No. COA21-192 FIFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

DAVID SCHROEDER and
PEGGY SCHROEDER

Plaintiffs-Appellees,

v.

CITY OF WILMINGTON and
CITY OF WILMINGTON BOARD OF
ADJUSTMENT,

Defendant-Appellant.

From New Hanover County

****

REPLY BRIEF OF DEFENDANT-APPELLANT CITY OF WILMINGTON

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ARGUMENT

I. Only the City's reading of the inspection statute satisfies the General Assembly's no-changes directive.

A. The different versions of the inspection statute—versions that the parties agree must mean the same thing—should guide the statutory analysis.

The parties agree that the substance of the inspection statute has not changed. In its opening brief, the City explained how 160D's "no-changes directive" means that the addition of nine words to the inspection statute did not change the law. Based on this, the City reasoned that the non-preemptive configuration—the only configuration that does not lead to "version-to-version dissonance"—was correct. City's Br. at 14. The Schroeders, although starting from a different analytical point, agree that the inspection statute has not changed: "The General Assembly was quite clear that it did not intend for its recodification of state law to change its substance in any way." Schroeders' Br. at 24.

The disagreement among the parties, therefore, is not over what different iterations of the inspection statute mean; rather, it is a debate over what the inspection statute has always meant. The City contends that it has always had authority to regulate short-term rentals using common zoning tools, including permitting and registration. And the Schroeders contend the opposite. So whether the Court analyzes the statute as it reads now, or as it

read when the City adopted its ordinance, should not alter the Court's holding. *See* N.C. Gen. Stat. § 160D-101(d) (stating that 160D "does not expand, diminish, or alter the scope" of local government authority). This is why the City used a comparative analysis of 160D in its opening brief. After all, if each version of the inspection statute means the same thing, why not compare those versions to resolve an interpretive dispute?

Nevertheless, the Schroeders take issue with this approach, insisting that the Court should avoid "wading into questions about subsequent statutory revisions." Schroeders' Br. at 9 n.2. Instead, the Schroeders ask the Court to only look at the law "as it existed at the time the ordinance was enacted"—i.e., N.C. Gen. Stat. § 160A-424(c). Schroeders' Br. at 10. And then the analysis "should end." Schroeders' Br. at 9 n.2.

There are significant issues with this approach.

First, as a clarifying amendment, 160D should guide the Court's analysis. *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012). A clarifying amendment "appl[ies] to all cases pending before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment." *Id.* This approach recognizes that clarifying amendments are "strong evidence of what the legislature intended when it enacted the original statute." *Jeffries v. County of Harnett*, 259 N.C. App. 473, 491, 817 S.E.2d 36, 48 (2018) (citations

omitted). Here, the parties agree that 160D did not change the law—i.e., it was "clarifying." So it should drive the statutory analysis.

Second, the amendment to the Vacation Rental Act that prompted this lawsuit (S.L. 2019-73, § 1(a)) occurred *after* the City passed its ordinance. The Schroeders argue that "this appeal is governed by the language in force at the time the ordinance was enacted." Schroeders' Br. 19, (R p 166). At the same time, however, the complaint alleges that the Vacation Rental Act "*as amended by* Session Law 2019-73"—an amendment that occurred months after the City enacted its ordinance—results in preemption. (R p 12 ¶ 41) (emphasis added). The Schroeders cannot have it both ways—logically, or under binding precedent. *Ray*, 366 N.C. at 9, 727 S.E.2d at 681 ("[T]he effective date [of a clarifying amendment] does not supersede the law that governs how clarifying amendments control.").

Finally, consulting both 160A and 160D will accomplish the purpose of the legislature. The Schroeders' do-not-consult-160D argument is out of tune with the agreed upon principle that 160D "does not expand, diminish, or alter the scope" of local government authority. § 160D-101(d). Indeed, as the City showed in its opening brief, a preemptive configuration of 160A coupled with the recent addition of nine words logically yields the conclusion that 160D changed the law. This undermines the "primary goal" of statutory construction: "ensur[ing] that the purpose of the legislature"—here, 160D's no-

changes directive—"is accomplished." *In re Miller*, 357 N.C. 316, 324, 584 S.E.2d 772, 780 (2003); *see also* 27 Strong's North Carolina Index 4th *Legislative intent as a controlling factor in statutory construction* § 30 (2021). Simply put, 160A and 160D should be harmonized.

In sum, the law "as it existed at the time the ordinance was enacted" is not where the analysis "should end." Schroeders' Br. at 9 n.2, 10. It's where the analysis begins.

B. Several rules of statutory construction reveal that the Schroeders' reading changes the law.

Although the Schroeders eventually discuss 160D, their attempt to pierce the logic of the City's opening brief falls short.

In its opening brief, the City explained how only the non-preemptive configuration of the inspection statute, N.C. Gen. Stat. § 160D-1207(c), satisfies the General Assembly's no-changes directive. Under that reading, the nine words added by 160D apply evenly across the statute's components:

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

The Schroeders contend that this construction is "utterly nonsensical" because one could not obtain a "permit to register." Schroeders' Br. at 21 n.11. But the inspection statute reads "permit *or* permission" not "permit *and* permission." Nothing is nonsensical about a "permit to lease" or "permission to register."

On the other hand, the preemptive reading adopted by the trial court limits the "under Article 11 or Article 12 of this Chapter" language to "permit or permission." This quarantines the registration clause from the rest of the text, making the nine words added by 160D apply to some—but not all—of the inspection statute's components. In other words, and as implicitly stated by the trial court (R p 154 ¶ 7), the preemptive reading changes the law:

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

Based on these two configurations, the City reasoned that the non-preemptive reading was the only reading that aligns with 160D's no-changes directive. *See* City's Br. at 11.

In an attempt to evade this reasoning, the Schroeders have devised a third configuration of the inspection statute:

Schroeders' reading[1]
In no event may a local government . . . adopt or enforce any ordinance that would require any owner or manager of rental property to obtain**[:]** **[1]** any permit or **[2]** permission ***under Article 11 or Article 12 of this Chapter*** from the local government to lease or rent residential real property or **[3]** to register rental property with the local government.

See Schroders' Br. at 21.

Unlike the configurations presented in the City's opening brief, the Schroeders' reading separates "permit" and "permission" into separate clauses. It then tethers 160D's new language to just "permission." And finally it treats the "or" preceding "permission" differently than the "or" preceding "to register."

The Court should not adopt this configuration for multiple reasons.

First, the Schroeders' reading results in surplusage. It is "well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant."

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[1] The Schroeders bold "permission" in their analysis along with the nine words added by 160D. The word "permission" was part of the inspection statute before 160D added clarifying language. To reduce confusion, the City has removed bold from "permission" in its diagram of the Schroeders' reading.

Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981); *see also State v. Conley*, 374 N.C. 209, 215, 839 S.E.2d 805, 809 (2020) ("It is presumed that the legislature [does] not intend any provision to be mere surplusage.") (citations omitted).

Here, by attempting to limit the "under Article 11 or Article 12 of this Chapter" language to just permission, the Schroeders create the same imbalance that forecloses the preemptive reading discussed in the City's opening brief—i.e., they change the law. To deal with this problem, the Schroeders posit that the nine words added by 160D do not amount to a change, but instead "simply direct[ ] the reader's attention" to Article 11 and Article 12. Schroeders' Br. at 21. That is, the Schroeders argue that the nine words added by 160D are "mere surplusage." *Conley*, 374 N.C. at 215, 839 S.E.2d at 809. The Court should not adopt a reading that renders every word added to the inspection statute by 160D "useless or redundant." *Porsh Builders, Inc.*, 302 N.C. at 556, 276 S.E.2d at 447.

Second, the Schroeders contend that the phrase "**under** Article 11 or Article 12 of this Chapter" should be read as "~~under~~ **including** Article 11 or Article 12 of this Chapter":

> Read naturally, the General Assembly's inserted cross-reference simply reaffirms that the permits, permissions, and registration requirements that municipalities are barred from enacting *include—but are not limited to*—permissions that would be

> required under the municipality's authority under *Articles 11 or 12*.

Schroeders' Br. at 20 (emphasis added).

The plain text of the inspection statute does not support this interpretive theory. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018). The restrictive word "under" (meaning "pursuant to") does not carry the same meaning as the non-restrictive word "including." *See* Bryan A. Garner, Garner's Dictionary of Legal Usage 439, 910 (3d ed. 2009). To be sure, *under* the Schroeders' reading, giving *under* its "plain and definite meaning" changes the law. *Wilkie*, 370 N.C. at 547, 809 S.E.2d at 858.

Finally, the Schroeders' reading requires inconsistent use of the word "or." As noted in the City's opening brief, "the placement and use of punctuation aids in the process of statutory interpretation." City's Br. at 10 (quoting *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020)). Implicit in this statement, of course, is that the absence of punctuation also has interpretive value. *See id.*; *see also Stephens Co. v. Lisk*, 240 N.C. 289, 295, 82 S.E.2d 99, 103 (1954) ("[P]ut a comma before clauses introduced by such conjunctions as 'and', 'but', 'or', 'nor', if a change of subject takes place.").

Under the Schroeders' reading, the phrase "to obtain" modifies both [1] the permit clause and [2] the permission clause—i.e., "to obtain any permit"

or "to obtain permission." If the leading phrase "to obtain" applies to these clauses—clauses separated by an "or" with no comma—why does it not also apply to [3] the registration clause in the Schroeders' reading?

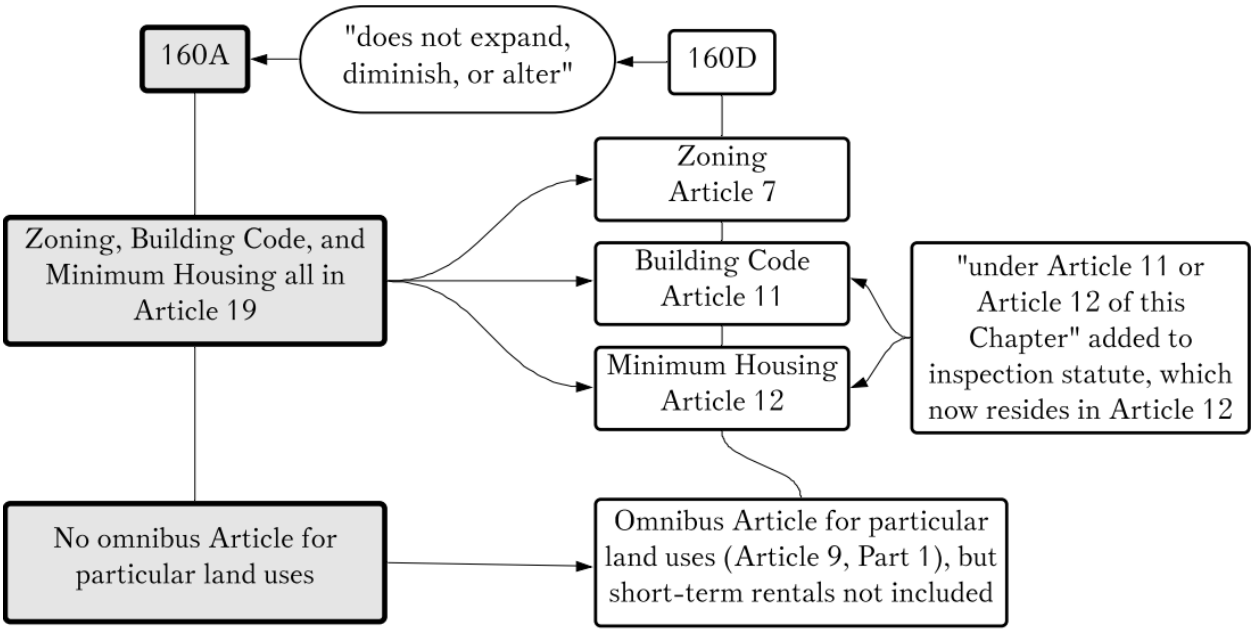
Unless the "or" preceding the registration clause is treated differently, the statute reads "to obtain to register." And this doesn't make sense. Still, the Schroeders contend that a comma preceding the registration clause is "not needed" because the "ordinary use" of the word "or" is "disjunctive." Schroeders' Br. at 22. If, as the Schroeders contend, the Court "need not insert any phantom punctuation and need only read 'or' to mean 'or,'" Schroeders' Br. at 22, why should the "or" before permission not also receive disjunctive treatment? This textual inconsistency further demonstrates why isolating "permission" to its own clause stretches the text beyond its practical limits.

In sum, the parties agree that 160D did not change the law. To this end, the City presents a textually sound reading of the inspection statute that resonates with the General Assembly's no-changes directive. The Schroeders, on the other hand, present a reading that requires overlooking multiple rules of statutory construction to avoid version-to-version dissonance. The City's non-preemptive reading should prevail.

II. Statutory history reaffirms that the inspection statute does not preempt the City's zoning authority.

As noted above, the Schroeders and the City agree that 160D "does not expand, diminish, or alter" local government zoning authority. § 160D-101(d). In conducting their analysis of statutory history, however, the Schroeders stop short of 160D, ending with changes made a year earlier. Schroeders' Br. at 17.

But that is only half of the picture. As shown below, a collection of clarifying updates in 160D reaffirm the inspection statute's non-preemptive effect on zoning authority:



As depicted, the legislative reorganization that occurred with 160D reveals a clear picture—the entire picture—of the General Assembly's intent.

First, the General Assembly moved the zoning enabling statutes into a separate Article ("Article 7"). As previously noted by this Court, the

"placement of a statute" is "probative of legislative intent." *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 551, 755 S.E.2d 393, 397 (2014). Before 160D, the zoning enabling statutes and the inspection statute both resided in Article 19 of Chapter 160A. As part of 160D, however, the General Assembly separated the zoning authority from the inspection statute—specifically, moving zoning to Article 7, and moving the inspection statute to Article 12. In doing so, the General Assembly clarified that the inspection statute has never impeded zoning authority. *See id.*

Second, the General Assembly did not list Article 7 in the clarified inspection statute. When a statute "lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 141, 757 S.E.2d 302, 307 (2014). Said another way, the "express mention" of Articles 11 and 12 in the inspection statute "implies the exclusion of all other" Articles. *See Granville Farms, Inc. v. County of Granville*, 170 N.C. App. 109, 114, 612 S.E.2d 156, 160 (2005).

Indeed, if the inspection statute "clearly and unambiguously" applies to Article 7 zoning authority, Schroeders' Br. at 32, why does it not list Article 7?

Hypothetical Statute
In no event may a local government . . . adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission under **[Article 7,]** Article 11[,] or Article 12 of this Chapter from the local government to lease or rent residential real property or to register rental property with the local government.

By not referencing Article 7, the General Assembly reaffirmed that the inspection statute has never preempted zoning authority.

Finally, further displaying the General Assembly's non-preemptive intent is Part 1 of Article 9. *See* N.C. Gen. Stat. §§ 160D-901 to -916. Under the title "Regulation of Particular Uses and Areas," this part of 160D specifies how local governments may—and, in some cases, may not—regulate particular land uses. The uses span a comprehensive spectrum, from "Adult businesses" to "Bee hives." Notably absent, however, is any reference to short-term rentals.[2]

When the General Assembly "includes particular language in one section of a statute but omits it in another" it is presumed that "the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *See State v. Mylett*, 253 N.C. App. 198, 206–07, 799 S.E.2d 419, 425 (2017).

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[2] The decision not to include short-term rentals in Article 9 confirms the non-preemptive stance taken by the University of North Carolina School of Government:

> The statutes do not divest local governments of their authority to use land use and development regulations to regulate different land uses. Through zoning, local governments commonly define a land use, set reasonable development standards for that use, and require some level of permitting. . . . Until the law holds otherwise, we believe that local governments may use zoning to regulate short-term rentals.

Rebecca Badgett, *Regulation of Short-Term Rentals & the Effect of S.L. 2019-73*, UNC Sch. of Gov't (Sept. 9, 2019), https://perma.cc/H249-HJDK.

And that is precisely the case here. In a new Article set aside specifically for limiting local government authority to regulate certain uses through zoning, the General Assembly remained silent on short-term rentals. Through this silence, the General Assembly "intentionally and purposely" conveyed its non-preemptive intent. *Id.*

* * *

The parties agree that the law has not changed. Where they disagree is on what the law has always meant. The Schroeders contend that their reading—a reading that requires overlooking multiple rules of statutory construction and stretching the practical limits of the text—should prevail. In contrast, the City presents a reading that logically aligns with the General Assembly's no-changes directive, bolstered by recent statutory history.

That history reveals a clear picture: The General Assembly separated the zoning power into Article 7, added language to the inspection statute clarifying that it did not apply to zoning or Article 7, and omitted short-term rentals from a comprehensive list of uses with specified limits on zoning authority.

Still, the Schroeders contend that "state law clearly and unambiguously preempts Wilmington's ordinance." Schroeders' Br. at 32. Although it's true that the General Assembly does not "hide elephants in mouseholes," Schroeders' Br. at 19, perhaps it's not the City with an elephant problem.

CONCLUSION

The City respectfully requests that the Court reverse the decision below.

Respectfully submitted the 3rd day of June, 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 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

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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 3rd day of June, 2021.

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