NO. COA 21-192 FIFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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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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RESPONSE BRIEF OF PLAINTIFFS-APPELLEES/ CROSS-APPELLANTS

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BRIEF OF PLAINTIFFS-APPELLEES/ CROSS-APPELLANTS

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Introduction

Peg and David Schroeder spent a significant portion of their retirement nest egg to purchase and prepare a rental property in Wilmington, North Carolina ("the City" or "Wilmington").[1] When they did so, they relied on the fact that short-term rentals were legal as a matter of both state and local law. And, even more than that, state law expressly provided that local governments could not "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 property or to register rental property with the city." N.C. Gen. Stat. § 160A-424(c)(i). That was the statutory language that the Schroeders relied on when they purchased their property. That was also the statutory language in effect when the City of Wilmington changed its law—enacting an ordinance that retroactively "capped" the number of vacation-rental properties allowed in the City.

The trial court correctly held the City's Vacation-Rental Ordinance was preempted by the "plain and unambiguous" text of that state law. State law forbids cities from requiring owners of vacation-rental property to obtain a permit or registration from the City to rent. But Wilmington did exactly that. The conflict could not be clearer or more stark.

Before the trial court, the City argued that the operative statutory language was in fact limited, so that it did not apply to the City's zoning power. But the City

[1] Defendants in this case are the City of Wilmington and the City of Wilmington Board of Adjustment. For ease of reference, this brief refers to both together as "the City."

never offered any textual explanation for why that would be so. In fact, the text is not so limited. And the legislative history also shows that the General Assembly never understood the text to be so limited. The trial court thus correctly rejected the City's arguments.

Now, on appeal, the City tries a different tack. The City barely even tries to grapple with the text of the law that was in place when the Schroeders bought their property, when the City enacted its ordinance, when the City held its lottery, and when this lawsuit was filed. Instead, the City now bases its arguments on amended statutory language that did not even exist when this case was filed, and that did not become effective until long after the City passed the ordinance in question.

The City's new argument fails. This new language is irrelevant, since, under North Carolina law, a subsequent change in state law cannot revive a local ordinance that was preempted at the time it was enacted. Even if the City were correct about the meaning of this amended statutory language, that would not save its ordinance. The City is arguing about the wrong law.

In any event, the City reads far more significance into the amended statutory language than it can possibly bear. The 2020 amendments inserted a cross-reference into the text of the relevant statute, as part of a massive omnibus bill recodifying state law. The amendment was intended to be non-substantive, and, as such, the General Assembly expressly stated that nothing in the omnibus bill was to "expand, diminish, or alter" existing law. N.C. Gen. Stat. § 160D-101(d). Nevertheless, the City argues that, if the Court squints hard at the placement and

punctuation of the added cross-reference, it is possible to read it as dramatically altering the law's preemptive sweep. But the General Assembly expressly disclaimed any intent to enact such a change. The Court should reject the City's attempt to smuggle in a dramatic revision of state law through a recodification.

Statement of Facts

A. Peg and David Schroeder

Plaintiffs Peg and David Schroeder are a retired couple who spent the majority of their adult lives in the Wilmington area. (R pp 135, 144 at ¶ 4). They raised their children in Wilmington, operated small businesses there, and developed strong social bonds within the community which remain through today. (R pp 136, 145 at ¶¶ 5–6). So, when the Schroeders decided to retire to the mountains of western North Carolina, they knew they would want to maintain a home in the Wilmington area. (R pp 136, 145 at ¶¶ 5–7). This way, they hoped, they could live quiet lives as retirees out in the mountains while still having a gathering place for family and friends during their regular visits back to Wilmington.

The Schroeders, however, could not afford both a primary residence in the mountains and a second home in Wilmington. (R pp 136, 145; 141, 150 at ¶¶ 9–10, 48). The only way they could maintain two homes, they realized, would be to offer the Wilmington house as a vacation-rental during its periods of non-use. After some research, the Schroeders learned that vacation rentals were legal under state and local law. (R pp 136, 145; 141, 150 at ¶¶ 10–11, 48). So with that in mind, the Schroeders felt comfortable purchasing a residence in Wilmington. They eventually

identified the Lion's Gate community in Wilmington as their desired location, in part because they knew others in the neighborhood were already offering vacation rentals there. (R pp 136, 145 at ¶ 10–11).

The Schroeders thought this made Lion's Gate the perfect community for them. They sold off other investments to pool the money they needed to purchase the property in Lion's Gate. (R pp 137, 146 at ¶ 14). Once they took ownership, they immediately began renovating the property to make it suitable for dual use as a vacation rental and as a personal residence. (R pp 137, 146 at ¶ 15). They hired contractors to do some of the work, and along with their son, they did much of the work themselves. (R pp 137, 146 at ¶¶ 16–18). The renovation took them nearly eight months. And by the time it was done, between materials and labor, the Schroeders had spent over $75,000 on the property to prepare it for themselves and their eventual renters. (R pp 137, 146 at ¶ 19).

B. The City Changes Its Law

At the time the Schroeders undertook these investments to prepare their rental home, their planned use of the property as a vacation rental was legal under both state and local law. Local ordinances did not limit their ability to rent, while state law clearly preempted any change in the local law, providing that "[i]n 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 property or to register rental property with the city." N.C. Gen. Stat. § 160A-424(c)(i).

Nonetheless, despite this clear state prohibition, the City passed an ordinance in February 2019 establishing a vacation-rental permitting and registration regime. The ordinance caps the number of rental properties in the City, providing that the "total number of permitted uses shall be limited by a cap" at two percent of properties within the City. City Code § 18-331(b). And, notwithstanding state law's prohibition on registration requirements, the ordinance contains an entire section captioned "Registration," which provides that "[t]he property owner shall register each establishment annually with the City," that a "registration number shall be assigned to each registered establishment," and that the total number of registrations issued shall be limited "based on the cap and separation requirements." *Id.* § 18-331(d). Finally, in addition to establishing this cap and registration system, the ordinance established that all vacation rentals must be at least 400 feet away from one another. *Id.* § 18-331(b).

To determine who could operate as part of the "two percent," 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. 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"—meaning they would have to phase out their use within a year. City of Wilmington, *Wilmington Lottery and Separation*, (Apr. 15, 2019), https://drive.google.com/file/d/1AYy-8lQ6bOrv9p1zc6Yq4NhIMBYMxmC1/view; *see also* (R pp 139–40, 148–49 at

¶¶ 34, 40). In effect, the City employed a lottery to raffle off property owners pre-existing property uses.

C. The Schroeders Lose the City's Lottery

So the Schroeders entered the lottery. And they lost. The City held its lottery in April 2019, and, as it turned out, a fellow Lion's Gate property owner was randomly assigned a higher-priority number, which meant that the Schroeders' entry was disqualified under the City's 400-foot proximity restriction. The Schroeders were able to continue renting for the duration of their one-year amortization period, and they will be able to do so for the remainder of this litigation. But without the long-term ability to offer their property as a vacation rental, the Schroeders will likely be forced to sell the townhouse. (R pp 139, 140–41, 148, 149–50 at ¶¶ 43–46).

The Schroeders filed this lawsuit on October 25, 2019, arguing both that the City's ordinance was preempted under state law and that the City's retroactive change in the law—outlawing their existing use of their townhome—violated the North Carolina Constitution by retroactively depriving them of their vested right to rent their property as vacation rental.

D. The General Assembly Recodifies State Law

In July 2019, after the City passed its ordinance and held its lottery, and after the Schroeders filed this lawsuit, the Governor signed an act designed to recodify state law. Indeed, Session Law 2019-111 explicitly states this additional language "should not be interpreted to affect the scope of local government authority" and is not intended to "eliminate, diminish, enlarge, []or expand the

authority of local governments" to "regulate development." And the recodified chapter has prefatory materials stating "[t]his Chapter does not expand, diminish, or alter the scope of authority for planning and development regulation authorized by other Chapters of the General Statutes." N.C. Gen. Stat. § 160D-101(d). In other words, the modification was not intended to provide local governments with any new or expanded authority.

In the course of this recodification, the General Assembly added seven words to the text of the statute that preempts the City's ordinance. This amended language adds the words "under Article 11 or Article 12 of this Chapter" after the phrase "permit or permission." N.C. Gen. Stat. § 160D-1207(c). Moreover, while this language was enacted in July 2019, it did not take effect until June 2020. *See* Session Law 2019-111, S.B. 355, at 128. Thus, this amended language did not even exist when the City enacted its ordinance and held its lottery—and even after it was enacted, it *still* was not effective for months after the Schroeders filed this lawsuit.

Argument

Municipalities are creatures of the General Assembly and cannot exercise any authority other than authority given to the municipality by the General Assembly. *Davis v. City of Charlotte*, 242 N.C. 670, 674, 89 S.E.2d 406, 409 (1955). When a municipality enacts a zoning ordinance that conflicts with state law "the ordinance must yield to the State law." *In re Melkonian*, 85 N.C. App. 351, 358, 355 S.E.2d 503, 507 (1987) (citing *Davis*, 242 N.C. at 674, 89 S.E.2d at 409). An ordinance is preempted, among other circumstances, when it "purports to regulate a

subject that cities are expressly forbidden to regulate by State or federal law," N.C. Gen. Stat. § 160A-174(b)(4), or where it "makes unlawful an act, omission, or condition which is expressly made lawful by State or federal law," *id.* § 160A-174(b)(2). Here, as the trial court correctly found, the City has enacted an ordinance that prohibits the Schroeders from renting unless they obtain a permit from the City and register their property to rent. City Code § 18-331.

The Schroeders' argument that state law preempts Wilmington's ordinance proceeds in four parts. First, while the City focuses on amended statutory language that was adopted after this lawsuit was filed, the relevant statutory language is the law in force at the time the City's ordinance was adopted. Second, the plain text of state law at the time Wilmington's ordinance went into effect preempts Wilmington's ordinance, and legislative history confirms the plain meaning of the statutory language.[2] Third, the General Assembly's amendment to that state law cannot, and does not, change the meaning of this plain text and, in any case, any ambiguity must be resolved in favor of the free use of property. Finally, because the preempted permit and registration requirements cannot be severed from the ordinance, it all must fall.

[2] The Court can and should end its preemption inquiry here, without wading into questions about subsequent statutory revisions nonexistent at the time the ordinance was passed. In the interest of completeness, however, the Schroeders explain why they prevail if this Court should advance to that inquiry.

A. The relevant statutory language is the law in effect at the time the City enacted its ordinance.

The question for the Court in this appeal is whether the City's ordinance was preempted by state law as it existed at the time the ordinance was enacted. The Supreme Court of North Carolina has repeatedly held that preemption of a municipal ordinance is resolved in this way, and that, absent an express statement by the legislature, a subsequent change in state law does not revive an ordinance that was contrary to state law at the time it was enacted. *See State v. Tenore*, 280 N.C. 238, 248–49, 185 S.E.2d 644, 651 (1972) (removing a preemptive state law "does not breathe life into an ordinance which was beyond the authority of the ordaining body when it was adopted"); *State v. Owen*, 242 N.C. 525, 528, 88 S.E.2d 832, 835 (1955) (absent express statement from legislature, later change in law does not validate ordinance that was invalid at time of enactment). Thus, under North Carolina law, the relevant statutory language is the language that was in effect at the time the City passed its ordinance.

The City's arguments in this appeal focus on the wrong law. The City argues that this "appeal turns on nine words that the General Assembly added" to the statute in a subsequent amendment. The City contends this addition rendered the statutory language ambiguous—such that it "can be read two ways," only one of which "preempts the registration provision of the City's short-term rental zoning ordinance." Appellant Br. at 2. As explained in Section C below, the City is wrong about how that amended language should be interpreted. But, even more fundamentally, those amendments did not become effective until June 2020.

Session Law 2019-111, S.B. 355, at 128. By contrast, the City adopted its ordinance more than a year earlier, in February 2019, and held its lottery in April 2019. City of Wilmington, *Wilmington Lottery and Separation*, (Apr. 15, 2019), https://drive.google.com/file/d/1AYy-8lQ6bOrv9p1zc6Yq4NhIMBYMxmC1/view; *see also* (R pp 139–40, 148–49 at ¶¶ 34, 40). Because the proper inquiry focuses on the law that was in force at the time the City enacted its ordinance, nothing in this case "turns on" amended language that was not in force until *after* the ordinance was adopted.[3]

B. The relevant state law unambiguously bars registration and permit requirements for vacation rentals.

Because the statute in effect when Wilmington enacted its ordinance governs this Court's analysis, that is where this discussion begins. Under that statutory language, the City does not seriously dispute that the trial court correctly found its ordinance preempted. The City did attempt to make that argument in the trial court—where it argued unsuccessfully that the statute did not limit its "zoning" power—but the City now largely abandons that argument on appeal, choosing to focus all of its efforts on a statute that did not even exist until months after this lawsuit was filed. Appellant Br. at 8 ("The issues in this appeal derive from the addition of the phrase 'under Article 11 or Article 12 of this Chapter' to the inspection statute, as the placement of that language creates an ambiguity.").

[3] Even if the City were somehow correct that the recodification provided it with new powers, it would remain the case that those powers did not exist until *after* that recodification—and thus its original ordinance would still be preempted. If the City wished to re-enact its ordinance using its supposedly new powers, it could attempt to do so.

The City does this, of course, because it does not want this Court to consider the statute that was actually in effect at the time the ordinance was enacted. And it adopts this strategy for good reason: The City's ordinance is irreconcilable with the plain text of that statute. This interpretation is only further cemented upon a review of the legislative history. This Court can—and indeed should—begin and end its inquiry here.

1. The City's ordinance is contrary to the plain text of the operative state law.

State law at the time Wilmington enacted its ordinance clearly forbade rental permit and registration requirements. It stated:

> 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, except for those individual rental units that have either more than four verified violations in a rolling 12-month period or two or more verified violations in a rolling 30-day period, or upon the property being identified within the top ten percent (10%) of properties with crime or disorder problems as set forth in a local ordinance

N.C. Gen. Stat. § 160A-424(c) (2018) (recodified at N.C. Gen. Stat. § 160D-12-7(c)). And in the Vacation Rental Act (Chapter 42A) the General Assembly expressly applied this provision to vacation rental properties. *Id.* § 42A-3.

The conflict between Wilmington's ordinance and state law is obvious. State law prohibits cities from requiring a permit from the city to rent property as a vacation rental, absent a pattern of code or crime violations. N.C. Gen. Stat. § 160A-424(c). But that is exactly the effect of the City's ordinance, which provides that the "total number of permitted uses shall be limited by a cap." City Code § 18-331(b).

State law further forbids cities from requiring vacation rental properties to "register rental property with the city," absent a pattern of code or crime violations. N.C. Gen. Stat. § 160A-424(c). But, again, that is exactly the effect of City Code § 18-331, which contains an entire section captioned "Registration" and which imposes detailed registration requirements on rental properties. *See* City Code § 18-331(d). Under the City's ordinance, a "registration number shall be assigned to each registered establishment," and that the total number of registrations issued shall be limited "based on the cap and separation requirements." City Code § 18-331(d). That is precisely the kind of permitting and registration scheme that state law forbids. The conflict is stark.

The trial court agreed with this plain reading, concluding the language was clear and unambiguous. After all, the statute provides that a city cannot "adopt or enforce *any* ordinance that would require *any* owner or manager of rental property to obtain *any* permit or permission from the city to lease or rent residential real property or to register rental property with the city." N.C. Gen Stat. § 160A-424(c) (emphasis added). The word "any" is repeated three times. When the General Assembly provided that a city cannot adopt "any ordinance" requiring "any owner" to obtain "any permit," the General Assembly clearly and expressly barred *any* permitting requirement for vacation rental properties. That includes the permitting and registration requirements at issue here. And when the plain text is clear, that ends the inquiry. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) ("It is well settled that where the language of

a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.") (cleaned up); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (describing the "ordinary-meaning rule" that "[w]ords are to be understood in their ordinary, everyday meanings" as "the most fundamental semantic rule of interpretation.").

Before the trial court, the City's entire argument was that this prohibition did not apply to zoning ordinances. The City now relegates that argument to a single footnote on appeal. Appellant Br. at 13 n.6. As well it should. It is well established that a municipal zoning ordinance is preempted to the extent that it conflicts with state law, regardless of whether that state law specifically mentions "zoning" or not. *See, e.g., Staley v. City of Winston-Salem*, 258 N.C. 244, 249, 128 S.E.2d 604, 608 (1962) (finding local zoning ordinance preempted insofar as it conflicted with state law); *Lamar OCI S. Corp. v. Stanly Cnty. Zoning Bd. of Adjustment*, 186 N.C. App. 44, 53, 650 S.E.2d 37, 43 (2007) (same). Moreover, nothing in the plain text of Section 160A-424(c) suggested the City could do through zoning what the ordinary meaning of the text said it could not do. And while some provisions of 160A-424 pertained to building inspections, several other provisions also swept more broadly. *See, e.g.*, N.C. Gen. Stat. § 160A-424(c)(ii) (city cannot "require that an owner or manager of residential rental property enroll or participate in any governmental program as a condition of obtaining a certificate of occupancy"); *id.* § 160A-424(c)(iii) (city cannot "levy a special fee or tax on

residential rental property"); *id.* § 160A-424(e) (police have an obligation to "assist the landlord in addressing any criminal activity," including by "testifying in court"). In sum, Section 160A-424(c) bars cities from enacting any ordinance requiring a permit or registration prior to operating a vacation rental. It makes no difference under Section 160A-424(c) whether the City characterizes its permit requirement as a zoning ordinance or as any other type of regulation.[4]

2. The legislative history confirms what the plain text makes clear.

Legislative history confirms what the statutory language makes plain. The General Assembly intentionally barred cities from requiring landlords to obtain a permit prior to renting residential properties; intentionally extended this prohibition to bar even simple registration requirements; and intentionally applied these prohibitions to vacation rentals.

The General Assembly first enacted the relevant language of Section 160A-424(c) in 2011, as part of a larger bill intended to protect the rights of residential landlords. *See* Session Law 2011-281, S.B. 683. At the time, it was understood that this language "[p]rohibits ordinances which require registration, application, or permission from the county or city to lease or rent residential property." UNC School of Government, Legislative Reporting Service, Bill Summary for S.B. 683 (June 8, 2011).[5] This history nowhere suggests that the bar on permit requirements

[4] If this Court rules Wilmington's ordinance preempted, the City asks this Court to find state law ambiguous to avoid attorneys' fees. Appellant Br. at 18–20. But as this analysis makes clear, the trial court correctly held state law "clear and unambiguous" in preempting Wilmington's ordinance. (R p. 154).

[5] Available at https://lrs.sog.unc.edu/billsum/s-683-2011-2012-3.

was intended to be limited to permits associated with an inspection regime.

Then, in 2016, the General Assembly amended this language to make clear that Section 160A-424(c) broadly prohibits *all* registration requirements for residential rental properties, absent a pattern of code or crime violations. *See* Session Law 2016-122. The legislative history for this change reflects the General Assembly's understanding that Section 160A-424(c) contains a "general prohibition on any requirement for a residential rental property permit, other than for those units with specified and verified code or crime problems." House Rules, Calendar, and Operations Committee, Summary for S.B. 326 (June 29, 2016).[6] The 2016 amendments extended that "general prohibition" to "also include[] a prohibition of a registration requirement." *Id.*; *see also* General Assembly, Legislative Staff Analysis of S.B. 326 (Sept. 8, 2016) (same).[7] These changes were made in direct response to a general registration requirement passed by another North Carolina city. *See* Ely Portillo, *N.C. Lawmakers to Charlotte: You Can't Make All Landlords Register With City*, Charlotte Observer (July 10, 2016).[8]

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[6] Available at https://dashboard.ncleg.gov/api/Services/BillSummary/2015/S326-SMBB-9(CSSU-54)-v-5.

[7] Available at https://dashboard.ncleg.gov/api/Services/BillSummary/2015/S326-SMTG-199(sl)-v-5. The bill was widely understood to have this interpretation. *See, e.g.,* City of Raleigh, *Rental Dwelling Registration: Eliminated Per NC General Assembly Senate Bill 326*, (Nov. 20, 2019), https://raleighnc.gov/Community/content/HousingNeighborhoods/Articles/RentalRegistration.html ("This bill eliminates the ability of municipalities to operate a rental dwelling registration program as of January 1, 2017.").

[8] Available at https://web.archive.org/web/20201124231605/https:/www.charlotteobserver.com/news/business/biz-columns-blogs/development/article88318857.html.

Finally, in 2019, the General Assembly amended Section 42A-3 to clarify that the ban on rental permits and registrations applies to vacation rentals. *See* Session Law 2019-73. The General Assembly understood that these amendments would ensure that "the existing statutes . . . limiting local governments' ability to regulate residential real property" would "apply to properties covered by the Vacation Rental Act." House Rules, Calendar, and Operations Committee, Summary of S.B. 483 (June 24, 2019).[9] That means, "among other things," that "cities and counties are not authorized to . . . [a]dopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission from the local government to lease or rent residential real property or to register rental property with the local government," other than in specified situations involving code or crime violations. *Id.* Nowhere in the legislative history is there any suggestion that the General Assembly meant for this language to be anything other than what it clearly is—a limitation on the municipal power to require permits and registrations for vacation rentals.[10]

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[9] Available at https://dashboard.ncleg.gov/api/Services/BillSummary/2019/S483-SMBB-52(e1)-v-2.

[10] Contemporary press accounts support this plain reading. *See* Michael Praats, *City of Wilmington's short-term rental ordinance appears to contradict state law*, Port City Daily (July 8, 2019), https://portcitydaily.com/local-news/2019/07/08/city-of-wilmingtons-short-term-rental-ordinance-appears-to-contradict-state-law/; Greg Holcomb, *North Carolina Amends Vacation Rental Act*, VRMA (July 17, 2019, 10:38 AM), https://www.vrma.org/blog/north-carolina-amends-vacation-rental-act; Jeffrey C. Billman, *Does a New State Law Preempt Raleigh's Airbnb Rules?*, INDY Week (July 9, 2019, 3:17 PM), https://indyweek.com/news/wake/does-a-new-state-law-preempt-raleigh-airbnb-rules/; Leonard Robinson III, *Raleigh's Ban On Some Short-Term Rentals Could Violate State Law*, Carolina Journal (July 9, 2019, 3:37 PM),

Thus, in multiple enactments over a period extending almost a decade, the General Assembly repeated its understanding that the law enacts a broad general prohibition on permitting and registration requirements for residential rental properties—including vacation rentals. In other words, the legislative history confirms that the relevant statutory provisions were understood by the General Assembly to mean exactly what they say on their face: Section 160A-424(c) bars rental permits and registration requirements, and Section 42A-3 makes that prohibition applicable to vacation rentals like the one at issue here.

C. The General Assembly's subsequent recodification of state law does not change this analysis.

Unable to argue with this straightforward analysis, the City tries to bypass the law at the time its ordinance was enacted by hanging its entire argument on a statutory cross-reference that was inserted into the relevant statute as part of an omnibus bill that recodified and reorganized state law. And the City does not even argue that it clearly wins under the amended statutory language; instead, the City argues that this amended language rendered the statute ambiguous, such that it now "can be read two ways." Appellant Br. at 2; *see also id.* at 8–9 (arguing "the addition of the phrase 'under Article 11 or Article 12 of this Chapter' . . . creates an ambiguity" between a preemptive and non-preemptive reading and "the non-preemptive reading should prevail."). The City thus argues that the Court should disregard the clear text of the law that was in effect at the time its ordinance was

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https://www.carolinajournal.com/news-article/raleighs-ban-on-short-term-rentals-could-violate-state-law/.

enacted because (in its view) the General Assembly's later addition of a statutory cross-reference introduced some arguable ambiguity into the text.

As explained above, this argument is ultimately irrelevant, as this appeal is governed by the language in force at the time the ordinance was enacted. But even setting that aside, the City's argument fails for at least four reasons. First, under the best and most straightforward reading of the plain text, the amended statute is just as broad as the pre-amendment version. Second, this plain-text interpretation is bolstered by the canon of interpretation that legislatures do not hide elephants in mouseholes; the Court should reject the suggestion that the General Assembly hid a dramatic expansion of municipal authority in an obscure technical amendment enacted as part of a comprehensive statutory recodification. Third, this plain text construction avoids a retroactive application of the amended statute. Fourth, this plain text construction respects North Carolina's longstanding rule of resolving ambiguities in favor of the free use of property.

1. Under the best reading of the amended text, it is just as broad as the pre-amendment law.

By framing its argument in terms of an "ambiguity," which "can be read two ways," Appellant Br. at 2, 8–9, the City concedes that it is at least *possible* to read the amended statute so that it sweeps just as broadly as the pre-amendment law. This interpretation—which the City terms the "preemptive" interpretation—respects the General Assembly's instruction that its recodification bill should not be read to enact any substantive change. *See* N.C. Gen. Stat. § 160D-1207(c); N.C. Gen. Stat. § 160D-101(d) (recodification "does not expand, diminish, or alter the scope of

authority for planning and development regulation authorized by other Chapters of the General Statutes."). And, as explained below, this preemptive interpretation is also the best and most natural reading of the added cross-reference.

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. In full, the amended language reads:

> In no event may a local government do any of the following: (i) adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or **permission under Article 11 or Article 12 of this Chapter** from the local government to lease or rent residential real property or to register rental property with the local government, except for those individual properties that have more than four verified violations in a rolling 12-month period or two or more verified violations in a rolling 30-day period, or upon the property being identified within the top ten percent (10%) of properties with crime or disorder problems as set forth in a local ordinance.

N.C. Gen. Stat. § 160D-1207(c) (emphasis added). Under this reading, the statutory cross-reference enumerates one kind of "permission" that municipalities are barred from requiring. But the cross-reference does not alter the provision's broad ban on *permitting* requirements for rental properties, and it most certainly does not alter the provision's ban on municipal *registration* requirements, which after all, follows in a completely separate clause.

In other words, consistent with the plain reading of the first statute, this preemptive reading of the added cross-reference would simply mean that a local government is barred from doing any of the following three things (absent

circumstances not present here):

(1) require a property owner to obtain a permit to rent;

(2) pass an ordinance, under any authority including under its housing or building code, that requires a landlord to secure "permission" to rent; or

(3) require a registration to rent.

This reading treats the amended statute as consistent with the original statute. The previous statute forbade permits, permissions, and registrations to rent except in limited circumstances. The added cross-reference does not change that. Instead, it simply directs the reader's attention to the fact that this prohibition on permits, permissions, and registrations includes a prohibition on "permission[s] under Article 11 or Article 12." In other words, this reading treats the added cross-reference as a non-substantive change, which, after all, is precisely what the General Assembly expressly intended. *See* N.C. Gen. Stat. §§ 160D-1207(c); 160D-101(d).[11]

In addition to following the General Assembly's directive—to treat this as a "recodification" rather than an alteration—this is also the best reading of the plain

[11] The City, for its part, does attempt to harmonize the two statutes in a way that supports its new arguments on appeal. Appellant Br. at 14. But in doing so, the City offers an interpretation of the original statute that is utterly nonsensical: "In no event may a city . . . require any owner or manager of rental property to obtain any *permit* . . . to *register* rental property." But there is no such thing as a "permit" to "register" something. Thus, it would be wrong to interpret the statute as enacting a prohibition on something that does not (and likely could not) exist. *Estate of Jacobs v. State*, 242 N.C. App. 396, 402, 775 S.E.2d 873, 877 (2015) (declining to adopt an interpretation that would have rendered portions of a statute "superfluous or nonsensical").

text. Indeed, unlike the City's suggested interpretations, this approach does not require this Court to assume punctuation or structure that the General Assembly did not use. For example, the City argues that a comma was needed to prevent the "under Article 11 or Article 12 of this Chapter" language from modifying everything that follows, stating "there is nothing that quarantines the registration clause from the rest of the text." Appellant Br. at 10. Of course, the statute's bar on registration requirements is found in an entirely separate clause. And the City's phantom-comma argument is not based on any rule of grammar or rooted in any accepted school of statutory interpretation.

Construing the statute properly, it is evident that the comma was not needed. That is because the ordinary use of the word "or" does in fact "quarantine" the registration clause from the newly inserted language. The "ordinary use" of "or" is "almost always disjunctive, that is, the [phrases] it connects are to be given separate meanings." *United States v. Woods*, 571 U.S. 31, 45–46 (2013) (cleaned up). No comma is needed. Giving the two sides of the "or" here disjunctive effect—as Courts routinely and typically do—requires this court consider the first phrase ("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") as separate from the second phrase ("to register rental property with the local government")—and thus not carry over the Article 11 or Article 12 limitation to modify the registration provision. To adopt a preemptive reading, the Court need not insert any phantom punctuation and need only read "or" to mean "or."

This reading of the statute is also consistent with the "Nearest-Reasonable-Referent Canon." Scalia & Garner at 152. This canon provides that "a prepositive or postpositive modifier" (here "under Article 11 or Article 12") "applies only to the nearest reasonable referent" (here "permission"). *Id.* So "under Article 11 or Article 12 of this Chapter" modifies only the power of a city to require a "permission . . . to lease or rent residential real property." This leaves the prohibition on permits and registration requirements untouched by the "under Article 11 or Article 12" amending language.[12] Well-recognized canons of construction thus confirm what should be clear from the statute's plain text.

2. The Schroeders' construction would avoid an absurd result—reading a massive expansion of government power into a non-substantive recodification.

This plain text reading also has the virtue of avoiding an absurd result. In the City's view, even though the pre-amendment language was clear, and the amended language is at most ambiguous, the City should strain to read the new

[12] It is true that the "nearest-reasonable-referent canon" can give way when the adverb comes before "a straightforward, parallel" series of nouns. *See* Scalia & Garner at 147–151. Under that canon, the phrase "under Article 11 or 12 of this Chapter" *might* extend to the entire phrase "permit or permission," but, even so, it would not alter the statute's separate prohibition on registration requirements. Because the ordinance includes a registration requirement, that reading would be enough to find preemption here.

But, in any event, "under Article 11 or Article 12 of this Chapter" is best read as modifying only "permission" and not "permit," because "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored," Scalia & Garner at 63, and the more limited reading proposed above is preferable because it respects the General Assembly's directive that the recodification amendments should not be construed to "expand, alter, or diminish" existing law.

ambiguous language in a way that dramatically alters the scope of the pre-amendment law. That makes no sense. The General Assembly did not hide a massive substantive change in an obscure technical provision inserting a statutory cross-reference as part of a recodification bill.

The General Assembly was quite clear that it did not intend for its recodification of state law to change its substance in any way. *See* N.C. Gen. Stat. § 160D-1207(c); N.C. Gen. Stat. § 160D-101(d) (recodification "does not expand, diminish, or alter the scope of authority for planning and development regulation authorized by other Chapters of the General Statutes."). And the General Assembly further expressed that the recodification "should not be interpreted to affect the scope of local government authority" and is not intended to "eliminate, diminish, enlarge, nor expand the authority of local governments" to "regulate development." Session Law 2019-111 at 16 (Section 2.1(f)). In sum, the sole purpose for the change was to "collect and organize existing statutes regarding local planning and development into a single Chapter of the General Statutes." *Id.* (Section 2.1(e)). Given that instruction, the City simply puts too much weight on the insertion of this statutory cross-reference. The General Assembly did not intend for this cross-reference to have *any* substantive effect, much less the sweeping effect that the City would interpret it to have.[13]

The City's contrary view is in tension with the principle that, as Justice

[13] To add to this, the General Assembly is currently considering removing the recodification's amendment to the text at issue here and that bill has already passed the House. House Bill 829, https://www.ncleg.gov/BillLookUp/2021/H829.

Scalia first memorably put it, legislatures do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Or, put differently, legislatures do not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *id.*, and do not "make radical—but entirely implicit—changes through technical and conforming amendments," *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) (cleaned up). In the City's view, although the plain text and legislative history of the pre-amendment law all confirm that the pre-amendment law preempted municipal ordinances requiring any permit or registration to rent property, the General Assembly vastly limited that existing law by inserting a seven-word cross-reference as part of a broader recodification bill. And the City would have the Court reach that conclusion even though the General Assembly nowhere indicated that it desired to enact such a change—and in fact expressly stated that it was not trying to change the law. That cannot be.

Worse, the City's reading would make this statutory language so limited that it would effectively read it out of the law. In the City's view, municipalities would be prohibited from requiring registrations or permits to rent under the inspection power (except under limited circumstances), but municipalities could adopt *the exact same* permitting and registration requirements so long as they did so through the zoning power (or any other power outside the inspection context). *See* Appellant Br. at 8 (arguing the statute preempts a city's inspection power but "did not have a preemptive effect on other local government authority—like, for instance, zoning

authority under Article 7."). This is an illogical contention. In effect, the City is arguing that the General Assembly limited cities' power to require permits or registrations to rent to enforce code violations and criminal activity but leaves cities unlimited power to adopt the exact same regulations by other means. That would effectively render this statutory language a nullity.

That would also give rise to absurd results. After all, the City would be barred from adopting permitting and registration requirements to remedy properties that are plagued by code violations or other issues, except in a narrow set of circumstances defined by the statute. But the City would be free to impose the same restrictions on all other types of properties. The Court can—and should—interpret the added cross-reference to avoid that absurdity. *See, e.g., Brown v. Brown*, 353 N.C. 220, 226, 539 S.E.2d 621, 625 (2000) ("Courts, of course, presume that the General Assembly would not intend something so absurd as contradicting itself in the same statute."); Scalia & Garner at 234 ("A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.").[14]

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[14] Against this, the City argues that the Schroeders' plain reading of the recodification results in an absurdity. The City argues that applying the "under Article 11 or Article 12 of this Chapter" language to modify only permits or permissions and not registrations "would allow the City to simply swap 'permitting' for 'registration' to cure its ordinance." Appellant Br. at 17. But the plain reading of the statute refutes this contention, as the statute still prohibits permitting, permissions, and registration schemes (including permissions required under Articles 11 and 12). Moreover, it is impossible to conceive of a permitting scheme that did not also in some sense require registration: how could a municipality issue

3. The Schroeders' construction avoids a problematically retroactive application of the recodified statute.

Even imagining the City were correct that the General Assembly introduced an ambiguity into the (previously clear) state law through the mere inclusion of a cross-reference, it still could not prevail in this appeal. Again, the relevant question here is whether the City's ordinance was preempted under state law as it existed at the time the ordinance was adopted. *See Tenore*, 280 N.C. at 248–49. And even if the City's arguments are accepted, and the revised statute is read as narrowing the preemptive scope of the first statute, that change cannot apply retroactively to save the ordinance here.

In North Carolina, every reasonable presumption must be made against a retroactive change in state law. *See State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999) ("This Court has stated that '[e]very reasonable doubt is resolved against a retroactive operation of a statute.'"); *see also* Scalia & Garner at 261 ("A statute presumptively has no retroactive application."). That is especially true when, as here, the City's preferred reading of the new language would retroactively "invalidate a [preemption] defense which was good when the statute was passed." *Brannock v. Brannock*, 135 N.C. App. 635, 644, 523 S.E.2d 110, 115–16 (1999). Yet the City is arguing for precisely that kind of a retroactive change: After all, the City's reading of the recodification would change the plain meaning of the original

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permits without also keeping a list (a registration) of all the permits that have been issued? Even if the statute *did* bar registrations but allow permits, the bar on registrations would sweep up practically any permitting scheme. The City's imagined absurdity thus simply does not exist.

text, and then apply that change retroactively to validate an ordinance that was plainly invalid under state law when enacted. Thus, the City asks this Court for a disfavored retroactive interpretation of state law.

Moreover, if the statutory amendment actually works a retroactive change in state law, then the ordinance's termination of the Schroeders' right to rent implicates the North Carolina Constitution's prohibition on retroactive deprivations of vested property rights. *See* Appellee Br. at 10–21; *see also Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). This Court should simply avoid an interpretation that triggers this constitutional conflict and affirm the trial court's decision that Wilmington's ordinance is preempted. *See In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) ("Where one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted.").

4. The Schroeders' construction is consistent with North Carolina's rule to resolve ambiguities in favor of property owners.

As explained above, the ordinance's conflict with state law is clear. Section 160A-424(c) was plain and unambiguous—cities cannot impose permitting or registration requirements as a precondition on owners' ability to rent their property. And the legislative recodification cannot, and does not, "expand, diminish, or alter" this plain text. N.C. Gen. Stat. § 160D-101(d).

But even the City's primary argument here relies on a recodification creating an ambiguity—an ambiguity that must be resolved in favor of the Schroeders' free use of their townhouse. It is well established that ambiguities in state law and

zoning ordinances are resolved in favor of the free use of property. *Bellsouth Carolinas PCS, L.P. v. Henderson Cnty. Zoning Bd. of Adjustment*, 174 N.C. App. 574, 577, 621 S.E.2d 270, 273 (2005) ("[S]ince zoning ordinances restrict common-law property rights, ambiguous zoning ordinances should be interpreted to permit the free use of land."); *see also Pamlico Marine Co., Inc. v. N.C. Dep't of Nat. Res. & Cmty. Dev.*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986) ("[A]ny law, ordinance or regulation adopted pursuant to the police power of the State which restricts the free use of private property is to be construed by the courts strictly in favor of the free use of that property."). If this Court has any doubt as to whether Wilmington's ordinance conflicts with state law, that doubt should be resolved in the Schroeders' favor. Indeed, Wilmington's entire argument turns on getting the better of its imagined ambiguity. *See* Appellant Br. at 8 ("The issues in this appeal derive from the addition of the phrase 'under Article 11 or Article 12 of this Chapter' to the inspection statute, as the placement of that language creates an ambiguity."). But conceding that the statute is ambiguous, in light of the analysis above, is fatal to any argument that the ordinance can be used to restrict the Schroeders' property rights.[15]

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[15] The City argues for a rule of broad construction. *See* Appellant Br. at 11 n. 4. But that rule of construction is inapplicable here. The rule of broad construction for municipal power does not apply if its application is "contrary . . . to the public policy of this State." N.C. Gen. Stat. § 160A-4. And "[t]he rule [favoring the free use of property] is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent." *J. T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981).

At the end of the day, the City simply reads too much into the General Assembly's insertion of a cross-reference as part of a broader reorganization and recodification of state law. There is no indication anywhere that the General Assembly intended for that single cross-reference to dramatically expand the authority of municipalities to impose permitting and registration requirements for rental properties. To the contrary, the General Assembly expressly disclaimed any intent to enact such a change. And even if the General Assembly *had* enacted such a change, it would not apply retroactively to this case. The City's arguments based on the General Assembly's recodification amendments should therefore be rejected.

D. The preempted registration and permit requirements are not severable from Wilmington's ordinance, so the entire ordinance is preempted.

The state's preemption of the City's permit and registration requirements invalidates the City's ordinance in its entirety. That includes the City's "cap and separation" system, which established the 2% cap and 400-foot proximity restriction for vacation rentals. Very simply, the permit and registration requirements are the mechanisms by which the City enforces the "cap and separation" system. Without them, the ordinance becomes unenforceable. Yet, the City argues "the rest of the ordinance should [be] saved" because its system achieved the City's stated goal of "'maintain[ing] the residential character' of its neighborhoods." Appellant Br. at 20. That is both wrong and irrelevant. The "cap and separation" regime cannot function without permits and registrations, and so it cannot survive.

The trial court correctly rejected this argument, refusing to sever the permit and registration requirements from the ordinance. When an unlawful portion of an ordinance is, as here, so "interrelated and mutually dependent that one part cannot be enforced without reference to another" then the offending portion cannot be severed and the whole ordinance must fall. *Fulton Corp. v. Faulkner*, 345 N.C. 419, 422, 481 S.E.2d 8, 9 (1997). The City's ordinance has three interworking components that cannot be severed from one another: a lottery system, registration and permitting requirements, and cap-and-separation requirements. When Wilmington's ordinance went into effect, the Schroeders were already using their property as a vacation rental, as were several of their neighbors. For the Schroeders to continue using their property as a vacation rental, they had to register with the City and obtain a permit. City Code § 18-331(d); *see also id.* at § 18-331(b) ("The total number of permitted uses shall be limited by a cap."). But they can only obtain a permit to rent if they are within the 2% of properties allowed to rent in Wilmington and spaced 400-feet away from another vacation-rental property. *Id.* at § 18-331(b). To adjudicate which properties would be allowed to register and obtain a permit, the City instituted a lottery system. *Id.* at § 18-331(d) ("For the initial registration process, a lottery method shall be utilized based on the cap and separation requirements."). If the permitting and registration requirements are preempted, then the lottery that doled out those permits and registrations is invalid. Without the initial granting of permits and registrations, the City has no means of enforcing its cap-and-separation requirements against existing property

uses. Here, the cap-and-separation requirements "cannot be enforced without reference to" the permit and registration requirements, so the entire ordinance must fall.

Conclusion

This Court should affirm the trial court's conclusion that state law "clearly and unambiguously" preempts Wilmington's ordinance.

Respectfully submitted, this 21st day of May, 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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