.[8] This abundance of short-term rentals in residential areas was compromising "the integrity of single-family neighborhoods," while also destroying "the character of the historic district."[9] Furthermore, the influx of transient tenants brought with it a host of related problems:

- *Increased nuisance activity*: Short-term rentals for properties other than a primary residence, such as the "rental business" at issue here, can create increased nuisance activity—for example, the late-night parties and increased noise, traffic, parking, and trash associated with groups of transient tenants. As this Court has noted, there are greater challenges in enforcing local ordinances against "relatively transient tenants" compared to "owners of property in the City." *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 140, 757 S.E.2d 302, 306 (2014).

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[7] The Schroeders concede that rational-basis review applies here. *See* Schroeders' Br. at 27.

[8] *See* Thomas S. Walker, *Searching for the Right Approach: Regulating Short-Term Rentals in North Carolina*, 96 N.C. L. Rev. 1821, 1844 (2018).

[9] *See* Emily Featherston, *After years of debate, short-term rental rules go into effect Friday*, WECT News (Feb. 28. 2019), https://www.wect.com/2019/02/28/after-years-debate-short-term-rental-rules-go-into-effect-friday/.

- *Affordable-housing concerns*: The conversion of long-term housing units to short-term rentals reduces housing stock and contributes to increased rent, decreasing the availability of affordable housing. This "lack of affordable housing" provides a "rational basis" for government action. *440 Co. v. Borough of Fort Lee*, 950 F. Supp. 105, 110 (D.N.J. 1996).
- *Erosion of community involvement*: As one court aptly noted: "Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community." *Ewing v. City of Carmel-By-The-Sea*, 286 Cal. Rptr. 382, 388 (Cal. Ct. App. 1991).

Any one of the above reasons provided the City with a rational basis to limit the total number and concentration of short-term rentals—an unavoidable reality that led to the dismissal of the Schroeders' equal protection claim. (R p 42). Still, the Schroeders contend that because they responsibly operate their short-term rental, ending *their* use could not have advanced a legitimate purpose of the ordinance. This argument fails for three reasons.

First, the Schroeders' argument overlooks that simply reducing the total number and concentration of short-term rentals advances a legitimate purpose

of the ordinance. As noted above, an influx of transient tenants destroys the residential character of neighborhoods. So the lottery, by reducing the total number and concentration of short-term rentals, helped restore that residential character—even if it prevented the most responsibly operated short-term rentals from operating.

Second, the facts surrounding the Schroeders' use have no bearing on the constitutional analysis. It does not matter if the Schroeders "followed all state and local rules and guidelines." Schroeders' Br. at 26. Nor does it matter if the Schroeders operate "a harmless, harmonious use with a sparkling record." Schroeders' Br. at 21. As noted above, courts look to the overall problem an ordinance seeks to correct—not the extent that an ordinance "furthers the government's interests in an individual case." *Ward*, 491 U.S. at 801.

Finally, the Schroeders do not have a "fundamental right" to *use* their property in every possible way. Schroeders' Br. at 27 (quoting *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 848, 786 S.E.2d 919, 921 (2016)). Accepting this argument would mark the end of zoning altogether.

The trial court appropriately denied the Schroeders' equal-protection claim under rational-basis review.

### B. The anti-monopoly, exclusive privileges, and fruits-of-labor claims lack merit.

The Schroeders' additional constitutional claims fail both collectively and individually.

Collectively, the Schroeders anti-monopoly, exclusive privileges, and fruits-of-labor arguments fail for two reasons.

First, those arguments overlook a central tenant of zoning: The ordinance does not place a limit on *the Schroeders*; rather, it places a limit on the use of *the property*. Nothing in the ordinance currently prevents the Schroeders from operating a short-term rental at a conforming location within City limits.

Second, the Schroeders' arguments are incompatible with modern-day zoning. The Schroeders contend that they have an absolute right to operate a "rental business" on their property. Schroeders' Br. at 26. But regulating the location of various property uses is the cornerstone of virtually every local zoning scheme. *See* N.C. Gen. Stat. §§ 160D-701, 160D-702 (permitting the regulation of the "use of buildings, structures and land" to promote the "health, safety, and general welfare" of the community); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) ("Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of [their] property.").

Under the Schroeders' theory, if the City allows a use—e.g., adult businesses—it cannot also limit where that use may occur without creating a monopoly, granting an exclusive privilege, or depriving the fruit of someone's labor. One simply cannot reconcile this logic with modern-day zoning.

Beyond these reasons, the Schroeders also cannot overcome multiple claim-specific deficiencies.

First, the Schroeders' anti-monopoly arguments fail because they are each premised on a flawed "common rights" theory. The Schroeders argue that the right to operate a rental business is a "common right" such that the ordinance creates an impermissible "horizontal monopoly." Schroeders' Br. at 22. But the authority cited by the Schroeders for this proposition reveals its flaw: Common rights cease to exist when "their restraint becomes necessary for the public good." *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 322, 749 S.E.2d 469, 473 (2013).

Here, the ordinance's stated purpose was to "maintain the residential character of the neighborhoods within the city." (R p 161). This, along with the many other reasons listed above, *see supra* at 25–26, defeats the Schroeders' various common-rights arguments as a matter of law. Schroeders' Br. at 22–23. Simply put, the ordinance is not "the evil which the antimonopoly provision seeks to prevent." Schroeders' Br. at 22.

Likewise, the Schroeders attack on the two percent cap fares no better. The prohibition-era case relied on by the Schroeders involved a use that courts at the time deemed "absolutely necessary to the progress of the community." *Town of Clinton v. Standard Oil Co.*, 137 S.E. 183, 183 (N.C. 1927). By contrast, the excess of short-term rentals here was having a "destabilizing effect on housing affordability," hindering the progress of the City. (R p 161).

Second, the emoluments claim fails because, as discussed above, the City has a rational basis for limiting the total number and concentration of short-term rentals. *See Town of Emerald Isle v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987). An ordinance does not create an exclusive emolument or privilege within the meaning of Article I, Section 32 if:

> (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and
>
> (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.

*Id.*

Here, under *Town of Emerald Isle,* the Schroeders' exclusive privileges arguments fail. The City determined at which point the harms associated with short-term rentals outweighed potential good—i.e., the two percent cap and the 400-foot buffer. So allocating limited permits among adjacent properties "promote[d] the general welfare." *Id.* Likewise, by allocating permits within those parameters, the City reasonably "serve[d] the public interest." *Id.* Under

*Town of Emerald Isle*, therefore, the ordinance did not create "an exclusive emolument or privilege within the meaning of Article I, section 32" as a matter of law. *Id.*; *see also Blinson v. State*, 186 N.C. App. 328, 341–42, 651 S.E.2d 268, 278 (2007) (applying the *Town of Emerald Isle* test and noting that "not every classification that favors a particular group of persons" creates an "emolument" or "privilege" within the meaning of Article I, section 32).

The other cases cited by the Schroeders do not change this analysis. Only one of those cases occurred after *Town of Emerald Isle*. And that case does not apply here. *See Leete v. Cnty. of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995). There, the Warren County Board of Commissioners authorized additional severance pay to the retiring county manager. Our Supreme Court found that absent "public services" to justify the additional payment, it could not be made. Based on *Leete*, the Schroeders contend that their neighbors could not receive a permit over them because those neighbors did not "perform a 'public service.'" Schroeders' Br. at 25. But this argument puts the cart before the horse: it presumes that the lottery did, in fact, result in an "exclusive emolument or privilege within the meaning of Article I, section 32." As shown above, under *Town of Emerald Isle*, it did not.

Finally, the Schroeders fruits-of-their-own-labor arguments fail under rational-basis review. Schroeders' Br. at 25. The Schroeders contend that "the City cannot identify any health-and-safety justifications for imposing this

ordinance." Schroeders' Br. at 26. Yet the ordinance does just that. It states that "neighborhoods stand to be harmed by undue commercialization." (R p 161). This, in addition to the many reasons listed above, *see supra* at 25–26, bears a "substantial relation" to the "general welfare" of the City. *King v. Town of Chapel Hill*, 367 N.C. 400, 407, 758 S.E.2d 364, 370 (2014) (quoting *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 735 (1949)). The Schroeders' arguments cannot survive the many reasons for the ordinance.

* * *

The Schroeders told the trial court that they were "not asserting a takings claim." (App. 4). And the trial court told the Schroeders that they could not assert "a claim for vested rights." (R p 129). These significant moments had significant consequences—consequences the Schroeders cannot evade.

If the Court does not address constitutional issues that arrive in "uncertain form," *Rice*, 259 N.C. at 511, 131 S.E.2d at 472, it certainly should not address those that arrive in no form whatsoever.

## CONCLUSION

The City respectfully requests that the Court affirm the dismissal of the Schroeders' constitutional claims.

Respectfully submitted the 12th day of May, 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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This the 12th day of May, 2021.

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# APPENDIX

Excerpts from Transcript of Proceedings,
*Schroeder v. City of Wilmington*,
19-CVS-4028 (N.C. Sup. Ct. Feb. 6, 2020)...............App. 1

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF NEW HANOVER FILE NO. 19-CVS-004028

| | | |
|---|---|---|
| DAVID SCHROEDER and PEGGY SCHROEDER, | ) | Volume I of I |
| Plaintiffs, | ) | (Pages 1 to 48) |
| v. | ) | Thursday, February 6, 2020 |
| CITY OF WILMINGTON and THE CITY OF WILMINGTON BOARD OF ADJUSTMENT, | ) | Transcript of Proceedings |
| Defendants. | ) | |

Superior Court Civil Session

The Honorable R. Kent Harrell, Judge Presiding

Motions Hearing

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1 every instance where somebody applies a human force, prove
2 that a concern that was the basis of the regulation is
3 actually created by that particular individual. So we would
4 submit that if there's a justification for the short-term
5 rental ordinance, we think there is. The fact that the
6 Schroeders' property may not have been the cause of the
7 problems enumerated isn't relevant, and that's what the
8 Fourth Circuit held in this independent used bookstore case.
9 And I think Your Honor touched on this second
10 point. The case law that they're relying on as fruits of
11 the labor, if you look at the facts of those cases, their
12 direct regulation, in many cases licensing to engage in a
13 particular business activity, they're not laying these
14 cases. As I said before, the Schroeders are not being asked
15 to pass some kind of test of whether they as individuals are
16 qualified and competent to engage in short-term rental, it's
17 a zoning ordinance. It's a land use ordinance, and if their
18 argument is correct, that means every land use ordinance
19 that restricts or limits certain businesses through certain
20 districts are subject to whatever intermittent scrutiny
21 they're asking for. There's no evidence in North Carolina
22 law that our courts have ever gone there in terms of land
23 use ordinances.
24 Two last points: We did brief the issue of taking
25 because we were unclear of whether or not they were raising

1 a claim. It wasn't argued. Based on conversation, we don't
2 think that's an issue in this case. That's why I didn't
3 address it, but it's in our brief; and, finally, I believe I
4 heard sort of a concession that the issues raised on cert
5 are the very same constitutional claims, and I'm not
6 quarreling with how those got here. I think I understand
7 why they did it, and I don't have any issue with it.
8 They brought them up through the board of
9 adjustment, but they're here sitting right next to counts
10 two and three, but I believe they're the same claims, the
11 same arguments in two and three, and that's why we submit
12 that if the Court is inclined to grant our motion that the
13 board's decision should be affirmed because there would be
14 nothing left to argue in that case.
15 There's been some indication of the need to
16 develop a record. Frankly, we're not seeing it. It's a
17 challenge to the ordinance as written. In regards to the as
18 applied, I can't think of how that comes in, other than the
19 argument that the Schroeders' property is not causing a
20 problem, and I think I just addressed that.
21 THE COURT: Thank you. On the issue of the cert
22 petition, does the plaintiff concede that if the Court finds
23 in favor of the defense on the constitutional issues
24 involved that that resolves the issues that are raised
25 through the writ of cert on the appeal of the board of

1 adjustment's decision, or do I still need to undertake a
2 review of the entire record?
3 MR. BROOKS: If I may, Your Honor --
4 THE COURT: I'm just trying to understand what the
5 scope of my review needs to be for this matter today, quite
6 frankly.
7 MR. BROOKS: Well, I do believe that -- when you
8 say constitutional, we're also including the preemption
9 arguments.
10 THE COURT: Right, yes.
11 MR. BROOKS: I do believe that the legal issues
12 that have been asserted with the state statute and also with
13 the constitutional arguments that I addressed, that if those
14 are resolved against the Schroeders that they would not have
15 the ability to go forward on their petition because we do
16 not challenge, as indicated, that there was any procedural
17 irregularity or that kind of thing, so I do think that that
18 is correct.
19 And, if I may, I can also confirm we are not
20 asserting a takings claim, so that is not an issue.
21 THE COURT: Thank you, counsel. As I said, I had
22 a chance to review the defense's memorandum in support of
23 their motion. I have not had an opportunity to review
24 plaintiffs' memorandum yet, so I'll take the matter under
25 advisement so that I can review plaintiffs' memoranda.

# ADDENDUM

*Assurance Grp., Inc. v. Bare*,
No. COA15–386, 2016 WL 608098
(N.C. Ct. App. Feb. 16, 2016) ....................................Add. 1

245 N.C.App. 566
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Court of Appeals of North Carolina.

The ASSURANCE GROUP, INC., Plaintiff,
v.
Samuel Allen BARE and Deborah Lynn Bare, Marcheta Perry Sawyer, Timothy Mark Byrd, Gregory Todd Byrd, James Chandler Beck, Michael Wayne Anderson, Jeffrey A. Heybrock, Charles Bernard Moore, Jr, Defendants.

No. COA15–386.
|
Feb. 16, 2016.

***1** Appeal by defendants from orders entered 20 November 2013 and 18 September 2014 by Judge Vance Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 8 October 2015.

**Attorneys and Law Firms**

Burger, Scott & McFarlin, by Wm. Kennerly Burger, and Young, Morphis, Bach & Taylor, LLP, by James R. Hawes, for defendants-appellants.

Roberson Haworth & Reese, PLLC, by Christopher C. Finan and Matthew A.L. Anderson, for plaintiff-appellee.

**Opinion**

DIETZ, Judge.

Defendants are insurance agents who worked on a commission basis selling products for the Assurance Group's insurance-company clients. The gist of this dispute is Defendants' claim that the Assurance Group failed to properly account for funds received from the sale of these insurance products and to pay Defendants the commissions and other funds owed under the parties' contracts.

The trial court dismissed the counterclaims of three Defendants at the pleading stage, concluding that those Defendants conceded that they had signed releases barring their claims. The trial court later entered summary judgment against the remaining Defendants' counterclaims based on the statute of limitations. Defendants then appealed.

For the reasons discussed below, we affirm. The three Defendants whose claims were dismissed under Rule 12(b)(6) acknowledged in their counterclaims that they had signed releases barring their claims. On appeal, those defendants point to affidavits submitted to the trial court asserting that the releases were induced through fraud. But those affidavits are outside the pleadings and cannot be considered in reviewing a dismissal under Rule 12(b)(6).

With respect to summary judgment, the Assurance Group presented evidence from Defendants' own testimony establishing that the statute of limitations expired before each Defendant brought suit in 2012. Defendants contend that each commission payment under the contract is a new violation with a separate statute of limitations period, like the separate-accrual rule applied to federal copyright claims. As explained below, we reject this argument and affirm the trial court's summary judgment ruling.

**Facts and Procedural History**

This case has a long and convoluted factual and procedural history, most of which is irrelevant to the issues raised in this appeal. We briefly address the facts relevant to the challenged rulings by the trial court.

The Assurance Group contracts with various insurance carriers to market and sell insurance products. Defendants are independent contractors who sold these insurance products on the Assurance Group's behalf under contracts that provide for commissions on sales.

On 15 August 2012, the Assurance Group sued Defendants to recover advanced costs and expenses that Defendants allegedly failed to repay under the terms of their respective contracts. Defendants asserted a number of counterclaims alleging that the Assurance Group failed to account for and pay commissions and related funds owed under the parties' contracts.

***2** On 20 November 2013, the trial court granted the Assurance Group's motion to dismiss all the counterclaims of Defendants Samuel Bare, Deborah Bare, and James Beck. And, on 18 September 2014, the trial court granted the Assurance Group's motion for summary judgment as to

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all Defendants' remaining counterclaims. Defendants timely appealed.

## Analysis

### I. Rule 12(b)(6) Dismissal

Defendants Samuel Bare, Deborah Bare, and James Beck challenge the trial court's dismissal of their counterclaims under Rule 12(b)(6) for failure to state a claim on which relief can be granted. For the reasons discussed below, we affirm the trial court.

This Court reviews the trial court's denial of a motion to dismiss *de novo. Hardy ex rel. Hardy v. Beaufort Cty. Bd. of Educ .,* 200 N.C.App. 403, 405, 683 S.E.2d 774, 777 (2009). "When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint must be dismissed." *Oberlin Capital, L.P. v. Slavin,* 147 N.C.App. 52, 56, 554 S.E.2d 840, 844 (2001). Thus, when a complaint properly alleges a claim but also alleges facts showing that the claim is barred by a settlement agreement or release, the claim is subject to dismissal under Rule 12(b)(6). *See Sutton v. Duke,* 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) ("If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed.").

Here, these three Defendants admitted in their Answer and Counterclaim that they each had signed a contract entitled "Separation and Release Agreement" which provided that the defendants fully released the Assurance Group from any legal claims for failure to pay commissions or other amounts due under the parties' contracts.

The trial court dismissed these Defendants' counterclaims based on this admission in their pleadings. On appeal, the Defendants assert only a single argument to oppose the dismissal: that they submitted signed affidavits that "affirmed under oath that their signatures on the purported settlement documents ... were induced by misrepresentations and outright fraud." But this Court, like the trial court, cannot consider evidence outside the pleadings when reviewing the grant a Rule 12(b)(6) motion. *See Weaver v. Saint Joseph of the Pines, Inc.,* 187 N.C.App. 198, 203, 652 S.E.2d 701, 707 (2007) ("[t]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed.") (citation omitted). [1]

1 The admissions concerning the release agreements appear in the answer portion of each Defendant's "Answer and Counterclaim" pleading. None of these pleadings specifies whether the facts contained in the answer portion are part of the counterclaim allegations as well. It appears the trial court treated the answer portion as part of the counterclaim. Defendants do not argue on appeal that this was improper, nor do they provide any reason why those allegations in the answer portion of a joint pleading cannot be considered at the Rule 12(b)(6) stage. Accordingly, any argument that the trial court erred in considering the admissions in the answer and the corresponding release agreements at the Rule 12(b)(6) stage is waived. *See* N.C. R.App. R. 28 ("Issues not presented and discussed in a party's brief are deemed abandoned.").

### II. Summary Judgment Ruling on Statute of Limitations

Defendants next argue that the trial court erred in granting the Assurance Group's motion for summary judgement. The trial court concluded that the statute of limitations barred Defendants' counterclaims as a matter of law. For the reasons explained below, we affirm the trial court.

***3** We review the grant of a motion for summary judgment *de novo. Harrison v. City of Sanford,* 177 N.C.App. 116, 118, 627 S.E.2d 672, 675 (2006). At the summary judgment stage, when a defendant asserts the statute of limitations as a bar to recovery, the burden shifts to the plaintiff to forecast at least some evidence that the claim accrued within the limitations period. *Georgia–Pacific Corp. v. Bondurant,* 81 N.C.App. 362, 363–64, 344 S.E.2d 302, 304 (1986).

Defendants' claims are all grounded in their allegations that the Assurance Group had an obligation to properly account for funds it received from its insurance-company clients and to pay to Defendants the amounts contractually owed to them from those funds. Defendants assert claims for breach of contract, declaratory judgment related to the contract, conversion, and breach of fiduciary duty. [2] These claims are all subject to a three-year statute of limitations. N.C. Gen.Stat. § 1–52.

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2 In their counterclaims, Defendants also asserted claims for statutory/regulatory violations and unfair and deceptive trade practices. The Assurance Group contends—and we agree—that Defendants abandoned any challenge to the dismissal of these claims by failing to address them in their appellate brief. *See* N.C. R.App. P. 28(b)(6).

"A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley,* 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985). Here, the Assurance Group presented undisputed testimony—from Defendants' own depositions—that Defendants first learned that the Assurance Group was paying them less money than they believed the contract entitled them to receive at various points between 2005 and 2008. But Defendants did not bring suit until 2012, well after the three-year statute of limitations period expired.

Defendants respond that this is irrelevant because they continued to receive monthly commission payments under the contract and these "discrete" payments trigger new statute of limitations periods in a manner analogous to the "separate-accrual rule" for federal copyright claims. *See, e.g., Petrella v. Metro–Goldwyn–Mayer Inc.* ––– U.S. ––––, 188 L.Ed.2d 979, 988 (2014). We disagree.

"The general rule for claims other than malpractice is that a cause of action accrues as soon as the right to institute and maintain a suit arises." *Williams v. Blue Cross Blue Shield of North Carolina,* 357 N.C. 170, 178–79, 581 S.E.2d 415, 423 (2003). Our Supreme Court has recognized the continuing wrong doctrine as an exception to this general rule. *Id* at 179; 581 S.E.2d at 423. This exception, however, does not apply here.

The heart of this dispute is a disagreement about what the Assurance Group owes Defendants under the terms of their contracts. Although the contract may require the Assurance Group to periodically make payments to Defendants, the underlying contract dispute remains the same. Thus, once Defendants learned that the Assurance Group was not paying them what they believed they were owed under the contract, the limitations period began to run on these claims.

Defendants also contend for the first time on appeal that their counterclaims include a claim for constructive fraud, which is subject to a ten-year statute of limitations. This argument is waived. We have held that a party cannot adopt a new statute of limitations theory for the first time on appeal. *See Wells Fargo Bank, N.A. v. Coleman,* ––– N.C.App. ––––, 768 S.E.2d 604, 608 (2015) (rejecting request to assert ten-year statute of limitations on appeal because "both parties relied entirely on the three-year statute of limitations" in the trial court and "issues and theories ... not raised below will not be considered on appeal"). Thus, even if we believed Defendants' counterclaims included a previously unreferenced constructive fraud claim—and we are not persuaded that they do—Defendants waived this argument by failing to raise it below. Accordingly, we affirm the trial court's dismissal of Defendants' claims based on the statute of limitations.

## Conclusion

***4** For the reasons discussed above, we affirm the trial court.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.
Report per Rule 30(e).

### All Citations

245 N.C.App. 566, 782 S.E.2d 581 (Table), 2016 WL 608098

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