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 ADJUSTMENT,	)	
Defendants-Appellants.	)	

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REPLY BRIEF OF PLAINTIFFS-APPELLEES/ CROSS-APPELLANTS

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REPLY BRIEF OF PLAINTIFFS-APPELLEES/ CROSS-APPELLANTS

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INTRODUCTION

This case began as a simple preemption matter. It still is.[1] The ordinance is not just preempted by statute; it is unconstitutional. And the original complaint challenging the ordinance fully and sufficiently alleged as much.

The City openly shared that understanding. At least, that is, for as long as it served its interests. Now, in its response brief, the City presents arguments that directly contradict its arguments below. It contends that the constitutional claims it once *explicitly* acknowledged were preserved for appeal have in fact been completely abandoned. Indeed, the City's primary argument is that the Schroeders' vested rights argument—the argument it said should *not* be heard below—should have been heard below.

That is wrong. As the City has openly conceded (and already convinced one court), the Schroeders' vested rights claims have been preserved. Any claim to the contrary would be so utterly inconsistent with the City's prior arguments that the City is estopped from arguing it here. Likewise, the Schroeders' complaint sufficiently alleged that the ordinance effects an unlawful taking—so sufficiently, in fact, that the City devoted significant argument to those issues. Because all of the constitutional claims are properly before this Court, resolution of this case on its merits—and not on the City's ever-shifting procedural arguments—is appropriate.

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[1] As the Schroeders advised in their response brief, Appellees' Resp. Br. at 24 n.13, the North Carolina General Assembly is considering legislation that would eviscerate the City's preemption defense. House Bill 829, https://www.ncleg.gov/BillLookUp/2021/H829.

ARGUMENT

I. THE AMORTIZATION ISSUES ARE PROPERLY BEFORE THIS COURT.

A. THE CITY HAS REPEATEDLY CONCEDED—AND THE TRIAL COURT HAS ACCEPTED—THAT THE SCHROEDERS PLED A VESTED RIGHTS CLAIM.

The City argues that the Schroeders have not pled a vested rights claim. But not even the City believes that. In fact, when the Schroeders sought to amend their complaint to add facts supporting their vested rights argument, the City responded by assuring the trial judge that the claim was already sufficiently alleged "in the original complaint." City's Br. Opp'n Pls' Mot. Amend Compl. at 8 (hereinafter "City's Br."). Likewise, because "the allegations involving 'vested rights' are tied to constitutional claims that the Court has already dismissed," *id.* at 5, the City argued, "[i]f Plaintiffs wish to challenge this Court's February decision to dismiss their constitutional claims, ***including their vested-rights claim, they may do so on appeal***." *Id.* at 8 (emphasis added).[2]

The trial court agreed and fully adopted the City's theory, thus reaffirming that the vested rights issue was ripe for appeal. *Compare* City's Br. at 7 (arguing that because "[t]he Court already dismissed Plaintiffs' vested-rights claim . . . [the plaintiffs'] right to amend under Rule 15(a) is terminated.") (citing *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987)), *with* Order on Mot. to

[2] The City's attorney repeated these arguments at oral argument. Sept. 3, 2020, Tr. of Proceedings at 12 ("The Court has ruled that the ordinances as written are constitutional, including against a claim that they're in violation of the Law of the Land clause. . . . They're just **trying to repeat that argument** [by amending their complaint].") (emphasis added).

Amend. at 2 ¶ 2 (agreeing that "plaintiff's right to amend under Rule 15(a) is **terminated** after dismissal of plaintiff's complaint under Rule 12(b)(6)."") (cleaned up, citing *Johnson v. Bollinger*). At the time, it was therefore evident to both the parties and the trial court that the Schroeders' vested rights claim was preserved for appeal because "the Court ha[d] already dismissed" it.

Suffice it to say the City has now changed its mind. Whereas the City once acknowledged that a "vested-rights argument was, in fact, part of the dismissed cause of action in the original complaint," City's Br. at 8, the City now argues the total opposite—that "the Schroeders ha[ve] not pleaded anything related to vested rights." Appellants' Resp. Br. at 11. The City, however, is wrong: the trial court's order plainly indicates that the vested-rights argument was subsumed within the already-dismissed Article I, Section 19 claims.[3]

The City's position is so contradictory to its prior argument that the City should be judicially estopped from asserting it here. North Carolina courts have "consistently held that 'a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation.'" *Beroth Oil Co. v. N.C. Dep't of Transp.*, 256 N.C. App. 401, 417, 808 S.E.2d 488, 500 (2017). Importantly

[3] The City's characterization of the trial court's order is woefully incomplete. Appellants' Resp. Br. at 13. The trial court, of course, never said the Schroeders "could not assert 'a claim for vested rights'" as the City now contends. *Id.* at 32. Rather, the trial court held that the amended complaint included "***new allegations of fact which relate to*** a claim for vested rights ***under the plaintiffs' [already-dismissed] third cause of action***." Order on Mot. to Amend. at 2, ¶ 9 (emphasis added to indicate omissions by the City). The trial court's explanation—that it was "no longer empowered to grant" the amendment—only makes sense if understood to mean that the vested rights arguments were pled and dismissed. *Id.* at 2, ¶ 2.

here, "[j]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." *Medicare Rentals, Inc. v. Advanced Svcs.*, 119 N.C. App. 767, 770, 460 S.E.2d 361, 363 (1995). It does not matter whether that shift was an "intentional misrepresentation" or calculated "in order to gain an advantage." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 27–28, 591 S.E.2d 870, 887–88 (2004).

Instead, under *Whitacre*, judicial estoppel applies, where: (1) a party's subsequent position is clearly inconsistent with its earlier position; (2) a party has succeeded in persuading a court to accept that party's earlier position such that accepting a subsequent, inconsistent position might lead to "inconsistent court determinations" or "the perception that either the first or the second court was misled"; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment if not estopped. *Id*. at 29, 591 S.E.2d at 889 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750–751 (2001) (additional citations and quotations omitted)). Although "[t]he first factor [is] the only factor that is an essential element which must be present for judicial estoppel to apply," *In re Will of Shepherd*, 235 N.C. App. 298, 306, 761 S.E.2d 221, 228 (2014), in this case each prong is easily met. The City's position is clearly inconsistent with its position below. Accepting that position would require this court to adopt a determination that is inconsistent with that of the trial court. And the result would provide an unfair advantage to the City (evading defense of its ordinance) while causing unfair detriment (eliminating a preserved cause of action)

for the Schroeders. As such, the City should be estopped from arguing that the Schroeders have not pleaded anything related to vested rights.

B. THE TAKINGS QUESTION IS PROPERLY BEFORE THIS COURT BECAUSE IT WAS PROPERLY PLED AND THE CITY HAD KNOWLEDGE OF IT.

The City also argues that the Schroeders did not allege a takings claim. But to plead a taking, a party need only allege a cause of action under Article I, Section 19. *Finch v. City of Durham*, 325 N.C. 352, 362–63, 384 S.E.2d 8, 14 (1989).[4] The Schroeders did exactly that. (R p 15 (Compl. ¶¶ 50–52) (alleging the ordinance violated "several provisions of the North Carolina Constitution" and identifying Article I, Section 19 as one such provision).

That prior counsel averred he was "not asserting a takings claim," *under a separate count*, does not mean that a takings claim was not pled under Count III.[5] The cases the City cites do not refute this. For example, in *Rice v. Rigsby*, 259 N.C. 506, 511, 131 S.E. 469, 472 (N.C. 1963), the Court explained that, just as the Schroeders did below, "[o]ne who alleges that a [law] is unconstitutional must ordinarily point out *the specific constitutional provision* that is violated by it"—in

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[4] This is consistent with North Carolina's notice pleading standards. *N.C. State Bar v. Merrell*, 243 N.C. App. 356, 361–62, 777 S.E.2d 103, 108–09 (2015). Given those standards, both the City's demand for more factual allegations (the same factual allegations they fought to keep out) and its preoccupation with the Schroeders' use of affidavits, *see* Appellants' Resp. Br. at 14–15, are meritless.

[5] It remains true that a takings claim was properly pled even if prior counsel was unaware of that at the time he pled it (and later failed to acknowledge that he had done it). That is because "a party is bound by his pleadings" and, therefore, a party "cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964). In other words, to the extent there is tension between the pleadings and a party's statement, the pleading "is conclusive" and "any [statement] to the contrary must be disregarded." *Id.*

this case, Article I, Section 19. Again, that is exactly what the Schroeders did. This makes them unlike the plaintiff in *Rice*, who failed to identify any constitutional provisions and "merely contended [the law] is unconstitutional." *Id*.

Likewise, in *Don't Do It Empire, LLC v. Tenntex*, the Court held that a party—here, the City—cannot later seek to exclude an argument when it "actively participated in the hearing" and defended against the argument it later seeks to exclude. 246 N.C. App. 46, 54, 782 S.E.2d 903, 908 (2016). Here, just as in *Tenntex*, the City mounted a full defense, complete with extensive briefing and oral argument against the takings claim. Under these circumstances, as *Rice* advised, the preservation question favors the Schroeders because "counsel have so fully presented their arguments and authorities in respect to the constitutionality." *Rice*, 259 N.C. at 512, 131 S.E. at 473.

The City also separately asserts that "a party must 'obtain a ruling' from the trial court" to have an issue to appeal. Appellants' Resp. Br. at 7 (citing N.C. R. App. P. 10(a)(1)). But again, because the claim was pled, argued, and dismissed in full, the Schroeders got exactly that. In fact, North Carolina law confirms that the trial court decided the takings issue when it dismissed all claims related to "Facial and As-Applied Unconstitutionality" under Article I, Section 19. (R p 42). Such a finding necessarily meant that the court determined the Schroeders were not entitled to relief under any legal theories explicitly identified, as well as "under *any other* legal theor[ies]." *Hart v. Ivey*, 102 N.C. App. 583, 586, 403 S.E.2d 914, 917 (1991) (citing *Brewer v. Hatcher*, 52 N.C. App. 601, 605, 279 SE.2d 69, 71 (1981)). The same

applies here, where "the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted *under some legal theory*." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (emphasis added) (citations omitted). Thus, all Article I, Section 19 claims pled by the Schroeders—including takings and vested rights claims—were considered and dismissed. That means there is a ruling to appeal.

II. THE AMORTIZATION ORDINANCE IS AN UNCONSTITUTIONAL DEPRIVATION OF VESTED RIGHTS AND IS A TAKING.

The City's pleading-based arguments aside, the Schroeders sufficiently alleged that the City's amortization ordinance was unconstitutionally retroactive and effects a taking. Despite the Schroeders' extensive arguments on this front, the City has but one (non-procedural) response: The Supreme Court of North Carolina settled these issues "[o]ver 40 years ago." Appellants' Resp. Br. at 16 (citing *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320 (1975)). *Joyner*, however, is not the talisman the City wants it to be. This section begins by reasserting that the City's amortization ordinance is unconstitutionally retroactive.[6] It then concludes by addressing the City's tacit concession that it is asking this Court to expand *Joyner* to subject vacation rentals to the same nuisance-like status as billboards.

[6] The City does not appear to provide a direct argument in response to the Schroeders' takings discussion, except to say once again that the Schroeders did not plead it and that *Joyner* resolves it. Accordingly, the Schroeders reincorporate their prior arguments on that issue. Appellees' Opening Br. at 17–18.

A. *JOYNER* DOES NOT ANSWER WHETHER THE ORDINANCE VIOLATED THE SCHROEDERS' VESTED RIGHTS UNDER NORTH CAROLINA LAW.

As the Schroeders argued in their opening brief, "[d]ue process protections apply to retroactive laws," Appellees' Opening Br. at 15, and the City's amortization ordinance is unconstitutional because it retroactively impairs vested rights.

Joyner does not settle this question. To start, the City does not acknowledge that *Joyner* says nothing at all about retroactivity. Nor does the City refute that *Joyner* was decided under only the federal constitution. Instead, the City begins by pointing to two cases cited in *Joyner*—*State v. Moye*, 200 N.C. 11, 156 S.E. 130 (1930) and *Town of Wake Forest v. Medlin*, 199 N.C. 83, 154 S.E. 29 (1930)—which it purports are "North Carolina Constitution" cases upholding amortization ordinances after supposedly "analyzing the state and federal Constitutions." Appellants' Resp. Br. at 17.

Except both cases are rooted in nuisance law, which, as the Schroeders have argued throughout, was the intended application of *Joyner* when it was decided (and has remained ever since). And, like *Joyner*, these nuisance cases show that whether the government can extinguish a use depends on the facts. *Moye*, 200 N.C. 11, 156 S.E. at 132 (holding that the ruling turned "[o]n the facts set out . . . in this case."). Regardless, neither opinion identifies any provision of the North Carolina Constitution, much less provides an "analysis" of one. Indeed, the language the City quotes is derived from yet another *federal* case interpreting *federal* law, *Reinman v.*

City of Little Rock, 237 U.S. 171 (1915).[7] And the basis for *Joyner*'s reasonableness test is a New York state court ruling, decided on a two-judge plurality, that also does not specify whether it is applying the state or federal constitution. *Harbison v. City of Buffalo* 4 N.Y.2d 553, 562–563, 152 N.E.2d 42, 46–47 (1958).

Joyner does not resolve this case. Nothing in the City's brief suggests that the Supreme Court of North Carolina intended for *Joyner*—a case involving the amortization of a junkyard nuisance, litigated by a non-owner, and resolved under federal law by relying on a New York decision—to be the first and last word on amortization in North Carolina.

B. THE CITY SEEKS A DRAMATIC EXPANSION OF *JOYNER*.

Ultimately, the City does not (because it cannot) refute the Schroeders' position that *Joyner* has never been applied to uphold the amortization of a non-nuisance use. *See* Appellees' Opening Br. at 20 n.12. In fact, while the City contends that "the cases cited in the Schroeders' brief do not support the proposed nuisance v. non-nuisance distinction," Appellants' Resp. Br. at 19–20, the City does not explain how this is so. Instead, the City introduces, for the first time, the argument that vacation rentals *are* basically nuisance uses and, as such, these residential properties may be treated just as if they were "billboards on both sides of the interstate" under *Joyner*. *Id.* at 20, 25–26.

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[7] The other intermediate appellate post-*Joyner* cases the City cites, *Goodman Toyota, Inc. v. City of Raleigh*, 63 N.C. App. 660, 306 S.E.2d 192 (1983) and *Huntington Properties, LLC v. Currituck County*, 153 N.C. App. 218, 569 S.E.2d 695 (2002), both involve billboards and thus reaffirm the Schroeders' longstanding position that *Joyner* has never been applied to non-nuisance uses.

Of course, a residence is not the same—either in terms of its aesthetic characteristics or the legal rights that attach to it—as the uses for which *Joyner* has been exclusively and historically applied. Likewise, the notion that "the facts surrounding the Schroeders' use have no bearing on the constitutional analysis," *see id.* at 20, 27, is wrong under *Joyner* itself. *See Joyner*, 286 N.C. at 376, 211 S.E.2d at 326 (calling for a fact-dependent inquiry). The Schroeders are entitled to make these arguments on summary judgment, just like the plaintiffs in the cases the City says control here. If this Court were to adopt the City's position, however, it would expand *Joyner* to allow amortization of *all* uses, not just nuisances, and without requiring any factual development at all.

III. THE SCHROEDERS STATED CLAIMS UNDER THE NORTH CAROLINA CONSTITUTION.

The City asks this Court to dismiss four independent constitutional claims because, according to the City, its ordinance advances the public good. Each of the Schroeders' four remaining constitutional claims—and why they cannot be defeated at this stage by untested assertions of legitimacy—are addressed below.[8]

First, the Schroeders sufficiently pled an anti-monopoly claim. The Schroeders alleged that they were excluded from exercising a "common right"

[8] Perhaps the City's most persistent mischaracterization (and there are many) is the notion that if the Schroeders are successful here, it will upend zoning as we know it. *See, e.g.*, Appellants' Resp. Br. at 29 ("Under the Schroeders' theory, if the City allows a use . . . 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."). Of course, this did not happen in any of the other jurisdictions that have rejected ordinances like this one. *See, e.g., Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. App. 2019); *Village of Oak Park v. Gordon*, 205 N.E.2d 464 (Ill. 1965).

because the City granted a small group of property owners "an exclusive privilege[] to" vacation rent. *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 321–322, 749 S.E.2d 469, 472–73 (2013) (citation omitted)).

In response, as throughout, the City redirects the Court to the ordinance's purported legislative purpose.[9] But the mere declaration that an ordinance advances the public good—which is primarily what the City argues here—cannot resolve this inquiry. To the contrary, a declaration of legislative purpose "is not conclusive," must be supported by facts, and is subject to judicial review. *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 125, 195 S.E.2d 517, 527 (1973); *State v. Grady*, 372 N.C. 509, 541, 831 S.E.2d 542, 566 (2019); *see also MacRae v. City of Fayetteville*, 198 N.C. 51, 150 S.E. 810, 813 (N.C. 1929) ("[T]he mere assertion by the Legislature that a statute relates to the public health, safety, and welfare, does not of itself bring such statute within the police power of the state.")

Nor does citing a law's legislative purpose evade on-point case law. In *Town of Clinton v. Standard Oil Company*, the North Carolina Supreme Court invalidated a cap on the number of properties that could engage in the same lawful business. 193 N.C. 432, 137 S.E. 183, 183–84 (1927). That is virtually identical to what is happening here. The City's only response is that *Town of Clinton* is an older case in which the court said gas stations are important, whereas here the City says

[9] The city also asserts that the Schroeders "concede" that rational-basis review applies. Appellants' Resp. Br. at 25, n.7. The Schroeders do argue that the law lacks any rational basis, but do not subscribe to the City's version of the test or otherwise "concede" that any court is duty-bound to blindly credit speculation and "hypothetical purposes" on a motion to dismiss.

vacation rentals are bad. *See* Appellants' Resp. Br. at 30. But again, those arguments are both contrary to the allegations in the complaint and improper at this stage. *Howe v. Links Club Condo. Ass'n*, 263 N.C. App. 130, 137, 823 S.E. 2d 439, 447 (2018) ("In reviewing a trial court's Rule 12(b)(6) dismissal . . . [t]he issue for the court is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim.") (quotations omitted).

Second, as for the Schroeders' exclusive emoluments claim, the City wrongly asserts that the rational-basis test applies. In support, the City cites *Town of Emerald Isle v. State*. 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987). But that case is of little value here because it describes the standard of review when a law "promotes the general welfare" and thus does not trigger the clause. Indeed, after *Emerald Isle* was decided, the Supreme Court of North Carolina reaffirmed that when, as here, a law *does* confer an exclusive privilege, such a benefit must be "in consideration of public services." *Leete v. County of Warren*, 341 N.C. 116, 118, 462 S.E.2d 476, 478 (1995). Here, the lottery plainly confers an exclusive benefit that is not "in consideration of public services."

Third, the Schroeders have pled a claim under the Fruits of Their Own Labor Clause. In response, the City argues once more that the Schroeders' arguments "fail under rational-basis review." Appellants' Resp. Br. at 31. The correct test, however, is the "substantial relation" test, which requires that the City show facts proving a "substantial relation" between its justifications and its impairment of the Schroeders' rights. *See King v. Town of Chapel Hill*, 367 N.C. 400, 407, 758 S.E.2d

364, 370 (2014). Here, again, the City asks this Court to adopt an asserted justification for the law that is contrary to the allegations in the complaint, and to do so without fact finding. But under either test, such blind deference is inappropriate.

Finally, the Schroeders state an equal protection claim. The City extensively argues for its lottery's fairness and about the asserted harms of short-term rentals. Appellants' Resp. Br. at 22–27. Once again, however, the City's allegations of harm contradicted by the complaint must be rejected. *Podrebarac v. Horack, Talley, Pharr & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) ("all [complaint] allegations . . . are taken as true.").

CONCLUSION

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 1st day of June, 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 3,750 words.

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The undersigned hereby certifies that on this 1st day of June, 2021, a copy of the foregoing was served upon all parties to this matter by Electronic Mail on the following counsel of record:

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