NO. COA 21-192 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, Defendants-Appellants.	)	From New Hanover County File No.: 19-CVS-4028

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PLAINTIFFS-APPELLEES/CROSS-APPELLANTS' BRIEF

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Plaintiffs-Appellants,	)	
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Defendants-Appellants.	)	

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PLAINTIFFS-APPELLEES/CROSS-APPELLANTS' BRIEF

****

ISSUES PRESENTED

I. Did the trial court err in dismissing Plaintiffs' N.C. Constitution Article I, Section 19 Law of the Land vested-rights challenge to the City of Wilmington's rental-registration ordinance?

II. Did the trial court err in dismissing Plaintiffs' N.C. Constitution Article I, Section 34 Anti-Monopoly claim?

III. Did the trial court err in dismissing Plaintiffs' N.C. Constitution Article I, Section 32 Exclusive Emoluments claim?

IV. Did the trial court err in dismissing Plaintiffs' N.C. Constitution claims for a violation of substantive and procedural due process under Article I, Section 19; equal protection under Article I, Section 19; the general law provision of Article XIV, Section 3; and their fundamental right to conduct a lawful business and earn a livelihood?

V. Did the trial court err in granting the City of Wilmington's motion to stay the trial court's final judgment?

STATEMENT OF THE CASE

Peg and David Schroeder ("the Schroeders") own a townhome in Wilmington, North Carolina ("the City"). They bought that townhome for a dual use: as a personal residence to visit family and friends, and as a vacation-rental property. After they made substantial investments equipping their property as a vacation rental, the City passed an ordinance "amortizing" that use, ultimately making it illegal.

The Schroeders filed a complaint on 25 October 2019, challenging the City's ordinance as preempted by state law and violating several provisions of the North Carolina Constitution. The trial court dismissed their constitutional claims on 17 February 2020, but allowed their preemption claim to proceed to the merits. Then,

on 15 September 2020, the trial court granted summary judgment for the Schroeders on their statutory preemption claim. Just two days later, on 17 September 2020, the trial court stayed its summary-judgment ruling. And on 15 October 2020, the trial court entered a final judgment memorializing the summary judgment decision, the stay, and the dismissed constitutional claims. The City appealed the trial court's summary judgment ruling on 10 November 2020, and the Schroeders cross-appealed their dismissed constitutional claims and the stay order on 18 November 2020.

This appeal addresses the legality of the City's retroactive deprivation of the Schroeders' lawful use of their property as a vacation rental. It also challenges the propriety of the trial court's decision to stay its order granting summary judgment in the Schroeders' favor during this appeal.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Because this appeal arises from a final judgment resolving all claims as to all parties, this Court has appellate jurisdiction. *See* N.C.G.S. § 7A-27(b).

STATEMENT OF THE FACTS

Peg and David Schroeder lived in Wilmington for over 30 years. (R pp 135, 144 at ¶ 4). They raised their family there, they operated their small businesses there, and it is still the community where they have deepest roots. (R pp 136, 145 at ¶¶ 5–6). But after spending the bulk of their working lives in Wilmington, the Schroeders decided to retire to the mountains of western North Carolina. (R pp 136, 145 at ¶ 5).

The Schroeders knew they would never fully leave Wilmington. Nor did they want to. Instead, the Schroeders planned to make regular trips back to Wilmington. *Id.* at ¶¶ 5–7. And to have a place they could call home during those trips, the Schroeders wanted to maintain a residence in Wilmington that could serve as a gathering place for friends and family while they were in town. *Id.* But maintaining two residences is costly, and it was something the Schroeders could not afford to do. *Id*. at ¶¶ 7–8. So to compromise, the Schroeders decided that they could maintain a property in Wilmington if—and only if—they could offer it as a vacation rental during the periods when they were not using it. *Id*.

After some research—which included consultations with both a realtor and an attorney—the Schroeders decided in early 2018 that they would be able to purchase a property in Wilmington for the dual purpose of using it as a personal residence and vacation rental. (R pp 136, 145; 141, 150 at ¶¶ 9–10, 48). The Schroeders ultimately settled on the Lion's Gate neighborhood in Wilmington. (R pp 136, 145 at ¶ 10). As they understood it, state law allowed for vacation rentals and Lion's Gate's HOA rules did as well. (R pp 136, 145, 141, 150 at ¶¶ 10–11, 48). In fact, the Schroeders were aware of several Lion's Gate property owners who were already offering their properties as vacation rentals when they decided to buy. (R pp 136, 145 at ¶ 11).

The Schroeders bought the property located at 1800 Eastwood Road, Unit #130, Wilmington, North Carolina, 28403 ("the Townhouse") in June 2018. (R pp 137, 146 at ¶¶ 12–13). To make it work financially, the Schroeders had to sell two

other investments to have the money they needed to purchase the Townhouse. *Id*. at ¶ 14. Right away, they began renovating the property to make it suitable for their intended dual use as vacation rental and residence. *Id*. at ¶ 15. The Schroeders hired several contractors to handle projects like flooring, plumbing, electrical work, and the installation of a new gas line and tank. *Id*. at ¶ 16. They also did much of the work themselves, like painting and installing new flooring, drywall, and cabinetry. *Id*. at ¶ 17. Finally, the Schroeders made several changes to secure some personal privacy from their renters, including installing a locked pantry and a private refrigerator, as well as modifying the master closet by erecting a wall secured by a locked door. *Id*. at ¶ 18. By the time the renovations were complete—roughly eight months later—the cost of materials and labor exceeded $75,000. *Id*. at ¶ 19.

The Schroeders completed their renovations in February 2019. *Id*. By 7 February 2019, the Schroeders had listed the Townhouse on VRBO, and within days they secured their first booking. (R pp 138, 147 at ¶ 21). The Schroeders then welcomed their first guest to the Townhouse on 18 March 2019. *Id*. And in July 2019, the Schroeders entered into an annual membership agreement with VRBO. *Id*. at ¶ 22.

For the entire time that the Schroeders have offered their property as a vacation rental, they have always done so responsibly. For example, the Schroeders only rent to mature adults over age 25; they do not allow more than four guests in the Townhouse; they do not allow pets; and they have secured the consent of each of

their neighbors. *Id*. at ¶¶ 23–24. In addition, the Schroeders obey all state and local laws, and they maintain compliance with the Lion's Gate HOA restrictions. As a result, they have never had any violations at the Townhouse. *Id*. at ¶ 24.

The Schroeders' vacation-rental business should have been legally protected. In 2016, more than two years before the Schroeders bought the Townhouse, the North Carolina General Assembly passed a law prohibiting cities and localities from requiring a permit or registration for any rental properties. N.C.G.S. § 160A-424(c)(i) ("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."). The General Assembly later clarified that the statute applies to vacation rentals, expressly providing that "[t]he provisions of G.S. 160A-424 . . . shall apply to properties covered under this Chapter [Vacation Rentals]."[1]

As far as the Schroeders understood it, this statutory language made clear that Wilmington could not establish a registration or permitting requirement for vacation rentals. (R pp 136, 145 at ¶ 10). Nevertheless, in June 2018, the City passed the first of two ordinances regulating "Whole-house lodging."[2] The first ordinance required vacation rentals to register annually with the City, but it did not limit the number of vacation rentals in the City or limit who could offer their

[1] In 2019 the Legislature recodified this language (without changing its substance) at N.C.G.S. § 160D-1207(c).

[2] Most vacation rentals, including the Schroeders', fit within the City's definition for a "whole-house lodging." *See* Wilmington City Code § 18-812.

properties as vacation rentals. *See* Wilmington City Code ("City Code") § 18-330. In February 2019, just after the Schroeders had completed their renovations, the City passed a second vacation rental ordinance—this time imposing a two-percent cap on vacation rentals in residentially zoned parcels within the city, requiring a permit to rent, and establishing a 400-foot proximity restriction between permitted properties. City Code § 18-331(b). In sum, although there is a state statute prohibiting municipalities from establishing permitting or registration requirements for vacation rentals, Wilmington passed an ordinance establishing both.

The second ordinance went into effect on 1 March 2019, nearly a year after the Schroeders bought the Townhouse and several weeks after they began offering it for rent. (R pp 137, 139, 146, 148 at ¶¶ 12, 27, 31). Using a process known as "amortization," anyone who did not obtain a permit would be forced to cease use of their property as a vacation rental within one year. City Code § 18-331(q).[3] To determine who could keep offering vacation rentals and who would have to cease their use, the City devised a lottery system. City Code § 18-331(d)(8). Under the lottery, each applicant was assigned a random number and every applicant's property was placed on a map. City of Wilmington, *Wilmington Lottery and*

[3] "Amortization" is primarily an accounting term used to describe a process by which a debt is gradually extinguished or an asset is depreciated. *See* Julie R. Shank, *A Taking Without Just Compensation? The Constitutionality of Amortization Provisions for Nonconforming Uses*, 109 W.Va. L. Rev. 225, 226 n.1 (2006). In the context of land use, "amortization" refers to a process by which a land use can be eliminated over time and "[c]ompensation is not required because the owner is expected to recoup the value of the nonconforming use in the time permitted." *Id*.

Separation.mp4, (15 April 2019), https://drive.google.com/file/d/1AYy-8lQ6bOrv9p1zc6Yq4NhIMBYMxmC1/view; *see also* (R pp 139–40, 148–49 at ¶¶ 34, 40). If two properties were within 400 feet of one another, the "winning" owner would retain their right to rent, while their neighbor's use would be amortized. *Id.* This is what happened to the Schroeders—a neighbor in Lion's Gate drew a higher-priority number, and thus the Schroeders lost their right to offer their property as a vacation rental. (R pp 140, 149 at ¶¶ 41–43).[4] As a result, the Schroeders were given until 22 April 2020, to cease their use. (R pp 141, 150 at ¶ 49).

The Schroeders were initially unaware of the new ordinance. (R pp 139, 148 at ¶ 29). So, for a brief period of time, they still offered the townhouse as a vacation rental—still without incident or complaint. However, after learning of the ordinance and then losing the lottery, the Schroeders lost the ability to do what they had been doing legally and peacefully before. (R pp 139, 140–41, 148, 149–50 at ¶¶ 30–31, 43–46). This lawsuit followed.

ARGUMENT

This argument proceeds in three parts. First, the Schroeders introduce the two standards of review that apply to the issues raised in this brief—one for the claims rejected on the motion to dismiss and another for weighing the trial court's order staying its judgment for the Schroeders. Second, the Schroeders argue that

[4] It is unclear whether the Schroeders lost their right to rent because the City treated Lion's Gate as a single property or because the owner within Lion's Gate with a higher-priority number was within 400 feet of the Schroeders' unit. *See* (R pp 140, 149 at ¶¶ 41–42). By dismissing the Schroeders' claims, the trial court made it impossible for them to find out.

the trial court wrongly dismissed their constitutional claims alleging that the City's amortization of their lawful use violated the North Carolina Constitution. And third, the Schroeders argue that the trial court abused its discretion in staying its order granting summary judgment in their favor.

I. APPLICABLE STANDARDS OF REVIEW

Because this brief involves questions resolved on a motion to dismiss and a motion to stay final judgment, two standards of review are implicated. First, in Section II of this brief, the Schroeders argue that the trial court wrongly dismissed their constitutional claims. With respect to those claims, "[t]he standard of review . . . is whether the complaint state[d] a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (internal quotation omitted). And it "should not be dismissed 'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.'" *Hyde v. Abbott Lab'ys, Inc.*, 123 N.C. App. 572, 575, 473 S.E.2d 680, 682 (1996).

And in Section III, the Schroeders address the trial court's stay of its order granting summary judgment in favor of the Schroeders. When considering such orders, the appropriate standard is abuse of discretion. *Meares v. Town of Beaufort*, 193 N.C. App. 49, 64, 667 S.E.2d 244, 254 (2008). This Court must reverse a trial court's stay for abuse of discretion when the court "abandons any consideration of the[] factors which this Court has deemed relevant in determining whether a stay is

warranted." *Lawyers Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 357, 435 S.E.2d 571, 574 (1993).

II. THE TRIAL COURT ERRED IN DISMISSING THE SCHROEDERS' LAW OF THE LAND CLAIMS CHALLENGING THE CITY'S AMORTIZATION ORDINANCE.

Even if the City's ordinance was not preempted, its retroactive deprivation of the Schroeders' right to rent was unconstitutional. That is because the City wielded a power—the amortization of a non-nuisance use—that it does not have. Indeed, amortization in North Carolina is limited to the elimination of nuisances, and no court in this state has ever allowed for its application in a scenario like this one. The City's attempt to use amortization to eliminate the Schroeders' rental property—a use which is both harmless and entirely consistent with its surroundings—reflects an ahistorical expansion of that power.

This section proceeds in three parts. First, the Schroeders show that they possess a vested property right and that amortization is a retroactive deprivation of that right. Second, the Schroeders establish that they sufficiently pled claims alleging that the North Carolina Constitution prohibits the retroactive termination of vested rights through amortization. And third, the Schroeders show that they sufficiently pled additional claims under the North Carolina Constitution's Anti-Monopoly, Exclusive Privileges, Fruits of Their Own Labor, and Equal Protection Clauses.

A. THE SCHROEDERS POSSESS A VESTED RIGHT IN THE USE OF THEIR TOWNHOME AS A VACATION RENTAL AND THE GOVERNMENT'S AMORTIZATION OF THEIR USE IS A RETROACTIVE TERMINATION OF THAT RIGHT.

1. The Schroeders Possess a Vested Right in the Use of Their Townhome as a Vacation Rental.

Vested rights can exist in various contexts. And North Carolina courts repeatedly have "recognized that a vested right in a particular land use" is one of them. *Michael Weinman Associates Gen. P'ship v. Huntersville*, 147 N.C. App. 231, 233, 555 S.E.2d 342, 345 (2001).[5] Indeed, a property owner can establish a vested right in a particular land use either by statute or by "qualify[ing] under the common law." *MLC Auto., LLC v. Town of S. Pines*, 207 N.C. App. 555, 560, 702 S.E.2d 68, 73 (2010). To do the latter, a property owner must satisfy the state's four-part test, which requires: (1) substantial expenditures; (2) in good faith reliance; (3) on valid governmental approval; (4) resulting in the party's detriment." *Id.*; *see also Town of Midland v. Wayne*, 368 N.C. 55, 63–64, 773 S.E.2d 301, 307 (2015).

The Schroeders sufficiently alleged that they would have easily satisfied this test. They satisfy prongs one and two because they bought the townhome and expended over $75,000 to make it suitable as a vacation rental at a time when such

[5] This principle—that one possesses a valuable or vested property right in an existing use—is a generally understood principle outside of North Carolina as well. *See, e.g.*, *Village of Oak Park v. Gordon*, 32 Ill. 2d 295, 298, 205 N.E.2d 464, 466 (1965) ("The right to continue an established nonconforming use [i]s . . . a valuable property right."); *Robert D. Ferris Tr. v. Plan. Comm'n of Cty. of Kauai*, 138 Haw. 307, 312, 378 P.3d 1023, 1028 (Haw. Ct. App. 2016) ("preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.") (citations and internal quotations omitted).

a use was legal (and protected by state statute). And the Schroeders satisfy prongs three and four because, in the absence of formal "government approval" in the form of a permit (which they did not need and, again, according to state statute, never would),[6] a property owner need only show that: their property was not subject to the zoning at issue "at the time they made their expenditures"; that the "expenditures were made in good faith reliance on that fact"; and that they incurred "substantial expense." *Swan Beach Corolla, LLC v. County of Currituck*, 234 N.C. App. 617, 625–28, 760 S.E.2d 302, 309–11 (2014) (quoting *Application of Campsites Unlimited, Inc.*, 287 N.C. 493, 502, 215 S.E.2d 73, 78 (1975)).

As described above, the Schroeders have sufficiently alleged good-faith reliance and substantial financial harm—just like the plaintiffs in *Swan Beach*. Thus, the trial court erred in not following the rule of law established in *Swan Beach*. The trial court ought to have acknowledged that, in light of the detrimental reliance alleged by the Schroeders and the harm incurred as a result of the City's amortization ordinance, and "[t]aking these facts [alleged in the complaint] as true . . . plaintiffs sufficiently pled their claim for common law vested rights to survive a motion to dismiss." *Id.* at 310.

2. Amortization of an Existing, Previously Lawful Use Is a Retroactive Termination of Property Rights.

Amortization is an inherently retroactive tool—that is, it attaches new

[6] In any case, while a statute is not a "permit" in the traditional sense, a statute that expressly bars a municipality from ever requiring a permit should satisfy prong three's "valid governmental approval" requirement.

consequences to the future exercise of a vested right. *See Miracle v. N.C. Local Gov't Emps. Retirement Sys.*, 124 N.C. App. 285, 292, 477 S.E.2d 204, 209 (1996) ("Retroactive legislation includes not only statutes which 'take effect from a time anterior to their passage,' but 'all statutes, which, though operating only from their passage, affect vested rights and past transactions.'") (quoting *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)). In fact, by definition, every amortization ordinance has the effect of rendering illegal a land use that was legal when it commenced. *See* William R. Maurer, *An Idea Whose Time Has Gone: How Amortization is Unconstitutional Retroactive Legislation in Texas*, 4 Tex. A&M J. Prop. L. 145, 156 (2017) ("Indeed, there are likely few kinds of legislation that better fit the definition of a retroactive law than ordinances creating an amortization period."). The City's amortization ordinance is plainly retroactive because it affects settled (or "vested") rights—like the right to continue a lawful pre-existing land use.[7] Specifically, the Schroeders bought a property and incurred substantial expenses only to have the City's ordinance eliminate their ability to use it in the way they had been using it.

[7] For that reason, several state courts have interpreted their state constitutions to prohibit local-level restrictions on short-term dwellings. For example, in *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. App. 2019), the Austin Court of Appeals very recently rejected an almost identical amortization scheme to eliminate vacation rentals in Austin, Texas, over a period of six years. And in *Village of Oak Park*, the Illinois Supreme Court struck down an amortization ordinance, pointing to the owner's substantial expenditures and concluding that there was "no evidence whatsoever that the public interest would be []served" by restricting a use "that in appearance was compatible with its surroundings." 205 N.E.2d at 465–66.

B. THE NORTH CAROLINA CONSTITUTION PROHIBITS THE RETROACTIVE TERMINATION OF VESTED RIGHTS THROUGH AMORTIZATION.

This Section discusses the Schroeders' vested-rights claims under Article I, section 19 of the North Carolina Constitution—claims that were all dismissed by the trial court. It proceeds in three subsections. First, the Schroeders show they sufficiently pled that the City's amortization of their use was a due process violation under the North Carolina Constitution. Second, the Schroeders show they sufficiently pled that the City's amortization of their use was a taking under the North Carolina Constitution. And third, the Schroeders address the only amortization case ever considered by the North Carolina Supreme Court and explain why its holding does not apply here.

1. The City's Amortization of the Schroeders' Property Violates Due Process and the Trial Court Erred in Dismissing That Claim.

Due process protections apply to retroactive laws. *See E. Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring).[8] As Justice Kennedy described it, the appropriate due process analysis of retroactive legislation should "reflect[] [a]

[8] Justice Kennedy's concurrence—which is a majority opinion in part—reflected his understanding that "due process protection for property must be understood to incorporate our settled tradition against retroactive laws[.]" And the four dissenting justices—Breyer, Stevens, Souter, and Ginsburg—agreed with Justice Kennedy insofar as he called for the application of the due process doctrine for retroactive laws. *Id.* at 556, 558 ("[T]he potential unfairness of retroactive liability finds a natural home in the Due Process Clause," a reading that reflects "a basic purpose: the *fair application of law*, which purpose hearkens back to the Magna Carta.") (Breyer, Stevens, Souter, Ginsburg, JJ., dissenting). The dissent simply disagreed that the plaintiffs should prevail under due process (or the takings doctrine adopted by the plurality).

distrust" of such laws. *Apfel*, 524 U.S. at 547 (Kennedy, J., concurring). That is because retroactive laws have been historically recognized as "generally unjust[,] and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." *Id.* (quoting 2 J. Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891)). Therefore, courts must give "*serious consideration* to retroactivity-based due process challenges." *Id.* at 548 (emphasis added).[9]

In practice, this "serious consideration" requirement means that the due process analysis tightens when courts consider a retroactive law, as opposed to a prospective one.[10] As the U.S. Supreme Court has explained, "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and *the justifications for the latter may not suffice for the former*." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16–17 (1976) (emphasis added). In other words, the City's justifications for amortizing the Schroeders' use must be weighed differently than if the City had only sought to regulate the Schroeders' use *prospectively*—which is what zoning is typically limited to. At least one other state

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[9] At least one state high court has indicated that amortization is a per se due process violation when applied to a use that "was in existence at the time of the passage of the ordinance and has continued without expansion or interruption ever since." *City of Akron v. Chapman*, 160 Ohio St. 382, 387, 116 N.E.2d 697, 700 (1953). "The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right." *Id.* at 700 (citing *Spann v. Dallas*, 111 Tex. 350, 235 S.W 513 (1921)).

[10] In fact, North Carolina's expansive protections for property rights are so vast that even "[r]etrospective statutes destroying or diminishing *contingent interests*[] in property" may also "deprive the holder thereof of property without due process of law." *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973).

high court has expressly said as much, explaining that "we cannot embrace the doctrine espoused by advocates of the amortization technique that there is no material distinction between regulating the *future* use of property and terminating *pre-existing* lawful conforming uses." *Hoffmann v. Kinealy*, 389 S.W. 2d 745, 753 (Mo. 1965) (emphasis added). Indeed, as the Supreme Court first acknowledged in *Usery v. Turner Elkhorn Mining Co.*, "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively." 428 U.S. at 16–17 (1976).

North Carolina's Law of the Land Clause compels more stringent review than the federal Due Process Clause. And a retroactive law cannot survive when a plaintiff shows it does not survive the heightened due process scrutiny described above. *Miracle*, 124 N.C. App. at 294, 477 S.E.2d at 210. Indeed, "although the 'law of the land' clause and the Due Process Clause are similar," the Law of the Land Clause contemplates relief "in circumstances under which no relief might be granted by the due process clause of the fourteenth amendment." *Id.* (quoting *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985)). Thus, whether a law is retroactive is a fact-intensive "question of degree and reasonableness"—an inquiry which requires that "the record . . . [be] developed sufficiently to allow the trial court to resolve [the case] as a matter of law." *Id.* Under this standard, the *Miracle* court made clear, blanket assertions of reasonableness—or as the City described them, hypothetical purposes—are not enough.

The trial court's decision does not reflect this standard. Rather, the trial court seemingly adopted the City's proposed (and incorrect) analytical framework—a self-

serving position that posited that the trial court must accept the City's unsupported assertions "so long as they are not entirely irrational." But under *Miracle*, the Schroeders, as "the one[s] complaining of a due process violation," must be afforded the opportunity "to establish that the [City] has acted in an arbitrary and irrational way." *Id.* at 293, 477 S.E.2d at 209. The City's unsupported assertions of legitimacy do not change that. As a result of the trial court's decision, however, the Schroeders lost the ability to make their case.

The trial court erred when it applied the City's preferred (and lax) version of due process scrutiny. And this error denied the Schroeders the opportunity to make their case under the correct due process standard. This Court should reverse the trial court's ruling on the motion to dismiss so that the Schroeders can do so.

2. The City's Amortization of the Schroeders' Property Is an Unconstitutional Taking and the Trial Court Erred in Dismissing that Claim.

Amortization is also an unconstitutional taking. For that reason, some state high courts—though not yet North Carolina's[11]—have interpreted their state constitution as prohibiting the practice altogether. For example, in *PA Northwestern Distributors, Inc. v. Zoning Hearing Board*, the Pennsylvania Supreme Court accepted the premise, as this Court should here, that "[a] lawful nonconforming use

[11] In *Finch v. City of Durham*, the North Carolina Supreme Court held that a zoning change was not a taking, but only because "where an investor knows of a pending ordinance change . . . the investor has no valid claim that he relied on the prior ordinance in guiding his investment decision." 325 N.C. 352, 366–67, 384 S.E.2d 8, 16 (1989). Here, the Schroeders had no idea the City's amortization ordinance was a possibility. In fact, it was forbidden by state law.

establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain." 526 Pa. 186, 192, 584 A.2d 1372, 1375 (1991). Having made that threshold finding, the court then concluded that "the amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution." *Id*. at 195, 584 A.2d at 1376. The court thus held that amortization was per se unconstitutional because it was an uncompensated taking.

Likewise, in *Hoffmann v. Kinealy*, discussed above, the Missouri Supreme Court determined that amortization was an unconstitutional taking under the Missouri Constitution. Like the Court in *PA Northwestern*, the Court in *Hoffmann* began by accepting the premise—again, as this Court should here—that a "lawful nonconforming use [is] . . . a vested right." *Hoffman*, 389 S.W.2d at 753. And in reaching its conclusion, the Court in *Hoffmann* explained that amortization is a taking precisely because it allows the government, over a period of time, to do something that it could not do immediately. *Id*. (rejecting the idea that "a pre-existing lawful nonconforming use properly might be terminated *immediately*.") (emphasis in original). "In fact," the court explained, the problem with "the amortization technique itself [is that it] would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a 'reasonable' time." *Id*. The Court in *Hoffmann* refused to accept such a doctrine, reasoning that it would "be a strange and novel doctrine indeed which would

approve a municipality taking private property for public use without compensation if the property was not too valuable and the taking was not too soon." *Id*.

As the section below makes clear, the question of whether amortization is unconstitutional under the North Carolina Constitution has not been resolved. But the trial court dismissed the Schroeders' takings arguments out of hand. The trial court thus erred by dismissing the Schroeders' claims raising that question, especially to the extent that takings questions under North Carolina law are fact-dependent inquiries. *See Williams v. Town of Spencer*, 129 N.C. App. 828, 500 S.E.2d 473 (1998). Whether the North Carolina Constitution does or does not forbid amortization as an unconstitutional taking—either on its face or as-applied here—is a question that should be fully developed through discovery and resolved on its merits.

3. The North Carolina Supreme Court Has Never Held That the Amortization of an Owner-Operated, Non-Nuisance Land Use Is Constitutional.

The North Carolina Supreme Court has repeatedly explained that "'[v]ested' rights may not be retroactively impaired by statute." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). But it has only considered amortization once. *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320 (1975). And in *Joyner*—a case involving the amortization of a junkyard—the Court declined to adopt "[a] Per se rule holding all amortization provisions unconstitutional." *Id.* at 375, 211 S.E.2d at 325; *see also id.* at 373, 211 S.E.2d at 325 (concluding that "provisions for amortization of nonconforming uses are valid if reasonable."). Except it did so only

under the *federal constitution*. And it did not establish a rule that implicates the use (a non-nuisance) or ownership interest (fee simple) at issue here. Instead, the Court explained, amortization ordinances should be weighed on their facts and have their constitutionality determined on an as-applied basis. *Id*. at 376, 211 S.E.2d at 326 ("*Under these facts*, we cannot say that the . . . ordinance . . . is unconstitutional *as applied* to defendant.") (emphasis added). And the Court was clear that it "neither consider[ed] nor decide[d] whether this ordinance" would be permissible "had the defendant been the owner in fee." *Id*.

The trial court erred because it barred the Schroeders from making *any* factual showing when it dismissed their vested rights arguments outright. Had the Schroeders been able to introduce facts, however, it would have been clear that this amortization ordinance is meaningfully distinguishable from the one at issue in *Joyner*. *Joyner* does not suggest otherwise. For one, *Joyner* does not contemplate—much less endorse—the amortization of the Schroeders' harmless, owner-operated rental use under *North Carolina's* takings or due process doctrines. And no court in this state has ever applied *Joyner* to land uses that did not exhibit "nuisance-like qualities, such as junkyards and signs." Julian Conrad Juergensmeyer et al., *Land Use Planning and Development Regulation Law* (LUPDRL) § 4:39 (3d ed. 2013).[12]

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[12] The virtual entirety of *Joyner*'s amortization progeny involves nuisance-type uses, like billboards and signs. *Naegele Outdoor Advert., Inc. v. City of Winston-Salem*, 113 N.C. App. 758, 760–61, 440 S.E.2d 842, 843–44 (1994) (billboards); *Summey Outdoor Advert., Inc. v. Cty. of Henderson*, 96 N.C. App. 533, 544, 386 S.E.2d 439, 446 (1989) (outdoor advertising signs); *Goodman Toyota, Inc. v. City of Raleigh*, 63 N.C. App. 660, 664–66, 306 S.E.2d 192, 195 (1983) (billboards); *R. O. Givens, Inc. v. Town of Nags Head*, 58 N.C. App. 697, 702, 294 S.E.2d 388, 391 (1982) (outdoor

The City's interpretation of its powers thus seeks a vast expansion of *Joyner*. The nuisance-like uses contemplated by *Joyner* and its progeny are much different from the owner-operated vacation rental at issue here—a harmless, harmonious use with a sparkling record.

The Schroeders should have had the opportunity to develop and present the facts necessary to highlight this distinction. And the trial court erred by preventing them from doing so. *See Miracle*, 124 N.C. App. at 294, 477 S.E.2d at 210 (remanding a retroactivity claim brought under the Law of the Land Clause because the court "d[id] not believe the record . . . was developed sufficiently to allow the trial court to resolve as a matter of law in defendants' favor their motion for summary judgment."); *Village of Oak Park*, 32 Ill. 2d at 298, 205 N.E.2d at 466 ("Each [amortization] case must be judged upon the particular facts of that case."). Because *Joyner* is distinguishable, this Court should conclude that the trial court erred in dismissing the Schroeders' Due Process and Takings Claims to the extent it relied on that case.

C. THE TRIAL COURT ERRED IN DISMISSING THE SCHROEDERS' REMAINING CONSTITUTIONAL CLAIMS.

The Schroeders sufficiently pled additional constitutional claims under the North Carolina Constitution. This section addresses those claims in four parts. First, the Schroeders establish that they sufficiently stated a claim for relief under

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advertising); *Cumberland County v. E. Fed. Corp.*, 48 N.C. App. 518, 521, 269 S.E.2d 672, 675 (1980) (signs). And the cases *Joyner* mainly relies on are, again, all nuisance cases. *Town of Wake Forest v. Medlin*, 199 N.C. 83, 154 S.E. 29 (1930); *State v. Moye*, 200 N.C. 11, 156 S.E. 130 (1930).

the Anti-Monopoly Clause. Second, the Schroeders establish that they sufficiently stated a claim for relief under the Exclusive Privileges Clause. Third, the Schroeders establish that they sufficiently stated a claim for relief under the Fruits of Their Own Labor Clause. And fourth, the Schroeders establish that they sufficiently stated a claim for relief under the Equal Protection Clause.

1. The Schroeders Have Stated an Anti-Monopoly Claim.

Wilmington's ordinance violates North Carolina's Anti-Monopoly Clause. Article I, Section 34 of the North Carolina Constitution declares "monopolies are contrary to the genius of a free state and shall not be allowed." N.C. Const. art. I, § 34. But Wilmington's ordinance creates a monopoly by granting 2% of Wilmington property owners an exclusive privilege to vacation rent, with a 400-foot buffer around their property protecting that exclusive privilege. This denies the Schroeders, along with 98% of Wilmington property owners, their right to vacation rent and excludes them from competing in the market.

This establishes an unconstitutional horizontal monopoly because it grants to one group "an exclusive privilege to do something" that was previously "a matter of common right." *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 321–22, 749 S.E.2d 469, 472–73 (2013) (quoting *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 864 (1940)). Such monopolies are precisely "the evil which the anti-monopoly provision seeks to prevent." *Am. Motors Sales Corp. v. Peters*, 311 N.C. 311, 318, 371 S.E.2d 351, 357 (1984). And for that reason, the City's ordinance must receive more exacting scrutiny. *Id.*

The last time the North Carolina Supreme Court considered a hard cap on the number of properties that could operate the same lawful business, the Court invalidated it as an unconstitutional monopoly. *Town of Clinton v. Standard Oil Co.*, 193 N.C. 432, 137 S.E. 183 (1927) (striking down a gas station cap). The Schroeders should have the opportunity to show that is exactly what is happening here, where Wilmington is prohibiting "like legitimate business[es]" from operating in the same locale. *Id*. Under similar circumstances, the Court in *Clinton* correctly found that the town granted an unconstitutional monopoly that "discriminat[ed] against [the] defendant." *Id*. And Wilmington's ordinance does that exact same thing. It grants an unconstitutional monopoly to 2% of Wilmington property owners, denying the other 98%, including the Schroeders, the "opportunity to earn a livelihood for themselves and their dependents." *Harris*, 216 N.C. 746, 6 S.E.2d at 864.

Wilmington's ordinance also violates the Anti-Monopoly Clause because "[i]t is no[t] [a] regulation; it is a prohibition." *Town of Clinton*, 193 N.C. 432, 137 S.E.2d at 184; *see also Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 735–36 (1973). Wilmington could (and does) regulate vacation-rental properties. *See, e.g.*, Wilmington City Code § 18-331(j) & (o). But it cannot grant a "special privilege" to one property in Lion's Gate and exclude another from that "common right" through a lottery. *See Town of Clinton*, 193 N.C. 432, 137 S.E. at 184 (upholding a separate regulation requiring "fireproof buildings" for gas stations but invalidating the gas station cap). That distinction controls here.

In sum, Wilmington's ordinance violates the Anti-Monopoly Clause. But at the motion to dismiss stage, the Schroeders needed only to sufficiently allege that it *could* violate that clause. They have more than carried that burden.

2. The Schroeders Have Stated an Exclusive Privileges Claim.

Article I, Section 32 of the North Carolina Constitution forbids Wilmington from granting any "person or set of persons . . . exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32. Yet, that is precisely what Wilmington has done here.[13] Its ordinance grants a separate privilege to vacation rent to just 2% of Wilmington property owners. This privilege gives them a 400-foot buffer around their property, in which no one else can rent.

The North Carolina Supreme Court has repeatedly held that the freedom to provide a particular service becomes "exclusive or separate" when granted to some but forbidden to others. *See, e.g.*, *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 736 (medical services); *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957) (tiling services); *Harris*, 216 N.C. 746, 6 S.E.2d at 859 (dry-cleaning services); *State v. Warren*, 211 N.C. 75, 189 S.E. 108, 111 (1937) (real-estate services). The permissibility of such an exclusive right turns on a simple question—whether the separate privileges are granted "in consideration of public services." *See Leete v.*

[13] There is "a long line of previous decisions" from the North Carolina Supreme Court "striking down legislative grants of separate emoluments and special privileges." *Duncan v. City of Charlotte*, 234 N.C. 86, 92–93, 66 S.E.2d 22, 26–27 (1951) (listing cases).

County of Warren, 341 N.C. 116, 118, 462 S.E.2d 476, 478 (1995) (explaining that Section 32 "by its definition" requires this consideration). Here, they are not. Those allowed to offer vacation rentals in Wilmington were not selected because they perform a "public service." They were selected because they entered a lottery and won.

As a result of that lottery, the Schroeders' neighbors may rent, while the Schroeders may not. That is precisely the sort of discrimination that Section 32 is intended to prevent. And the North Carolina Supreme Court has applied it that way, finding that the government may not allow a person to engage in an activity that would be illegal for their neighbor to engage in. *See State v. Glidden Co.*, 228 N.C. 664, 665, 46 S.E.2d 860, 861 (1948). Applying that rationale here, Section 32 forbids Wilmington's ordinance in that it allows one property owner to offer vacation rentals "with impunity and approval of the law," while such activity by another neighbor would be "denounced and punish[ed] as a crime." *Id.*

The holding in *Glidden* is applicable here. Therefore, Wilmington's ordinance violates the Exclusive Privileges Clause. But at the motion to dismiss stage, the Schroeders needed only to sufficiently allege that is a possibility. They have more than carried that burden here and the trial court's decision on the motion to dismiss should be reversed.

3. The Schroeders Have Stated a Fruits of Their Own Labor Claim.

Article I, Section 1 of the North Carolina Constitution protects "all persons" in "the enjoyment of the fruits of their own labor." N.C. Const. art. I, § 1.

Wilmington's ordinance arbitrarily infringes on the Schroeders' "fundamental" right to "conduct a lawful business or to earn a livelihood" by destroying their vacation-rental business. *See Roller*, 245 N.C. at 518–19, 96 S.E.2d at 859; (R p 9 (Compl. ¶¶ 24–26)); *see also King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014). This ordinance unconstitutionally deprives the Schroeders of their right to earn a living because it lacks any "rational, real, or substantial relation" to "a substantial government purpose." *See King*, 357 N.C. at 407, 758 S.E.2d at 370; *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949).

The Schroeders' vacation-rental business was (and still is, for some) a lawful property use. It poses no harm to the health, safety, or welfare of Wilmington's citizens. They followed all state and local rules and guidelines. (R pp 138, 147). And the City cannot identify any health-and-safety justifications for imposing this ordinance. *See King*, 367 N.C. at 409, 758 S.E.2d at 371 (holding that a state regulation on prices citizens pay for towing is "wholly unrelated to the protection of citizen health or safety."). Thus, the City destroyed the Schroeders' lawful, safe, and well-run business without a rational relation to a substantial government interest. (R p 8 (Compl. ¶ 19)). That is forbidden under the Fruits of their Labor Clause.

4. The Schroeders Have Stated an Equal Protection Claim.

Article I, Section 19 of the North Carolina Constitution provides that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. An ordinance is unconstitutional when "it discriminates among persons and establishments of the same kind" or "whenever persons engaged in the same

business are subject to different restrictions or are given different privileges under [t]he same conditions." *See Cheek v. City of Charlotte*, 273 N.C. 293, 298, 160 S.E.2d 18, 23 (1968). In an equal protection challenge, a classification must be "based on differences between the individuals," and those differences must be "rationally related to the purpose of the policy." *Dobrowolska ex rel. Dobrowolska v. Wall*, 138 N.C. App. 1, 18, 530 S.E.2d 590, 601 (2000).

Neither is the case here. First, there is no difference between the Schroeders' townhome and their neighbor's townhome in Lion's Gate. Thus, Wilmington has created an arbitrary distinction between who can and cannot exercise fundamental rights. *See Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852–53, 786 S.E.2d 919, 923–24 (2016) ("The fundamental right to property. . . encompasses every aspect of right [including] the right to possess, use, enjoy and dispose of [property] . . ." (internal quotation marks omitted)). Second, this classification is not rationally related to the purpose of the City's ordinance. As explained above, the Schroeders operate a professional, complaint-free, and violation-free vacation-rental business. There is no rational reason to strip the Schroeders of their right to rent while allowing others to keep it. As a result, the Schroeders have stated a claim under North Carolina's Equal Protection Clause.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A STAY.[14]

This section addresses two basic points. First, there is a factor-by-factor test

[14] The Schroeders acknowledge that this Court has already considered and denied their Motion to Dissolve Stay by its order of 20 April 2021. However, in the interest of preserving the issue, the Schroeders include their arguments here.

that trial courts must apply when deciding whether to grant a stay; because the trial court applied neither of them, an abuse of discretion has occurred. Second, applying that standard, the City was not entitled to a stay from the trial court's ruling.

A. THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE IT FAILED TO APPLY THE REQUISITE LEGAL STANDARD FOR A STAY.

Failure to apply the correct legal standard is an abuse of discretion, full stop. *See Swan Beach Corolla, LLC v. County of Currituck*, 255 N.C. App. 837, 843, 805 S.E.2d 743, 748 (2017) ("[W]e conclude that the trial court failed to apply the proper standard in its determination and abused its discretion through this failure."); *see also Powe v. Centerpoint Hum. Servs.*, 215 N.C. App. 395, 715 S.E.2d 296 (2011); *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009) (holding that a misapplication of the relevant (class certification) factors was a "misapprehension of law, and thus constituted an abuse of discretion."). This axiom holds true with respect to stays. *Lawyers Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 357, 435 S.E.2d 571, 574 (1993) (holding that abuse of discretion occurs when a court "abandons any consideration of these factors which this Court has deemed relevant in determining whether a stay is warranted.").

The trial court was required to apply a simple test to determine whether a party is entitled to a stay and it simply did not do that. The test consists of two factors—likelihood of success on the merits and irreparable injury to the *moving* party. *See, e.g.*, *Abbott v. City of Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820,

827 (1981).[15] In place of these considerations, however, the trial court relied solely on another "factor"—the harm to the *non*-moving party—that seemingly no North Carolina court has ever relied on in granting a stay. *See, e.g.*, *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, No. 14 CVS 711, 2014 WL 3809066, at *3 (N.C. Super. Ct. July 31, 2014) ("In determining whether to grant a discretionary stay pending appeal, the Court focuses on prejudice or irreparable harm to the moving party should a stay not issue."); *Vizant Techs., LLC v. YRC Worldwide Inc.*, No. 15 CVS 20654, 2019 WL 995792, at *4 (N.C. Super. Ct. Mar. 1, 2019) (same). Thus, the trial court disregarded both factors of the North Carolina test and substituted another (irrelevant) one in their place. That was an abuse of discretion.

B. APPLYING THE TEST CORRECTLY, A STAY WAS IMPROPER.

Had the trial court appropriately applied the standard, the stay would have been denied. That is because both North Carolina factors strongly favor the Schroeders.[16] The below analysis of these factors shows that the City could not have

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[15] The federal test, which some North Carolina courts purport to apply, includes four separate components: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). But no court—state or federal—has ever endorsed consideration of Prong 3 *before* looking to the other factors, much less granting a stay on that basis alone. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) ("*Once an applicant satisfies the first two factors*, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest.") (emphasis added). And for all practical purposes, North Carolina courts do not seem to consider that factor at all.

[16] The Schroeders applied the four-factor federal test in their Motion to Dissolve Stay in the interest of completeness. However, as explained above, North Carolina courts routinely consider only the first two factors of this analysis, and the North

carried its burden.

First, the City cannot show it is likely to prevail on the merits of this appeal. *See Nken*, 556 U.S. at 434 ("It is not enough that the [City's] chance of success on the merits be 'better than negligible' . . . '[m]ore than a mere "possibility" of relief is required.'"). The City lost on the merits in the trial court precisely because the trial court correctly held that Wilmington's ordinance was *expressly and unambiguously* preempted.

Specifically, North Carolina law prohibits requiring property owners to register with the City before renting their properties. N.C.G.S. § 160D-1207(c). Yet, the City's ordinance requires property owners to do just that. Wilmington City Code § 18-331(d). But the statute at the time of the ordinance's enactment was clear on this point:

> In no event may a city do any of the following: (i) adopt or enforce any ordinance that would require any owner or manager of rental property to obtain *any permit or permission from the city to lease or rent residential real property or to register rental property with the city*.

N.C.G.S. § 160A-424(c) (emphasis added); *see also* (R p 153 ¶ 1). In light of this language, the trial court correctly held that state law "clear[ly] and unambigious[ly]" prohibits local governments from "adopt[ing] or enforc[ing] any ordinance that would require any owner or manager of rental property to register rental property with the local government." (R p 154 ¶ 6). The City is thus not likely to prevail on appeal.

Carolina Supreme Court is yet to provide any definitive instruction on this point one way or the other. In any case, the Schroeders should have prevailed under the four-factor test as well.

Second, the City has not carried its burden of proving it will suffer irreparable injury without a stay. *See Nken*, 556 U.S. at 434–35 ("[S]imply showing some 'possibility of irreparable injury' fails to satisfy the second factor. . . . '[T]he "possibility" standard is too lenient.'") (internal citations omitted)). It is irrelevant that a stay supposedly "would have no prejudicial effect on Plaintiffs" and it is simply incorrect to suggest there is *actual* irreparable harm to other property owners because of the *hypothetical* outcomes if this Court reverses. (R p 157).

Neither argument is persuasive. This Court should not accept the notion that a stay should automatically issue because the Schroeders have the protection of a state statute during this appeal. To accept that argument would be to accept a categorical rule that a stay *must* issue whenever that statutory protection applies, on the theory that the victorious party is not harmed by the stay. Likewise, "allowing" individuals to rent their property, as they had legally done before, does no harm to the City. Administrative inconvenience is not irreparable injury. *See Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970) ("'[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.'").[17] Accordingly, the trial court's ruling granting the City's stay was an abuse of discretion.

[17] To be sure, "mere administrative inconvenience" is not a valid reason to deny "fundamental rights." *See Covington v. North Carolina*, No. 1:15-cv-399, 2018 WL 604732, at *6 (M.D.N.C. Jan. 26, 2018) (quoting *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996)).

CONCLUSION

In light of the foregoing, Plaintiffs-Appellees respectfully request that this Court affirm the trial court's order denying Defendants' motion for summary judgment and granting summary judgment in favor of Plaintiffs and dissolve the trial court's stay from the same; or in the alternative, reverse the trial court's order granting Defendants' motion to dismiss and remand this matter to the trial court for further proceedings consistent with this decision.

Respectfully submitted, this 23rd day of April, 2021.

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Pursuant to Rule 33(b) of the North Carolina Rules of Appellate Procedure, I hereby certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing brief complies with the requirements of Rule 28(j) of the North Carolina Rules of Appellate Procedure with respect to the length of the brief, which utilizes a proportional typeface. The brief, excluding the cover page, index, table of cases and authorities, and certificate of service, does not exceed 8,750 words.

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NO. COA 21-192 FIFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

DAVID SCHROEDER and, PEGGY SCHROEDER,	)	
Plaintiffs-Appellees,	)	From New Hanover County
v.	)	File No.: 19-CVS-4028
CITY OF WILMINGTON AND CITY OF WILMINGTON BOARD OF ADJUDGMENT,	)	
Defendants-Appellants.	)	

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PLAINTIFFS-APPELLEES/CROSS-APPELLANTS' APPENDIX

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INDEX OF APPENDIX

Sec. 18-331. - Whole-house lodging uses in the residential, multifamily, and historic districts.

(a) Within the R-20, R-15, R-10, R-7, R-5, R-3, MF, HD, HD-R, and HDMU districts, whole-house lodging establishments are permitted subject to the following conditions. Whole-house lodging is not permitted within the MHP district.

(b) Each whole-house lodging establishment shall meet the minimum separation distance from any other residentially-zoned whole-house lodging establishment or any properly permitted bed and breakfast lodging also within a residential zoning district, as measured from parcel line to parcel line. In the case of a duplex, triplex, quadraplex or multifamily development, this shall be measured from the parent parcel lines. The total number of permitted uses shall be limited by a cap.

The separation distances and caps shall be:

Within the 1945 corporate limits: four hundred (400) feet, with a cap of no more than two (2) percent of the total number of residentially-zoned parcels within the 1945 corporate limits being eligible for use as whole-house lodging establishments.

Outside the 1945 corporate limits: four hundred (400) feet, with a cap of no more than two (2) percent of the total number of residentially-zoned parcels outside of the 1945 corporate limits being eligible for use as whole-house lodging establishments.

(c) Such uses shall require a local operator, available twenty-four (24) hours per day, within twenty-five (25) miles of the subject property.

(d) Registration.

(1) The property owner shall register each establishment annually with the city of Wilmington.

(2) The owner shall provide proof of possession of the registered premises.

(3) A registration number shall be assigned to each registered establishment, which shall be clearly noted along with any advertisement for lodging.

(4) Registration is limited to natural persons only and no person shall be eligible for more than one (1) registration for a whole-house lodging in any residential district.

(5) Active registrations shall not expire; however, all property owners shall renew registration on an annual basis. Registrations not renewed on an annual basis shall deem the use terminated by the property owner.

(6) Registration does not vest the premises or the property owner with any rights. Registration terminates upon the transfer of the property.

(7) Only one (1) registration may be issued per property, either whole-house lodging or bed and breakfast lodging, at any given time.

(8) For the initial registration process, a lottery method shall be utilized based on the cap and separation requirements. Subsequent registrations will be processed by the city manager on a first-come, first-served basis.

(e) A minimum of one (1) off-street parking space, of an all-weather surface, per bedroom is required. Within HD, HD-R, and HDMU districts, only curb cuts existing at the time of the adoption of this section may be used to provide off-street parking. If off-street parking is not available on site, shared parking or rented

spaces in a private or municipal parking deck or lot may be used to satisfy this parking requirement. Proof of a shared parking plan or rental of spaces shall be included with annual registration. A shared parking plan will be enforced through written agreement among all owners of record. An attested copy of the agreement between the owners of record must be approved by the city attorney and submitted to the city for recordation on forms made available in the office of the city attorney. Recordation of the agreement must take place before issuance of a registration for any short-term lodging use to be served by the off-site parking area. A short-term lodging registration shall be revoked if required off-street parking spaces cannot be provided.

(f) The use provisions of this section are not subject to variance by the board of adjustment.

(g) The definition of "family" and the restriction of a minimum thirty-day rental period in the MF districts shall not apply to property registered whole-house lodging uses.

(h) Any use for which there are three (3) final determinations of violations of the City Code and/or criminal convictions related to the parcel (on, adjacent to, or within the property) by a property owner, tenant, guest, host, lessee, or individual otherwise related directly to the property within any rolling three hundred sixty-five-day period, shall constitute a violation of the terms of registration and shall terminate registration. For any registration that terminated due to code/criminal violations, the property owner shall be ineligible for registration for a period of three (3) years.

(i) A property owner who terminates registration shall be ineligible for registration for a period of three (3) years at that address.

(j) Any property owner registering a whole-house lodging shall: 1) be responsible for ensuring compliance with all federal, state, and local laws, including, but not limited to tax code, building code, fire code, and environmental health regulations for the level of occupancy of the lodging; and 2) not allow any party, event, classes, weddings, receptions, or other large gatherings on the premises.

(k) Property owners registering a whole-house lodging are responsible for keeping in full force and effect during all times the unit is used as a whole-house lodging commercial general liability insurance with a total limit of not less than five hundred thousand dollars ($500,000.00) each occurrence for bodily injury and property damage.

(l) Registrants shall maintain records demonstrating the local operator, the dates of rental for the previous three hundred sixty-five (365) days, and the number of renters. Such records shall be made available, upon request, to the city manager.

(m) Registration shall terminate upon any one (1) of the following: discontinuance of use for a period of one hundred eighty (180) days or more, failure to renew annual registration, transfer of the property.

(n) Written notice shall be conspicuously posted inside each short-term lodging unit setting forth the following information:

(1) The name and telephone number of the operator.

(2) The address of the lodging, the maximum number of overnight occupants permitted, and the day(s) established for garbage collection.

(3) The non-emergency phone number of the City of Wilmington Police Department.

(4) The annual registration number.

(5) That parties, events, classes, weddings, receptions, and large gatherings are not permitted.

(o) The operator shall ensure that all refuse is stored in appropriate containers and set out for collection on the proper collection day and the carts removed from the street or alley on the scheduled collection day, in accordance with section 10-14 of the City Code.

(p) Preparation and service of food by operators for guests shall be prohibited. No cooking shall be permitted in individual bedrooms.

(q) Any establishments existing at the time of the adoption of the ordinance from which this section derives and conforming with the regulations effective prior to adoption of this section for which registration cannot be accommodated due to the cap or the separation requirements shall have a one-year-amortization period. If, after this amortization period, the whole-house lodging establishment is unable to properly register, the use of the property as whole-house lodging must be terminated. Any such establishment shall register with temporary registration with the city manager register pursuant to section 18-330(1).

(Ord. No. O-2019-6, § 11, 2-5-19)