STATE OF NORTH CAROLINA COUNTY OF NEW HANOVER	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 19 CVS 4028
DAVID SCHROEDER and PEGGY SCHROEDER Plaintiffs, v. CITY OF WILMINGTON and THE CITY OF WILMINGTON BOARD OF ADJUSTMENT Defendants.	**RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW**

Pursuant to North Carolina Rule of Civil Procedure 56, Plaintiffs David and Peg Schroeder respond to the Defendants' Motion for Summary Judgment, and in support respectfully submit this Response to Defendants' Motion for Summary Judgment and Incorporated Memorandum of Law.

I. INTRODUCTION

Plaintiffs Peg and David Schroeder ("Peg and David") are a retired couple who spent the majority of their adult lives in the Wilmington area. They raised their children in Wilmington, operated small businesses there, and developed strong social bonds within the community. For decades, it was the seat of their familial, social, and economic lives. So when Peg and David decided to retire to the mountains of Western North Carolina, they knew they would want to maintain a home in the Wilmington area. 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.

But Peg and David could not afford both a primary residence in the mountains and a second home in Wilmington. The only way they could maintain two homes, they realized, would

be to offer the Wilmington house as a vacation-rental property during its periods of non-use. After some research, Peg and David learned that vacation rentals were legal under state and local law. So with that in mind, Peg and David 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. Peg and David thought this made Lion's Gate the perfect community for them.

Peg and David sold off other investments to pool the money they needed to purchase the property in Lion's Gate. 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. They hired contractors to do some of the work, and along with their son, they did much of the other work themselves. The renovation took them nearly eight months. And by the time it was done, between materials and labor, Peg and David had pumped over $75,000 into the property to prepare it for themselves and their eventual renters.

Unbeknownst to Peg and David, the Defendants, the City of Wilmington and the City of Wilmington Board of Adjustment (together, "the City"), were separately working to put an end to vacation rentals in Wilmington. So just as Peg and David were completing their renovations and beginning to offer it for rental, the City passed an ordinance establishing a vacation-rental permitting regime. In addition to requiring permission and registration, the new ordinance imposed two major restrictions on property owners in Wilmington. First, it provided for a hard two-percent cap on vacation rentals citywide. And second, it established that all vacation rentals would have to be at least 400 feet away from one another. To determine who could operate as part of the "two percent," the City devised a lottery system.

All of this is preempted by state law. In fact, the plain language of the relevant North Carolina statute provides 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). And the General Assembly has made clear that this restriction on municipal power specifically applies to the regulation of vacation rentals. In spite of this clear language, however, the City pushed forward with its cap-and-lottery system. Those who did not "win" a permit to operate, according to the new ordinance, would have to phase out their use within a year.

So Peg and David entered the lottery. And they lost. As it turned out, a fellow Lion's Gate property owner was randomly assigned a higher-priority number, which meant that Peg and David's entry was disqualified under the City's 400-foot proximity restriction. But Peg and David had a clearly established right to offer their property for rental at the time they purchased it. Indeed, they made substantial expenditures to renovate it and offer it for rent to short-term guests. And everything Peg and David did was done with the understanding that state law prohibited the City from enacting an ordinance precisely like the one they enacted. Peg and David filed this lawsuit to challenge the City's vacation-rental ordinance as unconstitutional on the grounds that it is preempted by state statute and because it strips Peg and David of their constitutional rights.

II. STATEMENT OF FACTS

A. PEG AND DAVID SCHROEDER PURCHASE THE LION'S GATE TOWNHOUSE TO STAY CONNECTED TO THE WILMINGTON COMMUNITY.

Peg and David Schroeder lived in Wilmington for over 30 years. Affidavit of Peg Schroeder ¶ 4; Affidavit of David Schroeder ¶ 4.[1] They raised their family there, they operated their small businesses there, and it is still the community where they have deepest roots. Schroeder Affs. ¶ 5–6. But after spending the bulk of their working lives in Wilmington, Peg and David decided to retire to the mountains of Western North Carolina. *Id*. at ¶ 5.

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

After some research—which included consultations with both a realtor and an attorney—Peg and David decided in early 2018 that they would be able to purchase a property in Wilmington for the dual purpose of using it as a personal residence and vacation rental. *Id*. at ¶¶ 9–10, 48. Peg and David ultimately settled on the Lion's Gate neighborhood in Wilmington. *Id*. at ¶ 10. As they understood it, state law allowed for vacation rentals and Lion's Gate's HOA

[1] The affidavits of Peg Schroeder and David Schroeder are attached hereto as Exhibits "A" and "B," respectively. For purposes of brevity, both affidavits—which are substantively identical—are referred to hereafter as "Schroeder Affs."

rules did as well. *Id*. at ¶ 10–11, 48. In fact, Peg and David were aware of several Lion's Gate property owners who were already offering their properties as vacation rentals at the time they decided to buy. *Id*. at ¶ 11.

Peg and David purchased the property located at 1800 Eastwood Road, Unit #130, Wilmington, North Carolina, 28403 ("the Townhouse") in June 2018. *Id*. at ¶¶ 12–13. To make it work financially, Peg and David had to sell two other investments to have the money they needed to purchase the Townhouse. *Id*. at ¶ 14. Right away, they began renovating the property to make it suitable for their intended dual use as vacation rental and residence. *Id*. at ¶ 15. Peg and David hired several contractors to handle projects like flooring, plumbing, electrical work, and the installation of a new gas line and tank. *Id*. at ¶ 16. They also did a great deal of work themselves, including applying fresh paint throughout and installing new flooring, drywall, and cabinetry. *Id*. at ¶ 17. Finally, Peg and David made several changes to secure some personal privacy from their renters, including installing a locked pantry, a private refrigerator, and modifying the master closet by erecting a wall secured by a locked door. *Id*. at ¶18. By the time the renovations were complete—roughly eight months later—the cost of materials and labor exceeded $75,000. *Id*. at ¶ 19.

Peg and David completed their renovations in February 2019. *Id*. By February 7, 2019, Peg and David had listed the Townhouse on VRBO, and within days they secured their first booking. *Id*. at ¶ 21. Peg and David then welcomed their first guests in the Townhouse on March 18, 2019. *Id*. And in July 2019, Peg and David entered into an annual membership agreement with VRBO. *Id*. at ¶ 22.

For the entire time that Peg and David have offered their property as a vacation rental, they have always done so responsibly. For example, Peg and David only rent to mature adults

over age 25, they do not allow more than four guests in the Townhouse, they do not allow pets, and they have secured the consent of each of their neighbors. *Id*. at ¶¶ 23–24. In addition, Peg and David obey all state and local laws, and they maintain compliance with the Lion's Gate HOA restrictions. As a result, they have never had any violations at the Townhouse. *Id*. at ¶ 24.

B. DESPITE A PREEMPTIVE STATE STATUTE, THE CITY PASSES AN ORDINANCE REQUIRING A PERMIT FOR ALL VACATION RENTALS IN WILMINGTON.

In 2016, more than two years before Peg and David purchased the Townhouse, the North Carolina General Assembly passed a law prohibiting cities and localities from requiring a permit or registration for any rental properties. N.C. Gen. Stat. § 160A-424(c)(i) ("In no event may a city . . . adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission from the city to lease or rent residential real property or to register rental property with the city."). The General Assembly subsequently clarified that statute as applying to vacation rentals, expressly providing that "[t]he provisions of G.S. 160A-424 . . . shall apply to properties covered under this Chapter [Vacation Rentals]."[2]

As far as Peg and David understood it, this statutory language made clear that Wilmington could not establish a registration or permitting requirement for vacation rentals. *See* Schroeder Affs. ¶ 10. Nevertheless, in June 2018, the City passed the first of two ordinances regulating "Whole-house lodging."[3] The first ordinance required vacation rentals to register annually with the City, but it did not limit the number of vacation rentals in the City or limit who

[2] As discussed in greater detail in Section IV.A. below, the statute has undergone additional amendments since its initial passage in 2017. As that section makes clear, however, those changes are not substantive. The City's ordinance was preempted by state law at the time of its passage and that is still the case today.

[3] Most vacation rentals, including Peg and David's, fit within the City's definition for a "whole-house lodging." *See* Wilmington City Code § 18-812 (defining a "Whole-house lodging" as "[a] business engaged in the rental of an entire dwelling unit that provides lodging for pay, for a maximum continuous period of twenty-nine (29) days and does not include the serving of food.").

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

The second ordinance went into effect on March 1, 2019, nearly a year after Peg and David purchased the Townhouse and several weeks after they began offering it for rent. Schroeder Affs. ¶¶ 12, 27, 31. Using a process the City describes as amortization,[4] anyone who did not obtain a permit would be forced to cease use of their property as a vacation rental within one year. City Code § 18-331(q). To determine who could continue offering vacation rentals and who would have to cease their use, the City devised a lottery system. Wilmington Code § 18-331(d)(8). Under the lottery, each applicant was assigned a random number and every applicant's property was placed on a map. City of Wilmington, *Wilmington Lottery and Separation.mp4*, (April 15, 2019), https://drive.google.com/file/d/1AYy-8lQ6bOrv9p1zc6Yq4NhIMBYMxmC1/view; *see also* Schroeder Affs. ¶¶ 34, 40. If two properties were within 400 feet of one another, the "winning" owner would retain their right to rent, while their neighbor's use would be amortized. *Id*. This is what happened to Peg and David—a neighbor in Lion's Gate drew a higher-priority number, and thus Peg and David were

[4] Peg and David have separately challenged the constitutionality of the City's use of amortization in this case. Those claims were raised in Peg and David's Complaint under their Law of the Land claims. This Court dismissed that claim on February 17, 2020, and subsequently denied Peg and David's attempt to amend the complaint to include additional allegations related to amortization and vested rights on September 3, 2020. Accordingly, Peg and David do not provide extensive argument regarding amortization in this brief, but preserve this issue for appeal.

stripped of their right to offer their property as a vacation rental. Schroeder Affs. ¶¶ 41–43.[5] As a result, Peg and David were given until April 22, 2020 to cease their use. *Id*. at ¶ 49. And it is unclear—because the City has refused to clarify—whether Peg and David might be able to seek a permit later on. Schroeder Affs. ¶ 47.

C. PEG AND DAVID MUST STOP OFFERING THE TOWNHOUSE AS A VACATION RENTAL AFTER LOSING THE LOTTERY.

Peg and David were initially unaware of the new ordinance. Schroeder Affs. ¶ 29. So for a brief period of time, they still offered the townhouse as a vacation rental—without incident or complaint. However, after becoming aware of the ordinance and then losing the lottery, Peg and David lost the ability to do what they had been doing legally and peacefully before. *Id*. at ¶¶ 30–31, 43–46.

Peg and David were able to continue renting for the duration of their one-year amortization period, *id*. at ¶ 49, and they will be able to do so for the remainder of this litigation. Without the long-term ability to offer the property as a vacation rental, however, Peg and David will most likely be forced to sell the Townhouse. *Id*. at ¶¶ 44–46. As a result, Peg and David are at risk of substantial financial harm, as they incurred great expense and exerted considerable effort to renovate their property to make it suitable for use as vacation rental. *Id*. at ¶¶ 19, 43–46.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "no genuine issue of material fact exists and [when] the movant is entitled to judgment as a matter of law." *Evans v. Cowan*, 132 N.C. App. 1,

[5] It is unclear whether Peg and David lost their right to rent because the City treated Lion's Gate as a single property wherein only one property owner would be eligible for a permit (which is incorrect) or because the owner within Lion's Gate with a higher-priority number was within 400 feet of Peg and David's unit. *See* Schroeder Affs. ¶¶ 41–42. It ultimately does not matter: Peg and David lost the right to rent their property because someone else in Lion's Gate won the right to rent theirs.

5, 510 S.E.2d 170, 173 (1999). To obtain summary judgment, "[t]he burden is on the movant to show: (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim." *Id*. (citing *Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995)). Further, "[i]n assessing whether this burden is met, all inferences are to be viewed in the light most favorable to the non-movant." *Id*. (citing *Crow v. Citicorp Acceptance Co*., 319 N.C. 274, 281, 354 S.E.2d 459, 464 (1987)). As the following discussion shows, because the City cannot meet its burden here, summary judgment is not appropriate.

IV. ARGUMENT

A. THE CITY'S ORDINANCE VIOLATES STATE LAW, WHICH MAKES CLEAR THAT CITIES CANNOT REQUIRE RENTAL PERMITS.

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." *Application of 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, the City of Wilmington has enacted an ordinance that prohibits Peg and David from renting unless they obtain a permit from the City and register their property to rent. City Code § 18-331. But North Carolina law expressly forbids cities from requiring an owner of rental

property to register or obtain city permission to rent. Preemption is clear both from the plain text of the statute, *see infra* pp. 9–12, and from the legislative history, which shows a clear legislative intent to broadly bar cities from adopting rental permit and registration schemes, *see infra* pp. 12–14. That straightforward analysis is in no way subverted by recent, non-substantive changes recodifying the relevant laws. *See infra* pp. 14–16. And, even imagining the statute were in any way ambiguous (and it is not), the statute would have to be construed in favor of the free use of property. *See infra* pp. 16–18. The City's ordinance is, accordingly, preempted.

1. State Law Unambiguously Bars Cities From Requiring Owners Of Vacation Rental Properties To Obtain Rental Permits.

The relevant statutory language is clear: "In no event may a city . . . adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission from the city to lease or rent residential real property or to register rental property with the city," other than in situations where a property presents a pattern of code violations or crime problems not at issue here. N.C. Gen Stat. § 160A-424(c) (recodified, effective August 1, 2021, at N.C. Gen. Stat. § 160D-12-7(c)). In The Vacation Rental Act (Chapter 42A), the General Assembly expressly stated that this provision applies to vacation rental properties. *Id.* § 42A-3.

The City's ordinance is directly contrary to this statute. State law provides that cities cannot require 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). Moreover, state law also provides that cities cannot require owners of vacation rental properties to "register rental property with the city." 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 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." City Code § 18-331(d). In other words, state law provides that cities cannot require a permit to operate a vacation rental and, in fact, cannot even subject owners to a registration requirement; the City's ordinance is unlawful because it *both* requires property owners to register and makes the City's permission a condition of registration.

The City's narrower reading of the statute cannot be squared with the text. In its earlier Motion to Dismiss, the City argued that Section 160A-424(c)'s registration and permitting proscriptions "only appl[y] in the context of building inspections." Brief in Support of Defendants' Motion to Dismiss ("Defs' MTD") at 8–9. But nothing in the text of Section 160A-424(c) suggests that it is subject to any such limitation. 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," with two exceptions not relevant here. 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 requirement at issue here.

The City responds that *other* provisions of Section 160A-424 not at issue in this case pertain to building inspections. *See* Defs' MTD at 7. But that is not a reason to limit the specific provision at issue in this case. Moreover, while it is true that *some* provisions of Section 160A-424 pertain to building inspections, several other provisions also sweep 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"). These provisions also have little or nothing to do with rental inspections, yet all are located within Section 160A-424. Taken together, the provisions of Section 160A-424 deal broadly with the rights of owners of residential rental properties. The General Assembly's decision to locate the specific provision at issue here within Section 160A-424 was not at all anomalous, and the provision's location does not provide a reason to disregard its plain text.

The City also argues that Section 160A-424(c) cannot preempt its zoning ordinance because the statute does not mention zoning. *See* Defs' MTD at 8–9. But 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 Cty. Zoning Bd. of Adjustment*, 186 N.C. App. 44, 53, 650 S.E.2d 37, 43 (2007) (same).[6] Section 160A-424(c) bars cities from enacting any ordinance requiring a permit—or even registration—prior to operating a vacation rental. It makes no difference under Section 160A-424(c) whether

[6] Cases cited by the City are easily distinguished because the zoning ordinances at issue in those cases did not actually conflict with state law. *See* Defs. MTD at 8. Under Section 160A-424(c) the City remains free to adopt a variety of health-and-safety-based zoning restrictions for vacation rentals. But, under the plain terms of Section 160A-424(c), the City cannot require a permit or registration as a condition of operating a rental property of any kind.

the City characterizes its permit requirement as a zoning ordinance or as any other type of regulation. However characterized, the City's permitting requirement is unlawful and preempted.

2. The Legislative History Confirms That The General Assembly Intended To Prohibit Cities From Requiring Rental Permits For Vacation Rentals.

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. 683 (June 8, 2011).[7] This history nowhere suggests that the bar on permit requirements 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

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

Operations Committee, Summary for S.B. 326 (June 29, 2016).[8] 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).[9] Again, this history nowhere suggests that the ban on permits or registration requirements was limited to requirements associated with inspections; to the contrary, these changes were made in response to a general registration requirement that had nothing at all to do with building inspections. *See also* Ely Portillo, *N.C. Lawmakers to Charlotte: You Can't Make All Landlords Register With City*, Charlotte Observer (July 10, 2016).[10]

Finally, in 2019, the General Assembly amended Section 42A-3 to clarify that the ban on rental permits 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." General Assembly, Legislative Staff Analysis of S.B. 483 (June 24, 2019).[11] 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

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

[9] 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., Rental Dwelling Registration: Eliminated per NC General Assembly Senate Bill 326*, Raleigh (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.").

[10] Available at https://www.charlotteobserver.com/news/business/biz-columns-blogs/development/article88318857.html.

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

situations involving code or crime violations. *Id.* Again, this legislative history nowhere suggests the General Assembly intended for these provisions to somehow be limited to permitting and registration requirements associated with building inspection.[12]

The legislative history does not remotely support the cramped statutory interpretation advanced by the City in this litigation. The General Assembly nowhere indicated that it understood the relevant provisions as somehow limited to building inspections; to the contrary, 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.

3. The Recodification Cited By The City Does Not Defeat The Clear Statutory Language.

Since its Motion to Dismiss was denied, the City has suggested that this straightforward application of Section 160A-424(c) is somehow called into question by the enactment of Session

[12] 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), https://www.carolinajournal.com/news-article/raleighs-ban-on-short-term-rentals-could-violate-state-law/. While the City cites an article by two academics advocating for a possible alternative interpretation, *see* Defs' MTD at Ex. B, that idiosyncratic position is contrary to both the legislative history and the statutory text. In any case, the position advocated in that article seems to address only express—and not implied—preemption.

Law 2019-111 in July 2019. But that statute has nothing to do with the question at issue here and has no impact on the preemption analysis set out above.

At the outset, Session Law 2019-111 can have no possible impact on this case, as the General Assembly recently postponed that law's effective date until August 1, 2021. *See* Session Law 2020-3, S.B. 704, at 65.[13] The City cannot invoke a change to the law that is not yet effective.

More fundamentally, Session Law 2019-111 merely moves Section 160A-424(c) within the General Statutes and makes no substantive change. Session Law 2019-111 repeals Article 19 of Chapter 160A of the General Statutes in its entirety, including Section 160A-424(c). *See* Session Law 2019-111, at 17. But then Session Law 2019-111 enacts a new Section 160D-12-7(c), which includes language mirroring the language currently found at Section 160A-424(c). *See id.* at 106-07. Session Law 2019-111 explicitly states that this 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." *Id.* at 16 (Section 2.1(f)). Rather, the sole purpose for this change is to "collect and organize existing statutes regarding local planning and development into a single Chapter of the General Statutes." *Id.* (Section 2.1(e)). The General Assembly's reorganization of the General Statutes is not a substantive change and does not alter the preemption analysis set forth above.

While the General Assembly did tweak the language of Section 160A-424(c) as part of that recodification, those changes are consistent with the foregoing. The primary change made to the relevant language was to modify the word "permission" with "under Article 11 or 12 of this Chapter." *See* Session Law 2019-111 at 107. So modified, the provision reads:

[13] Available at https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf.

> 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 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.

Id. The statute's reference to "permission under Article 11 or 12 of this Chapter" underscores that cities cannot use their authority under Article 11 and 12—which govern building and housing codes—to restrict who can operate residential and vacation rentals. But that change does not otherwise limit the statute's bar on rental permits. And the words "under Article 11 or 12 of this Chapter" certainly do not restrict the statute's bar on registration requirements, which, after all, follows in an entirely separate clause. This amended language, as before, prohibits *all* permitting and registration requirements.[14]

4. Any Possible Ambiguity In The Statute—And There Is None—Must Be Construed In Favor Of Individual Property Owners.

As explained above, the ordinance's conflict with state law is clear. Section 160A-424(c) just means what it says—cities cannot impose permitting or registration requirements as a precondition on owners' ability to rent their property. But the City has done just that, claiming that these state law prohibitions on permitting and registration limit only the City's inspection power, not its zoning power. Wilmington's zoning ordinance is clearly in conflict with state law, contrary to the plain text and legislative intent of Section 160A-424(c).

[14] Even if this Court is inclined to accept the City's argument here—that the not-yet-effective iteration of the statute will resolve the preemption question in favor of the City once it takes effect in 2021—it still does not follow that the ordinance is not preempted *right now*. This is important as a practical matter: It would mean that the ordinance should be struck down as preempted under state law, and then, when the new statute takes effect in 2021, the City will have to re-pass the ordinance. Given its unpopularity, that might never happen. And even if it did, Peg and David would have another opportunity to enter the lottery—an impossibility for them now. *See* City of Wilmington Planning and Development, *Frequently Asked Questions,* https://www.wilmingtonnc.gov/departments/planning-development-and-transportation/short-term-lodging ("There is no lottery process moving forward.")

But to the extent there is any ambiguity in the ordinance's validity, that ambiguity should be resolved in favor of Peg and David's 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 Cty. 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. Carolina Dep't of Nat. Res. & Cmty. Dev., Coastal Res. Com'n Div.*, 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 favor of Peg and David.

Although Section 160A-424(c) is clear and preempts the City's ordinance, to the extent the City is claiming that the recodification clarifies that its ordinance is not preempted, they admit an ambiguity that should be resolved in favor of the free use of Peg and David's property. At the Motion to Dismiss hearing, the City explained that the legislative recodification of land use law created a new Chapter 160D that includes Article 7 (Zoning), Article 11 (Building Code Enforcement), and Article 12 (Minimum Housing Code). Section 160A-424(c), under current law, is moved into Article 12 under the recodification and is identical except the text was edited to modify the word "permission" with the phrase "under Article 11 or Article 12 of this Chapter." The City argued that this "made explicit what was at least implicit." Transcript of Motions Hearing Oral Argument ("Hearing Transcript") at 14, *Schroeder, et al. v. City of Wilmington, et al.*, Case No. 19-cv-4028 (Feb. 6, 2020). But if the City's position was implicit

(ambiguous) before the recodification, that ambiguity is resolved in favor of Peg and David. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 157, 162, 712 S.E.2d 868, 871, 874 (2011) ("This Court has long held that governmental restrictions on the use of land are construed strictly in favor of the free use of real property.").

B. THE STATE'S COMPREHENSIVE REGULATION OF VACATION RENTALS SHOWS THE STATE HAS PREEMPTED THE FIELD.

Even when a municipal ordinance is not in direct conflict with state law, the ordinance can still be indirectly preempted by state law. "The General Assembly can create a regulatory scheme which, though not expressly exclusory, is so complete in covering the field that it is clear any regulation on the county level would be contrary to the statewide regulatory purpose." *Craig v. Cty. of Chatham*, 356 N.C. 40, 46, 565 S.E.2d 172, 176 (2002); *see also* N.C. Gen. Stat. § 160A-174(b)(5) (an ordinance is preempted if "it purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation."). The Court relies on the legislative purpose of state law to determine if an "ordinance purports to regulate a field in which a State statute has provided a complete and integrated regulatory scheme to the exclusion of local regulations." *State v. Williams*, 283 N.C. 550, 553–54, 196 S.E.2d 756, 758–59 (1973).

In this case, the Vacation Rental Act is a "complete and integrated regulatory scheme" that covers the "field" and preempts Wilmington's ordinance. Due to the unique nature of vacation rentals, the General Assembly found it "necessary" to "enact laws regulating the competing interests of landlords, real estate brokers, and tenants." And then the General Assembly later enacted Session Law 2019-73 (S.B. 483) giving municipalities a limited and defined role in regulating vacation rentals.

The Vacation Rental Act comprehensively regulates vacation rentals in North Carolina. The Act covers vacation rental agreements, the handling of funds, evictions, early terminations, landlord and tenant duties, and real-estate broker rights and duties. *See generally* N.C. Gen. Stat. § 42A-1 *et seq.* As such, the Act provides a comprehensive regulatory framework, centered on a statutorily prescribed vacation-rental agreement. N.C. Gen. Stat. §§ 42A-10, 42A-11. Each agreement expressly regulates the "USE [OF] THIS PROPERTY FOR A VACATION RENTAL." *Id.* § 42A-11. As part of that agreement, owners are required to provide a property in "a fit and habitable condition," comply "with all current applicable building and housing codes," make repairs, keep common areas in safe conditions, provide smoke detectors and carbon monoxide alarms, and other duties. *Id.* §§ 42A-17(b), 42A-31, 42A-32, 42A-33.

Session Law 2019-73 (S.B. 483) then expressly applied §§ 160A-424 and 153A-364 to properties covered under the Vacation Rental Act. This gives a limited and delineated role for municipalities to regulate vacation rentals and it expressly forbids them from requiring "any permit or permission from the county to lease or rent residential real property or to register rental property with the county" unless a property has certain criminal or code violations. N.C. Gen. Stat. § 160A-424. This fits into the Vacation Rental Act requirement that all vacation-rental properties must "[c]omply with all current applicable building and housing codes to the extent required by the operation of the codes." *Id.* § 42A-31. Thus, when it comes to how municipalities may specifically regulate vacation rentals, they are only permitted to do so within the context of their own housing and building codes. This is an unremarkable position. Indeed, municipal enforcement authority regarding "properties covered by the Vacation Rental Act" is limited to "performing periodic inspections for hazardous and unlawful conditions" and the like. *See* House Rules, Calendar, and Operations of the House, Summary for S.B. 483: Vacation Rental Act

Changes (June 24, 2019).[15] The Vacation Rental Act thus addresses local inspection power as it relates to "hazardous and unlawful conditions" because, as a plain reading of the Act makes clear, that is the extent to which municipalities may specifically regulate vacation rentals.

But the City sees it another way. The City's position, rather, is that because the Vacation Rental Act spells out the scope of its local inspection power, the Act must have left it with a free hand to regulate zoning. *See* Defs' MTD at 7–9. Of course, the City concedes that the Vacation Rental Act prohibits municipalities from requiring registration or permission to rent under its inspection power unless a property has certain minimum criminal or code violations. But the City contends that it can require this exact same registration requirement without meeting the requirements of criminal or code violations, if it does so through zoning. *See* Hearing Transcript at 10-11 (Feb. 6, 2020) ("So we submit the statute is saying that you cannot have a regulatory scheme for inspecting property for code violations and criminal activity that requires registration unless you meet the conditions that allow you to require registration. Again, nothing about zoning. Our contention is the statute does not in any way implicate or affect Wilmington's authority to zone.").

This is an odd contention. In effect, the City is arguing that the General Assembly limited their power to require permission or registration to rent to enforce code violations and criminal activity, but left the City unlimited power to require permission to rent if cities wish to police lawful, noncriminal, code-compliant property uses. The City is contending that the General Assembly limited its ability to regulate bad behavior but left them unlimited power to regulate good behavior. More likely, the Vacation Rental Act preempts the field of vacation rentals by restricting the City's power to require permission or registration to rent to enforce code

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

violations and criminal activity *only*. Under this plain reading, the City may not require a permit or registration under any other circumstance. And because the City's ordinance plainly purports to do just that, it is preempted.

C. PEG AND DAVID UNQUESTIONABLY HAVE STANDING TO RAISE THEIR CLAIM.

The City's Motion for Summary Judgment also suggests that the City intends to argue that the Schroders somehow lack standing to challenge its ordinance. That argument fails: Wilmington took Peg and David's right to rent (injury) through a City ordinance (causation) that this Court should declare preempted by state law (redressability). This undoubtedly gives rise to standing.

Although North Carolina courts are not bound by the federal "case or controversy" requirement, they have adopted a constitutional minimum for standing. This requires Plaintiffs to show "(1) injury in fact—an invasion of a legally protected interest . . . (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely . . . that the injury will be redressed by a favorable decision." *Teague v. Bayer AG*, 195 N.C. App. 18, 22, 671 S.E. 2d 550, 554 (2009) (cleaned up); *Northfield Dev. Co.*, *Inc. v. City of Burlington*, 136 N.C. App. 272, 279, 523 S.E. 2d 743, 748 (2000) (explaining a party has standing to contest a zoning ordinance when he has a legal interest "directly and adversely affected" by the ordinance).

First, Peg and David suffered an injury in fact because the City's ordinance requiring a permit to rent takes away their right to use their property for vacation rentals. They purchased, made substantial investments, and began listing their Townhouse as a vacation rental, while it was legal to do so. Schroeder Affs. at ¶¶ 6–27. Then, the City enacted an ordinance that made it illegal to rent unless Peg and David obtained a permit, taking away a right they already had. City

Code § 18-331. And the ordinance works a further injury in that it also stripped Peg and David of a future right to rent, something that they planned to do for as long as they owned the Townhouse.

Second, the City caused this injury by requiring a permit and registration for vacation renting. When the City denied Peg and David a permit, they lost their right to rent. Schroeder Affs. at ¶¶ 31–46. Moreover, Peg and David later sought a permit to rent again, and a City official informed them that it was not possible. Indeed, only if a current permit holder gave up their permit, Peg and David were told, they "may" have a chance to get one. *Id.* at ¶ 47. Without this permit, Peg and David cannot use their Townhouse for vacation rentals.

Third, this injury is redressable because this Court can and should declare that the City's registration and permit-to-rent ordinance is preempted by state law. North Carolina law expressly says cities cannot require a permit to rent. N.C. Gen. Stat. § 160A-424(c); Session Law 2019-73 (S.B. 483). As explained above, § 160A-424(c) preempts the City's ordinance requiring a permit to rent. And if this Court agrees and declares the City's ordinance preempted, then Peg and David can lawfully use their property for vacation rentals. Therefore, Peg and David have standing to challenge Wilmington's ordinance.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Court should deny the City's Motion for Summary Judgment.

Dated this 10th day of September 2020.

Respectfully submitted,

W. Gray Smith
MASON & MASON, ATTORNEYS AT LAW
514 Princess Street

Ari Bargil (FL Bar No. 71454)*
INSTITUTE FOR JUSTICE
2 South Biscayne Blvd., Suite 3180

Wilmington, NC 28401
Tel: (910) 763-8106
Email: gray@masonmasonlaw.com

Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601
Email: abargil@ij.org

*Admitted *pro hac vice*

Adam Griffin (NC Bar No. 55075)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: agriffin@ij.org

Counsel for Plaintiffs

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF
JUSTICE SUPERIOR DIVISION
FILE NO. 19-CVS-4028

DAVID SCHROEDER and
PEGGY SCHROEDER

Plaintiffs,

v.

CITY OF WILMINGTON and
CITY OF WILMINGTON
BOARD OF ADJUSTMENT,

Defendants.

AFFIDAVIT OF PEGGY SCHROEDER

I, Peggy "Peg" Schroeder, being of majority age and competent mind, declare under penalty of perjury that the following is true and correct:

1. I am a citizen of the United States and a resident of the State of North Carolina. I make this Affidavit based on my personal knowledge, unless otherwise stated knowledge, and, if called as a witness in this matter, I could and would testify to the matters stated herein.

2. The undersigned Affiant, having been duly sworn or affirmed, deposes and states that Affiant is competent to give the testimony below.

3. I am married to David Schroeder.

4. David and I lived in Wilmington, North Carolina, for over 30 years.

5. Upon retiring to the North Carolina mountains, we purchased a townhouse in Wilmington as a place to stay connected to friends and family in the Wilmington area, which is where we had spent most of our working lives.

6. We raised our children in the Wilmington community, and that is where the bulk of our social and familial connections remain. We thought a townhouse would be a perfect gathering place for our friends and family whenever David and I traveled to Wilmington to see everyone.

7. We planned to rent out the townhouse when we were not using it because we need the rental income to afford the townhouse.

8. Therefore, the ability to rent on a short-term basis was a major factor in our decision to buy a townhouse, and it impacted where we decided to buy our townhouse.

9. Before purchasing a townhouse, we researched the Lion's Gate Community in Wilmington.

10. David and I consulted our realtor and a lawyer, and determined that vacation rentals for less than 29 days ("vacation rentals") were legal under state, local, and HOA rules and regulations in the Lion's Gate community where we planned to buy.

11. We expressly purchased the property in Lion's Gate because vacation rentals were allowed, and we knew of neighbors who already engaged in vacation rentals.

12. On June 6, 2018, we purchased a townhouse located at 1800 Eastwood Road, Unit #130, Wilmington, North Carolina, 28403 (our "Townhouse") in the Lion's Gate Community.

13. We purchased our Townhouse for $257,000.

14. We sold two other rental properties that we owned to afford to purchase our Townhouse.

15. Soon after purchasing, we began renovating our Townhouse to make it suitable for vacation rentals.

16. We hired contractors to do renovations including minor plumbing, electrical work, installation of a gas line, flooring, and other general repairs.

17. We also did much of the improvements ourselves or with the help of our son, including reflooring a bathroom and bedroom, doing drywall repairs, installing kitchen cabinets, stocking supplies, and painting.

18. We also made specific renovations to maintain some privacy from our renters, including modifying the main bedroom's closet by building a wall with a locked door to section off an owner's closet, putting a locked handle on a pantry in the kitchen, buying a mini fridge, and installing shelving for our own separate provisions in the locked pantry.

19. Between June 2018 and February 2019, we spent over $75,000 renovating our Townhouse to make it suitable for both our use and for use as a vacation rental.

20. Following renovations, in early 2019, we began offering vacation rentals of our Townhouse.

21. On February 7, 2019, we first listed our Townhouse for vacation renting on HomeAway (a vacation rental marketplace now rebranded as Vacation Rentals by Owner ("VRBO")), our first booking was on February 12, and our first renter arrived on March 18.

22. In July 2019, we began an annual membership with VRBO to continue listing our Townhouse as a vacation rental through the VRBO website. And we still maintain our membership with VRBO today.

23. We have always operated our vacation-rental business in a very professional manner and have received no complaints from either neighbors or local officials about the individuals to whom we have rented.

24. We maintain our property in the best possible condition out of respect for our community and neighbors. We do not allow pets, we rent only to mature adults (at least 25-years old), we limit rentals to four people, we have obtained our neighbors' consent, and we comply with all state laws, city ordinances, and HOA rules and guidelines. As a result, we have never had any verified violations at our Townhouse.

25. At the time we purchased our Townhouse, and still today, cities in North Carolina cannot require a permit to rent.

26. We purchased our Townhouse to engage in vacation rentals in reliance on state law that says the City of Wilmington cannot require a permit to rent.

27. Then, on February 5, 2019, the City amended its Code of Ordinances to regulate whole-house vacation rentals and to require a permit to engage in vacation rentals.

28. This ordinance, which I understand is now City Code § 18-331, capped the number of vacation-rental properties in Wilmington, imposed 400-foot buffers between vacation-rental properties, and created a lottery system to determine which properties would be permitted to offer vacation rentals.

29. We were unaware that the city council was considering the ordinance until after it passed.

30. The ordinance passed after we had already completed the renovations of our Townhouse and were making plans to offer it as a vacation rental.

31. The new ordinance took effect on March 1, 2019. Thus, the ordinance went into effect after our first guests had booked our Townhouse.

32. Among other things, the new ordinance required us to register with the City and get a permit to rent.

33. The number of permits the City will issue is capped at 2% of residentially-owned properties. Additionally, the ordinance says properties engaged in vacation rentals must be at least 400 feet apart.

34. The ordinance used a lottery system to determine who would be awarded permits.

35. As a result of these requirements, property owners who were already exercising their right to legally offer vacation rentals could lose their right to do so.

36. The City conducted its lottery on April 15, 2019.

37. We registered for a permit and were placed in the lottery by the City.

38. To our knowledge, we satisfy all the criteria for eligibility for a permit.

39. As I later learned, the City had a live-stream video of the lottery as it was being conducted in real time.

40. As I also later learned, the lottery system assigned random numbers to all applicants and then mapped those applicant properties on a City of Wilmington map. Each property was displayed on the map with a 400-foot buffer around it. When two properties were within 400 feet of each other, their property numbers were drawn, and the lowest number won the right to rent.

41. As a representative from the City has told us, the City deems all of the Lions Gate community to be "one property," and thus the City will only issue a permit to one unit within Lions Gate, regardless of another unit's distance from the one permitted property.

42. It is my understanding that there were at least two other properties within 400 feet of our Townhouse entered into the lottery.

43. We lost the lottery and with it our right to use our Townhouse for vacation rentals.

44. Because we lost the lottery, we cannot use our Townhouse in the manner we had intended when we purchased it prior to the enactment of the specific ordinance at issue here.

45. Because we lost the lottery, we cannot use our Townhouse for vacation rentals after making substantial renovations to accommodate vacation rentals prior to the enactment of the specific ordinance at issue here.

46. Without the right to use our Townhouse for vacation rentals, we will not be able to afford to keep our Townhouse as a home for our family and will most likely have to sell our Townhouse.

47. The City informed us that the lottery is a one-time event and if a current permit holder gives up their right to rent then another permit "may" open up.

48. Had the ordinance been in effect when we were shopping for a property, we would not have bought within 400 feet of another vacation-rental property. In fact, we detrimentally relied on the previous legal regime by buying a townhouse in the same area as someone else who was offering vacation rentals because, at the time, that demonstrated that the neighborhood allowed vacation rentals. Because the ordinance was not in effect at that time, and we were not aware that the City had plans to strip certain property owners of their right to rent, we felt comfortable purchasing our Townhouse.

49. After we lost the lottery, the City informed us that we could "continue to operate as an amortized registration until April 22, 2020."

50. Just over two months after the City's lottery, on July 1, 2019, the North Carolina General Assembly enacted Session Law 2019-73 (S.B. 483)

clarifying that the no-permit-to-rent provision in state law applied specifically to vacation rentals. This law is still in effect today.

51. Then, on July 11, 2019, the North Carolina General Assembly recodified the statutes pertaining to land use law, moving the no-permit-to-rent provision from § 160A-424(c) to § 160D-12-7(c).

52. As I understand it, the recodification does not take effect until August 1, 2021.

53. As I understand it, the recodification does not affect our claim that the City is prohibited from requiring a permit to rent our Townhouse.

54. Nevertheless, as I understand it, the City believes it has the authority to deprive us of our constitutionally-protected vested right to use our Townhouse as a vacation rental.

55. Following our loss in the lottery and the enactment of these legislative changes, we appealed to the Wilmington Board of Adjustments ("BOA"), which held a hearing on August 15, 2019.

56. The BOA upheld the decision of the City staff to deny issuance of a permit to us.

57. We filed this lawsuit on October 25, 2019, to vindicate our rights under the North Carolina Constitution and state law.

FURTHER AFFIANT SAYETH NOT.

Executed on September 8, 2020.

Peg Schroeder

Sworn to or affirmed before me and subscribed in my presence the 8 day of September, 2020, in the state of North Carolina and county of Avery.

Amanda L. Hicks

Notary Public in and for the
State of North Carolina

My commission expires: August 9, 2025

AMANDA HICKS NOTARY EXPIRES ON AUG. 9, 2025 PUBLIC AVERY, NC

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF
JUSTICE SUPERIOR DIVISION
FILE NO. 19-CVS-4028

DAVID SCHROEDER and
PEGGY SCHROEDER

Plaintiffs,

v.

CITY OF WILMINGTON and
CITY OF WILMINGTON
BOARD OF ADJUSTMENT,

Defendants.

AFFIDAVIT OF DAVID SCHROEDER

I, David Schroeder, being of majority age and competent mind, declare under penalty of perjury that the following is true and correct:

1. I am a citizen of the United States and a resident of the State of North Carolina. I make this Affidavit based on my personal knowledge, unless otherwise stated, and, if called as a witness in this matter, I could and would testify to the matters stated herein.

2. The undersigned Affiant, having been duly sworn or affirmed, deposes and states that Affiant is competent to give the testimony below.

3. I am married to Peggy "Peg" Schroeder.

4. Peg and I lived in Wilmington, North Carolina, for over 30 years.

5. Upon retiring to the North Carolina mountains, we purchased a townhouse in Wilmington as a place to stay connected to friends and family in the Wilmington area, which is where we had spent most of our working lives.

6. We raised our children in the Wilmington community, and that is where the bulk of our social and familial connections remain. We thought a townhouse would be a perfect gathering place for everyone whenever Peg and I traveled to Wilmington to see friends and family.

7. We planned to rent out the townhouse when we were not using it.

8. We needed the rental income to afford the townhouse and the ability to rent on a short-term basis was a major factor in our decision to buy a townhouse and it impacted what and where we decided to buy.

9. Before purchasing a townhouse, we researched the Lion's Gate Community in Wilmington.

10. Peg and I consulted our realtor and a lawyer, and determined that vacation rentals for less than 29 days ("vacation rentals") were legal under state, local, and HOA rules and regulations in the Lion's Gate community where we planned to buy.

11. We specifically purchased the property in Lion's Gate because vacation rentals were allowed, and we knew of neighbors who already engaged in vacation rentals.

12. On June 6, 2018, we purchased a townhouse located at 1800 Eastwood Road, Unit #130, Wilmington, North Carolina, 28403 (our "Townhouse") in the Lion's Gate Community.

13. We purchased our Townhouse for $257,000.

14. We sold two other rental properties that we owned to afford to buy our Townhouse.

15. Soon after purchasing, we began renovating our Townhouse to make it suitable for vacation rentals.

16. We hired contractors to do renovations including minor plumbing, electrical work, installation of a gas line, flooring, and other general repairs.

17. We also did much of the improvements ourselves or with the help of our son, including reflooring a bathroom and bedroom, doing drywall repairs, installing kitchen cabinets, stocking supplies, and painting.

18. We also made specific renovations to maintain some privacy from our renters, including modifying the main bedroom's closet by building a wall with a locked door to section off an owner's closet, putting a locked handle on a pantry in the kitchen, buying a mini fridge, and installing shelving for our own separate provisions in the locked pantry.

19. Between June 2018 and February 2019, we spent over $75,000 renovating our Townhouse to make it suitable for both our use and for use as a vacation rental.

20. Following renovations, in early 2019, we began offering vacation rentals of our Townhouse.

21. On February 7, 2019, we first listed our Townhouse for vacation renting on HomeAway (a vacation rental marketplace now rebranded as Vacation Rentals by Owner ("VRBO")); our first booking was on February 12; and our first renter arrived on March 18.

22. In July 2019, we began an annual membership with VRBO to continue listing our Townhouse as a vacation rental through the VRBO website. And we still maintain our membership with VRBO.

23. We have always operated our vacation-rental business in a very professional manner and have received no complaints from either neighbors or local officials about the individuals to whom we have rented.

24. We maintain our property in the best possible condition out of respect for our community and neighbors. We do not allow pets, we rent only to mature adults (at least 25-years old), we limit rentals to four people, we have obtained our neighbors' consent, and we comply with all state laws, city ordinances, and HOA rules and guidelines. As a result, we have never had any verified violations at our Townhouse.

25. At the time we purchased our Townhouse, and still today, cities cannot require a permit to rent.

26. We purchased our Townhouse to engage in vacation rentals in reliance on state law that says the City of Wilmington cannot require a permit to rent.

27. Then on February 5, 2019, the City amended its Code of Ordinances to regulate whole-house vacation rentals and to require a permit to engage in vacation rentals.

28. This ordinance, which I understand is now City Code § 18-331, capped the number of vacation-rental properties in Wilmington, imposed 400-foot buffers between vacation-rental properties, and created a lottery system to determine which properties would be permitted to offer vacation rentals.

29. We were unaware that the city council was considering the ordinance until after it passed.

30. The ordinance passed after we had already completed the renovations on our Townhouse and were making plans to offer it as a vacation rental.

31. The new ordinance took effect on March 1, 2019. Thus, the ordinance went into effect after our first guests had booked our Townhouse.

32. Among other things, the new ordinance required us to register with the City and get a permit to rent.

33. The number of permits the City will issue is capped at 2% of residentially-owned properties. Additionally, the ordinance says properties engaged in vacation rentals must be at least 400 feet apart.

34. The ordinance used a lottery system to determine who would be awarded permits.

35. As a result of these requirements, property owners who were already exercising their right to legally offer vacation rentals could lose their right to do so.

36. The City conducted its lottery on April 15, 2019.

37. We registered for a permit and were placed in the lottery by the City.

38. To our knowledge, we satisfy all the criteria for eligibility for a permit.

39. As I later learned, the City had a live-stream video of the lottery as it was being conducted in real time.

40. As I also later learned, the lottery system assigned random numbers to all applicants and then mapped those applicant properties on a City of Wilmington map. Each property was displayed on the map with a 400-foot buffer around it. When two properties were within 400 feet of each other, their property numbers were drawn, and the lowest number won the right to rent.

41. As a representative from the City has told us, the City deems all of the Lions Gate community to be "one property," and thus the City will only issue a permit to one unit within Lions Gate, regardless of another unit's distance from the one permitted property.

42. It is my understanding that there were at least two other properties within 400 feet of our Townhouse entered into the lottery.

43. We lost the lottery and with it our right to use our Townhouse for vacation rentals.

44. Because we lost the lottery, we cannot use our Townhouse in the manner we had intended when we purchased it prior to the enactment of the specific ordinance at issue here.

45. Because we lost the lottery, we cannot use our Townhouse for vacation rentals after making substantial renovations to accommodate vacation rentals prior to the enactment of the specific ordinance at issue here.

46. Without the right to use our Townhouse for vacation rentals, we will not be able to afford to keep our Townhouse as a home for our family and will most likely have to sell our Townhouse.

47. The City informed us that the lottery is a one-time event and if a current permit holder gives up their right to rent then another permit "may" open up.

48. Had the ordinance been in effect when we were shopping for a property, we would not have bought within 400-feet of another vacation-rental property. In fact, we detrimentally relied on the previous legal regime by buying a townhouse in the same area as someone else who was offering vacation rentals because, at the time, that demonstrated that the neighborhood allowed vacation rentals. Because the ordinance was not in effect at that time, and we were not aware that the City had plans to strip certain property owners of their right to rent, we felt comfortable purchasing our Townhouse.

49. After we lost the lottery, the City informed us that we could "continue to operate as an amortized registration until April 22, 2020."

50. Just over two months after the City's lottery, on July 1, 2019, the North Carolina General Assembly enacted Session Law 2019-73 (S.B. 483)

David Schroeder

Sworn to or affirmed before me and subscribed in my presence the 8 day of September, 2020, in the state of North Carolina and county of Avery.

Amanda L Hicks

Notary Public in and for the
State of North Carolina

My commission expires: August 9, 2025

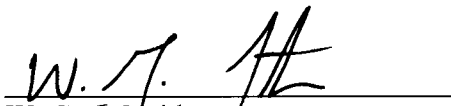
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 10, 2020, a copy of the foregoing was served upon all parties to this matter by Electronic Mail and by placing a copy in the United States Mail, First Class, postage prepaid and addressed as follows:

Robert Hagemann
Cosmo Zinkow
POYNERSPRUILL
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601
Tel: (919) 783-6400
Fax: (919) 783-10751

Meredith Everhart
Deputy City Attorney
CITY OF WILMINGTON
102 North Third Street
P.O. Box 1810
Wilmington, NC 28402-1810

Counsel for Defendants



W. Gray Smith
MASON & MASON, ATTORNEYS AT LAW
514 Princess Street
Wilmington, NC 28401
Tel: (910) 763-8106
Email: gray@masonmasonlaw.com

Local Counsel for Plaintiffs