INSTITUTE FOR JUSTICE

August 10, 2022

Via Electronic Mail
Patrick Taylor
Mayor of the Town of Highlands
210 North Fourth Street
Highlands, NC 28741
mayor@highlandsnc.org

Town of Highlands
Board of Commissioners
210 North Fourth Street
Highlands, NC 28741
piersones@aol.com
marchehn@nctv.com
bstiehler@highlandscountryclub.com
buz@ppoh.com

RE: Highland's Amortization of Short-Term Rental Properties

Dear Mayor Taylor and Town of Highlands Board of Commissioner Members,

It has come to my attention that the town of Highlands is considering reclassifying the town's short-term rental properties as non-conforming uses and ordering their eventual elimination through the use of amortization. I have been contacted by concerned residents and property owners who see this as an affront to their property rights. I am writing to you because I believe they are correct.

The Institute for Justice ("IJ") is the nation's leading law firm for liberty and a nationally recognized advocate for property rights. In addition to successes at the state and federal level, including the United States Supreme Court, IJ also successfully represented Peg and David Schroeder in their challenge to Wilmington's short-term rental amortization scheme.[1] Highlands' proposal shares several similarities with the Wilmington restriction, which, it should be noted at the outset, ***was deemed unlawful under North Carolina law and was struck down as such by the North Carolina Court of Appeals***. Given many of those similarities, the town's proposal is deeply concerning, both practically and legally.

First, practically speaking, forcing property owners to register or permit their properties, submit to a novel and ill-defined "intensity determination" to establish the extent of their permissible use, and then to eliminate that use entirely in a period of two years is problematic to say the least. Most obviously, it offends the settled expectations of property owners, many of whom purchased their property and made improvements—often incurring substantial expense—based on their reasonable belief that their intended use was (and would continue to be) legal.

[1] *Schroeder v. City of Wilmington*, 2022-NCCOA-210, 872 S.E.2d 58 (N.C. App. 2022). A copy of the Court of Appeals' decision is enclosed.

2 S. Biscayne Boulevard, Suite 3180 Miami, FL 33131 (305) 721-1600 (305) 721-1601 Fax
general@ij.org www.ij.org/florida

Next, the town's proposal funnels all of those property owners into a seemingly yet-defined process that will review their *past* use and apply that as a guidepost for defining what they may do in the future. In other words, past conduct will define future legality. And then, in the end, the ordinance would extinguish property owners' preexisting rights without compensation or sincere consideration of the time and expense incurred. All of this is objectively unfair.

From a legal perspective, there are other problems. My understanding is that the town council is under the impression that amortization of non-conforming uses—a controversial land-use tool to say the least—has already been approved by the North Carolina Supreme Court. Given this understanding, I suspect that the town council further expects that it will be successful in a potential legal challenge to the town's use of amortization here. I recommend caution. The North Carolina Supreme Court has addressed amortization only once, nearly 50 years ago. *See State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975). And *Joyner* hardly involved property interests like those at issue here. For one thing, the challenging party in *Joyner* did not even own the land; he was a lessee. Nor did the case involve the elimination of a common, low-intensity use like a residence. To the contrary, *Joyner* dealt with a nonconforming industrial scrap-yard in a business district. That is nothing like what the town is considering here—the elimination of undesirable residential uses within an area ***zoned residential***. And even in *Joyner*, that town gave the property owner more time (three years) than this town is considering here.

Again, *Joyner* was the first and only time the North Carolina Supreme Court addressed amortization. And in the intervening time since *Joyner* was decided, amortization decisions (in the North Carolina *intermediate* court of appeals) have uniformly dealt with the elimination of billboards and signs, not residences. *See Naegele Outdoor Advert., Inc. v. City of Winston-Salem*, 113 N.C. App. 758, 760–61, 440 S.E.2d 842, 843–44 (1994) (billboards); *Summey Outdoor Advert., Inc. v. Cty. of Henderson*, 96 N.C. App. 533, 544, 386 S.E.2d 439, 446 (1989) (outdoor advertising signs); *Goodman Toyota, Inc. v. City of Raleigh*, 63 N.C. App. 660, 664–66, 306 S.E.2d 192, 195 (1983) (billboards); *R. O. Givens, Inc. v. Town of Nags Head*, 58 N.C. App. 697, 702, 294 S.E.2d 388, 391 (1982) (outdoor advertising); *Cumberland County v. E. Fed. Corp.*, 48 N.C. App. 518, 521, 269 S.E.2d 672, 675 (1980) (signs). In other words, amortization has been upheld where it has been used to eliminate typical nuisance-like uses. As in, not homes. This understanding makes sense, given that *Joyner* is itself rooted in North Carolina nuisance jurisprudence. *Joyner*, 286 N.C. at 373, 211 S.E. 2d at 324–25 (relying on *Town of Wake Forest v. Medlin*, 199 N.C. 83, 154 S.E. 29 (1930); *State v. Moye*, 200 N.C. 11, 156 S.E. 130 (1930)).

As I understand it, several members of the town council or planning board have expressed curiosity regarding whether any other localities have attempted to amortize short-term rentals in the manner considered by the town here. I am unsure whether you were given an answer, so I will provide one. Outside of Wilmington's doomed attempt to amortize its short-term rentals through licensing and registration, I am aware of only one fully litigated legal action involving an approach like what the town is contemplating. That case, *Zaatari v. City of Austin*, 615 S.W. 3d 172 (Tex. App. 2019), involved a ***six-year*** amortization of short-term rentals in Austin, Texas. Austin lost. In its decision, the Texas Court of Appeals ruled that Austin's amortization ordinance was an unconstitutional disruption of the property owners' settled expectations—the very same reason the town's proposal is legally problematic here.

2 S. Biscayne Boulevard, Suite 3180 Miami, FL 33131 (305) 721-1600 (305) 721-1601 Fax
general@ij.org www.ij.org/florida

None of this, of course, addresses the issue of attorneys' fees—which Highlands, by law, will be responsible for paying in the event of a successful legal challenge to the proposed ordinance. That is because North Carolina law, unequivocally, provides for attorneys' fees:

> [i]n any action in which a city or county is a party, upon a finding by the court that the city or county ***violated a statute or case law setting forth unambiguous limits on its authority***, the court shall award ***reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action***.

N.C.G.S. § 6-21.7 (emphasis added). Here, this attorneys' fees statute will almost surely be triggered because the town's proposal involves a permitting scheme—something that is unambiguously foreclosed by state law. *See* N.C.G.S. § 160D-1207(c) ("In no event may a local government . . . adopt or enforce any ordinance that would require . . . any permit or permission . . . from the local government to lease or rent residential real property or to register rental property with the local government."). This is precisely the statute that was at issue in the *Schroeder v. Wilmington* matter.[2] And because the appeals court in that case said—***literally ten different ways***—that Wilmington's ordinance was unambiguously foreclosed by state statute, plaintiffs' counsel (the undersigned) has claimed an entitlement to fees.[3] The amount sought: **$324,564.20, plus costs**.[4]

In sum, the town's proposal deploys legally dubious land-use tools to eviscerate the settled expectations of property owners. And the supposed legitimacy of the town's approach rests on a half-century-old legal decision upholding, unremarkably, the power of government to moderate nuisances. Finally, the town's implementation of the proposed ordinance calls for the creation of a permitting system—something the North Carolina Court of Appeals struck down as unlawful earlier this year. Accordingly, the proposed ordinance also exposes the town to substantial financial liability, in the form of attorneys' fees, in the seemingly likely event that it will have to defend its unlawful permitting/amortization scheme in court.

I urge you to reconsider your proposal in light of this information.

---

[2] In theory, Wilmington's attorneys—the same law firm evidently retained by Highlands—might argue that, given the novelty of the issue, the statute at issue did not *unambiguously* foreclose their legal position in the *Schroeder* matter. Highlands will not have that luxury. To the extent there was doubt before, the Court of Appeals' decision in *Schroeder* eliminated it.

[3] In addition to attorneys' fees, the City of Wilmington also had to repay the unlawfully collected permitting fees, plus interest—to the tune of $511,484. *See* Michael Praats, *Wilmington's short-term rental restrictions already cost taxpayers, could now cost more in legal fees*, WECT (June 21, 2022), https://tinyurl.com/4abemwrp.

[4] The hearing on the Schroeders' motion for attorneys' fees and costs is set for hearing in early September. For your convenience, a copy of the Schroeders' motion is enclosed.

2 S. Biscayne Boulevard, Suite 3180 Miami, FL 33131 (305) 721-1600 (305) 721-1601 Fax
general@ij.org www.ij.org/florida

Sincerely,

Ari Bargil
Attorney
INSTITUTE FOR JUSTICE

Enclosures

cc: Town of Highlands Planning Board (Darren Whatley, dlwdesign828@gmail.com; Helene Siegel, helenemsiegel@gmail.com; Wendell Willard, wkwillard@me.com; Chris Wilkes, lumpywilkes@gmail.com; Nick McCall, nickmccallasu@gmail.com; Michael Mathis, michael.mathis@highlandsnc.org)
Jay Coward, Jr., Town Attorney (jkcoward@chspa.com)
Bob Hagemann, County Attorney (RHagemann@poynerspruill.com)

2 S. Biscayne Boulevard, Suite 3180 Miami, FL 33131 (305) 721-1600 (305) 721-1601 Fax
general@ij.org www.ij.org/florida

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-210

No. COA21-192

Filed 5 April 2022

New Hanover County, No. 19-CVS-4028

DAVID SCHROEDER and PEGGY SCHROEDER, Plaintiffs,

v.

CITY OF WILMINGTON and CITY OF WILMINGTON BOARD OF ADJUSTMENT, Defendants.

Appeal and cross-appeal from a judgment and stay entered 15 October 2020 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 17 November 2021.

Nelson Mullins Riley & Scarborough, LLP, by John E. Branch, III, and Andrew D. Brown, and Institute for Justice, by Ari Bargil and Adam Griffin, for Plaintiffs-Appellees/Cross-Appellants.

Poyner Spruill LLP, by N. Cosmo Zinkow and Robert E. Hagemann, and Deputy City Attorney Meredith T. Everhart, for Defendant-Appellant/Cross-Appellee City of Wilmington.

INMAN, Judge.

¶ 1 The North Carolina Constitution establishes the State as sovereign, and local governments may exercise only those powers that our General Assembly "deem[s] advisable" through legislative enactment. N.C. Const. art. VII, § 1. When a legal question arises regarding the scope of a local government's authority, it is the

judiciary's duty to interpret the enabling law and apply it in accordance with the General Assembly's intent. *Occaneechi Band of Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 653, 551 S.E.2d 535, 538 (2001). And when a local government enacts an ordinance asserting powers that exceed those granted by the General Assembly, we are compelled to invalidate the unauthorized action. *King v. Town of Chapel Hill*, 367 N.C. 400, 411, 758 S.E.2d 364, 373 (2014).

¶ 2 David and Peggy Schroeder ("Plaintiffs") dispute the authority of the City of Wilmington ("Wilmington") to enact a zoning ordinance restricting short-term rentals through a registration and lottery process. Plaintiffs presented several state law and constitutional law rationales to the trial court. The trial court dismissed Plaintiffs' constitutional challenges but agreed that the zoning ordinance was entirely invalid based on a statute and its amended recodification precluding local governments from "requir[ing] any owner or manager of rental property . . . to register rental property with the local government." N.C. Gen. Stat. § 160A-424(c) (2017), *recodified as amended at* N.C. Gen. Stat. § 160D-1207(c) (2021).

¶ 3 The trial court stayed its judgment, and both parties appeal. Wilmington challenges the judgment and Plaintiffs challenge the dismissal of their constitutional

claims and the entry of a stay.[1]

¶ 4 After careful review, we affirm the trial court's judgment that the registration and lottery provisions of Wilmington's ordinance are invalid under Section 160D-1207(c) of our General Statutes. But we reverse the portion of the judgment striking provisions of the Wilmington ordinance that are not prohibited by statute and are severable from the invalid provisions. Because our holding renders moot Plaintiffs' constitutional challenges to the ordinance, we do not reach Plaintiffs' cross-appeal.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 5 The record below and our General Statutes disclose the following:

A. The General Assembly Restricts Permitting, Permission, and Registration Requirements for Residential Rentals

¶ 6 In 2011, the General Assembly enacted a statute prohibiting cities from penalizing or restraining the rental of residential real property absent "reasonable cause." 2011 N.C. Sess. Laws 1034, 1034, ch. 281. That statute, Section 160A-424(c),[2] prohibited cities from "requir[ing] any owner or manager of rental property to obtain any permit or permission from the city to lease or rent." N.C. Gen. Stat. § 160A-424(c)

---

[1] Plaintiffs moved this Court to dissolve the stay by separate motion, and we denied that motion by order entered 20 April 2021. Because Plaintiffs concede that we have already decided this issue against them and they advance their arguments strictly for preservation purposes, we do not revisit that issue in this opinion.

[2] Our General Statutes are organized by subject matter into chapters, which may be further subdivided into subchapters, articles, parts, or subparts. A "Section" is the text of the law itself, and sections are placed within the chapters and their various subdivisions.

(2011). The statute provided an exception allowing cities to "levy a fee for residential rental property *registration* under subsection (c)" if the rental units in question had a sufficient number of local ordinance violations or were hotspots for criminality. *Id.* § 160A-424(d) (emphasis added). Subsection (d) further allowed cities "that charge[d] registration fees for all residential rental properties as of June 1, 2011" to continue to do so according to a specific fee schedule. *Id.*

¶ 7 As the land development statutes were codified at the time Section 160A-424(c) was originally enacted, municipal land development regulatory powers were found in Article 19, "Planning and Regulation of Development," of Chapter 160A, "Cities and Towns." County land development regulatory powers were located in Article 18, "Planning and Regulation of Development," in Chapter 153A, "Counties." Thus, the statutes authorizing local governments to regulate land uses were codified in two separate chapters, depending on the body politic. Section 160A-424(c), as a statute governing municipalities, was located in Part 5, "Building Inspection," of Article 19 in Chapter 160A. Organizationally, this placed Section 160A-424(c) apart from our municipal zoning laws, which were located in Part 3, "Zoning," of Article 19 in Chapter 160A.

¶ 8 In 2017, the General Assembly added language to Section 160A-424(c) to bar cities from "requir[ing] any owner or manager of rental property to obtain any permit or permission . . . to lease or rent . . . *or to register rental property with the city*." N.C.

Gen. Stat. § 160A-424(c) (2017) (emphasis added). The statute continued the exceptions for properties that repeatedly violated building codes or were sites of substantial criminal activity. *Id.* The amended statute repealed the subsection that allowed the uniform rental registration programs predating June 2011 to continue, ending the authorization of those programs. *Id.* § 160A-424(d).

B. Wilmington Regulates Short-Term Rentals Through Registration

¶ 9 Against this statutory backdrop, Wilmington sought to protect its neighborhoods and housing market from the impact of widespread short-term rentals. Wilmington's City Council identified concerns including "undue commercialization and disruption to the primary and overarching purpose of a neighborhood being first and foremost a residential community, where people actually live," and the possibility that "inordinate reductions in the supply of housing available for standard rentals for the citizens of Wilmington could have a destabilizing effect on housing affordability." These concerns led Wilmington to enact a zoning ordinance (the "Ordinance") in January 2019 regulating short-term rentals within city limits in an effort to balance their negative effects against the benefits of a "properly regulated" short-term rental market—including "assisting property owners to keep properties in good repair, which, in turn, stabilizes home ownership, maintains property values, and strengthens the economy of the City."

¶ 10 The Ordinance restricted short-term rentals to specific zoning districts,

required at least 400 feet of separation between short-term rentals, and capped the total percentage of short-term rentals at two percent of residential parcels within Wilmington's 1945 Corporate Limits and two percent of residential parcels outside the same. To implement the separation and cap requirements, the Ordinance required short-term rental operators to register their properties. Initial registrations were to be doled out in conformity with the separation and cap requirements by lottery. Registrations would terminate if not renewed annually, upon transfer of the subject property, or for violations of law, and registrations filed after the initial lottery would be received and processed on a first-come, first-served basis. Existing short-term rental operators who failed to obtain a registration by lottery were required to cease short-term rentals by the end of a one-year amortization period. Other sections of the Ordinance imposed health, safety, and similar requirements, such as requiring short-term rental operators to conspicuously post the dates for garbage collection and the non-emergency telephone number for the Wilmington Police Department.

C. Plaintiffs' Challenge

¶ 11 Plaintiffs own a townhome in the Lions Gate community of Wilmington, which they used as a short-term rental without any reported problems prior to the enactment of the Ordinance. After the Ordinance was passed, Plaintiffs registered their property but lost in the initial lottery, as another property within 400 feet of

their townhouse drew a lower lottery number. Plaintiffs appealed to the Wilmington Board of Adjustment, which upheld Wilmington's denial of registration.

¶ 12 With no other administrative avenues available to them, Plaintiffs filed a declaratory judgment action in October 2019 to challenge the validity of the Ordinance, alleging it violated Section 160A-424(c)'s prohibition against ordinances "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."[3]

D. The General Assembly Reorganizes and Recodifies Local Land Use Regulatory Statutes

¶ 13 In July 2019, shortly before Plaintiffs filed suit, the General Assembly amended and recodified statutes concerning local government regulation of short-term rentals, including Section 160A-424(c). On 1 July 2019, the General Assembly enacted Session Law 2019-73 to explicitly place vacation rentals under the ambit of Section 160A-424. 2019 N.C. Sess. Laws 300, 300, ch. 73, § 1. Ten days later, the General Assembly amended and recodified Section 160A-424 as part of a session law

---

[3] Plaintiffs also brought several facial and as-applied challenges to the Ordinance under the North Carolina Constitution and have cross-appealed the later dismissal of those claims to this Court. Because we hold that the allegedly unconstitutional portions of the Ordinance are preempted on statutory grounds, we dismiss as moot Plaintiffs' cross-appeal arguing the unconstitutionality of the Ordinance. *Chavez v. McFadden*, 374 N.C. 458, 467, 843 S.E.2d 139, 147 (2020).

captioned, "An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State." 2019 N.C. Sess. Laws 424, 424, ch. 111 (hereinafter "the Act"). Part II of the Act—which contains the recodification of Section 160A-424—is titled "Provisions to Reorganize, Consolidate, Modernize, and Clarify Statutes Regarding Local Planning and Development Regulation." *Id.* at 439, ch. 111.

¶ 14 Part II of the Act at issue in this case provides:

> . . . The intent of the General Assembly by enactment of Part II of this act is to collect and organize existing statutes regarding local planning and development into a single Chapter of the General Statues and to consolidate the statutes affecting cities and counties.
>
> . . . The intent of the General Assembly by enactment of Part II of this act is to neither eliminate, diminish, enlarge, nor expand the authority of local governments to exact land, construction, or money as part of the development approval process or otherwise materially alter the scope of local authority to regulate development . . . .

Id. at 439, ch. 111, §§ 2.1.(e)–(f). Part II relocated the previously scattered patchwork of planning and development statutes into a single new chapter, Chapter 160D. *Id.* at 439, ch. 111, § 2.4. The Act also expressly provides that "Part II of this act clarifies and restates the intent of existing law and applies to ordinances adopted before, on, and after the effective date." *Id.* at 547, ch. 111, § 3.2. As an express clarifying amendment of declared retroactive effect, the Act's recodification retroactively applied to Wilmington's Ordinance.

¶ 15 The new Chapter 160D is organized into 14 Articles. Chapter 160D maintains the structural separation between zoning and building code inspection that existed in the previous codification of our land regulation statutes. Zoning is now found in Article 7, "Zoning Regulation," N.C. Gen. Stat. §§ 160D-701, *et seq*.; building code enforcement in Article 11, "Building Code Enforcement," *id.* §§ 160D-1101, *et seq*.; and minimum housing standards in Article 12, "Minimum Housing Codes." *Id.* §§ 160D-1201, *et seq*. The Act recodified Section 160A-424 as Section 160D-1207, placing it among the minimum housing standard statutes in Article 12.[4] *Id.* §§ 160D-1201, *et seq*.

¶ 16 The General Assembly also modified the language regarding the prohibitions against permitting, permissions, and registrations applicable to residential rentals. The new statute, with additions marked in bold and deletions struck through, now reads:

> In no event may a ~~city~~ **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 ~~city~~ **local government** to lease or rent residential real property or to register rental property with the ~~city~~ **local government.**

[4] The sections in Chapter 160D are generally numbered sequentially according to their placement in the Chapter. The amended statutory language at issue here is found in the seventh section of Article 12 in Chapter 160D, hence Section 160D-1207.

Compare N.C. Gen. Stat. § 160A-424(c) (2017), *with* N.C. Gen. Stat. § 160D-1207(c) (2021).

E. The Trial Court Concludes the Ordinance Is Preempted by Statute

¶ 17 Wilmington moved to dismiss Plaintiffs' complaint. The trial court dismissed Plaintiffs' constitutional claims by order entered 11 March 2020. Wilmington then filed its answer and moved for summary judgment in its favor, while Plaintiffs moved to amend their complaint to explicitly address, among other things, the changes to and recodification of Section 160A-424(c) as Section 160D-1207(c). The trial court denied this motion by order entered on 3 September 2020, and on 15 September 2020, the trial court granted summary judgment to Plaintiffs, declaring the entirety of the Ordinance void based on the conclusion that Section 160A-424(c) and its revised codification at Section 160D-1207(c) unambiguously prohibited Wilmington's short-term rental registration scheme.

¶ 18 Wilmington moved for a stay of the trial court's judgment shortly after entry. The trial court granted that motion as to all parties except Plaintiffs who, by statute, enjoyed a stay of the Ordinance's enforcement against them during litigation. The trial court's ruling on summary judgment and the entry of the stay were then consolidated into a final judgment entered 15 October 2020, and both parties filed timely notices of appeal.

II. ANALYSIS

¶ 19 This appeal requires us to resolve three competing interpretations and applications of Sections 160A-424(c) and its successor statute 160D-1207(c): by the trial court, by Plaintiffs, and by Wilmington. Section 160A-424(c) prohibited Wilmington from enacting an ordinance that required a short-term rental operator "to obtain any permit or permission from the city to lease or rent . . . or to register rental property with the city." N.C. Gen. Stat. § 160A-424(c). When it recodified the statute as Section 160D-1207(c), the legislature added nine words that have spawned the differing interpretations before us, prohibiting Wilmington from requiring short-term rental operators "to obtain any permit or permission **under Article 11 or Article 12 of this Chapter** . . . to lease or rent . . . or to register rental property." N.C. Gen. Stat. § 160D-1207 (emphasis added).[5]

¶ 20 The trial court concluded that Section 160D-1207(c) prohibits Wilmington from requiring: (1) permits and permissions to rent under Articles 11 and 12; and (2) all registrations of rental property. Plaintiffs construe the new language to prohibit (1) all permits to lease or rent; (2) permissions to rent under Articles 11 and 12; and (3) all registrations of rental property as a condition to rent. Wilmington advocates a third reading, contending the added cross-reference to Articles 11 and 12 modifies the

[5] Section 160D-1207 includes several specific exceptions that are not at issue in this case, so we do not address them.

scope of "permits," "permissions," *and* registrations, so that local governments are authorized to use their zoning powers—found in Article 7—to implement registration schemes on short-term rentals.

¶ 21 After reviewing the language of the statutes, we hold that Wilmington's registration requirements for rentals, and those provisions of the ordinance inseparable from them, are prohibited by state statute and therefore invalid, and we affirm the trial court's judgment in this respect. However, because several of the Ordinance's provisions are severable from the invalid registration provisions, we reverse the trial court's judgment in part and remand for entry of a judgment that invalidates the registration requirement and those provisions insevarable from it, but leaves the severable sections, described below, intact.

A. Standard of Review

¶ 22 We review the trial court's entry of summary judgment *de novo*. *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶8. Summary judgment is proper when there are no genuine issues of material fact and judgment in favor of a party is appropriate as a matter of law. *Id.* The same *de novo* standard applies to questions of statutory interpretation. *Id.*

B. Section 160A-424(c) Unambiguously Prohibited Wilmington's Registration Ordinance

¶ 23 When the Ordinance was first enacted, Section 160A-424(c) generally precluded cities from "requir[ing] any owner or manager of rental property . . . to obtain any permit or permission . . . to lease or rent residential real property or to register rental property with the city." N.C. Gen. Stat. § 160A-424(c) (2017). Thus, the statute prohibited two categories of regulation: (1) permits or permissions to lease or rent; and (2) registrations of rental property. The statutory language is in no way ambiguous, so it must be afforded its plain effect without reference to canons of statutory interpretation. *See, e.g., Jeffries v. Cnty. of Harnett*, 259 N.C. App. 473, 488, 817 S.E.2d 36, 48 (2018) ("[W]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning." (citation and quotation marks omitted)). The Ordinance is prohibited by the statute's straightforward language to the extent it requires Plaintiffs "to register rental property with the city." N.C. Gen. Stat. § 160A-424(c).

¶ 24 Wilmington asserts that Section 160A-424(c) was only intended to limit registration requirements in the context of building code inspections—not zoning—by pointing out that it was included in a part of our General Statutes that, per its title, related to municipal building inspections. But, because Section 160A-424(c) is

unambiguous, our analysis begins and ends with the plain meaning of the text, and we need not consult its placement in a building inspection statute to discern the legislature's intent. *Appeal of Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974) ("The law is clear that captions of a statute cannot control when the text is clear." (citation omitted)); *First Bank v. S&R Grandview, L.L.C.*, 232 N.C. App. 544, 551, 755 S.E.2d 393, 397 (2014) (noting that "the placement of a statute within an act is less probative of legislative intent than the plain language of the statute itself" and holding the placement of a plain and unambiguous statute had no bearing on the interpretation of its plain language). *But see Ray v. N.C. Dept. of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012) (observing that "even when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature" where there was no question as to the plain meaning of a statutory amendment but only whether the amendment was intended to apply retroactively or prospectively) (citation and quotation marks omitted)).

C. Recodification as Section 160D-1207(c) Did Not Alter the Restriction Against Registrations

¶ 25 Our review of Section 160D-1207(c), in context with the rest of Chapter 160D and together with Section 160A-424(c)'s prior unambiguous language, leads us to hold that the registration provisions of the Ordinance are invalid. We hold that Section 160D-1207(c) continues to impose a disjunctive list of two prohibitions, restricting

local governments from:

> requir[ing] any owner or manager of rental property [1] to obtain any permit or permission under Article 11 or Article 12 of this Chapter from the local government to lease or rent residential real property or [2] to register rental property with the local government. . . .

N.C. Gen. Stat. § 160D-1207(c). The Ordinance's registration provisions thus remain preempted by statute.

¶ 26 This reading of Section 160D-1207(c) avoids any violence to the statutory language and structure. It also continues to treat "permit or permission . . . to lease or rent" as a single category of prohibited regulatory action separate from "registrations"—just as was demanded by the unambiguous language of its predecessor statute, Section 160A-424(c).

¶ 27 Treating "permit or permission" of a like kind and as a single categorical phrase also accords with the construction of Chapter 160D itself. Article 11's statutes explicitly refer to "permits" and other approval mechanisms. Except for the prohibition against permits at issue here, Article 12's statutes do not expressly refer to "permits," but they do contemplate other forms of governmental approvals, *i.e.,* permissions. *Compare* N.C. Gen. Stat. §§ 160D-1101, *et seq.* (providing for building code enforcement powers through the issuance of building permits and other forms of written approvals for work), *with* N.C. Gen. Stat. §§ 160D-1201, *et seq*. (allowing for adoption and enforcement of minimum housing code ordinances without specifically

referencing permitting).[6] Thus, applying the statutory cross-reference to both "permit or permission" and treating them together results in a general prohibition against requiring government approval to lease or rent, however required under Articles 11 or 12, that aligns with the structure of those Articles. *See, e.g., Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.,* 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) ("[W]e are guided by the structure of the statute and certain canons of statutory construction." (citations omitted)).

¶ 28 We acknowledge that this reading appears, in some sense, to conflict with the provisions of Chapter 160D's enabling session law that express an intention to clarify, rather than change, the law. But every interpretation before this Court results in some substantive alteration, as each imposes some restriction where the prior unambiguous language of Section 160A-424(c) contained none.[7] In this circumstance, we must attempt to construe the provisions of Chapter 160D's enabling session law together, and "harmonize such statutes, if possible, and give effect to each." *Town of*

---

[6] For example, Section 160D-1112 in Article 11 provides that post-permit changes to construction are only allowed if they "are clearly permissible under the State Building Code" or are made pursuant to "specific written approval of the proposed changes . . . [by] the inspection department." N.C. Gen. Stat. § 160D-1112 (2021). Article 12, meanwhile, allows a local administrative tribunal to close dwellings unfit for human habitation by order—rather than permit—until repairs are completed and habitation may resume. N.C. Gen. Stat. § 160D-1203(3)(a) (2021).

[7] Ironically, the "clarifying" changes in Section 160D-1207 have now rendered the statute ambiguous. *See Winkler v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contractors*, 374 N.C. 726, 730, 843 S.E.2d 206, 211 (2020) (holding a statute was ambiguous where "the provision at issue is equally *unsusceptible* of each proposed interpretation").

Blowing Rock v. Gregorie, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956).

¶ 29 Our reading of Section 160D-1207(c) seeks to harmonize the clarifying intent of the legislature with the imposition of a new limitation on local government authority to the extent possible. It aligns with and continues the clear original legislative intent, previously expressed in Section 160A-424(c), to provide two disjunctive restrictions: (1) prohibiting permits and permissions to lease or rent (now clarified as permits or permissions pursuant to Articles 11 or 12), and (2) prohibiting registrations of rental properties. In other words, Section 160A-424(c) unambiguously restricted permits or permissions to the same and equal extent, and our reading of Section 160D-1207(c) continues to treat them identically. Similarly, Section 160A-424(c) treated the restriction against permits and permissions separately from the prohibition against registrations, and our interpretation of Section 160D-1207(c) maintains this division, as we do not apply the statutory cross-reference to Articles 11 and 12 inserted into the clause restricting permits and permissions as applying to registrations. As discussed below, neither interpretation of Section 160D-1207(c) suggested by the parties allows for this same symmetry when compared to the original, unambiguous language contained in Section 160A-424(c).

¶ 30 In sum, we hold that the General Assembly enacted Section 160D-1207(c) to clarify that the restriction against permits or permissions to lease or rent originally found in Section 160A-424(c) applied only to the government approvals now found in

Articles 11 and 12. The language added in Section 160D-1207(c) does not suggest that the legislature intended to modify the structure of the previous unambiguous statute precluding registrations generally, nor does it suggest treating "permission[s] . . . to lease or rent" as a separate category of prohibition from "permit[s] . . . to lease or rent." We agree with the trial court's interpretation of Section 160D-1207(c) as prohibiting local governments from requiring a short-term rental owner to obtain a permit to rent under Articles 11 or 12, a permission to rent under the same Articles, or to register the property as a rental with the government.[8] The provisions of Wilmington's Ordinance requiring such a registration—as well as any provisions that are inseverable from that initial registration requirement—are preempted by Section 160D-1207(c) and its unambiguous predecessor Section 160A-424(c).[9]

---

[8] We do not interpret Sections 160A-424(c) or 160D-1207(c) as exempting rental properties from all zoning or permitting requirements; as Plaintiffs conceded at oral argument, even their reading would not preclude Wilmington from zoning or requiring Plaintiffs to obtain a building permit to construct an addition to their property. Our reading does not prohibit these actions either and only limits "permit[s] . . . *under Article 11 or Article 12 . . . to lease or rent*." N.C. Gen. Stat. § 160D-1207(c) (emphasis added).

[9] Wilmington asserts that our interpretation would allow it to replace "register" with "permit" in the Ordinance and reenact it under Article 7 without violating Section 160D-1207(c). But such a hypothetical ordinance is not before us today and would be open to legal challenges asserting that the statute's language should be applied to reach any "permit" that is, in all practical effect, a registration otherwise barred by the statute. *Cf. Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (" '[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and

D. The Parties' Preferred Interpretations Fail

¶ 31 In adopting the trial court's interpretation of Section 160D-1207(c), we reject the competing interpretations proposed by the parties.

¶ 32 Plaintiffs' proposed interpretation of the statute would rework the language and punctuation of the statute in the following manner, reflected in bold, to provide that local governments are prohibited from:

> requir[ing] any owner or manager of rental property**[:] [1]** to obtain any permit **[from the local government to lease or rent residential real property;]** or [**2] [to obtain]** permission under Article 11 or Article 12 of this Chapter from the local government to lease or rent residential real property**[;]** or **[3]** to register rental property with the local government **[to lease or rent residential real property]**. . . .

N.C. Gen. Stat. § 160D-1207(c).

¶ 33 Plaintiffs' proffered interpretation—which they contend is the only unambiguous reading—requires a substantial revision of the statutory language; truly unambiguous statutes require no modification to be given their plain effect. *See In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) ("When the language

---

purpose of the law shall control and the strict letter thereof shall be disregarded.' " (quoting *State v. Barksdale*, 181 N.C. 621, 625 107 S.E. 505, 507 (1921))). Because Wilmington's hypothetical ordinance is not before us, we decline to resolve whether such an ordinance would be preempted by Section 160D-1207(c). *See Chavez*, 374 N.C. at 467, 843 S.E.2d at 147 (noting our appellate courts do not " 'determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions' " (citation omitted)).

of a statute is clear and unambiguous, . . . the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein."); *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (noting that, in applying an unambiguous statute, "it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used"). And Plaintiffs offer no rule of grammar or construction that would allow us to transpose the modifier "to lease or rent" to the later restriction on registrations. Plaintiffs acknowledge that the prohibition on registration "follows in a completely separate clause" from "permit[s] or permission[s] . . . to lease or rent."

¶ 34 Plaintiffs argue that "it is impossible to conceive of a permitting scheme that did not also in some sense require registration. . . . [A] bar on registrations would sweep up practically any permitting scheme." But if this is true, Plaintiffs' reading of the statute would render its provisions redundant: the legislature would not need to prohibit permits to lease or rent and registrations to lease or rent separately if a ban on the latter encompassed the former. *See State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) ("We are further guided in our decision by the canon of statutory construction that a statute may not be interpreted in a manner which would

render any of its words superfluous." (citation and quotation marks omitted)).[10] And, because this interpretation presumes the legislature intended to create *three* categories of restrictions—(1) permits, (2) permissions under Articles 11 or 12, and (3) registrations—when the unambiguous language of Section 160A-424(c) only imposed *two*—(1) permits or permissions, and (2) registrations—we decline to adopt it as the "clarified" meaning of Section 160A-424(c).

¶ 35 We also disagree with Wilmington's argument that the statutory cross-references added to Section 160D-1207(c) limit the general prohibition against registrations originally found in Section 160A-424(c). Under that reading, Section 160D-1207(c) prohibits local governments from:

> requir[ing] . . . any permit or permission under Article 11 or Article 12 . . . from the local government[:] [1] to lease or rent residential real property or[;] [2] to register rental property with the local government.

---

[10] Our reading of the statute does not result in this redundancy. By prohibiting "permit[s] or permission[s] under Article 11 or Article 12 of this Chapter . . . to lease or rent" together, the General Assembly identified what permits it intended to curtail in Section 160D-1207(c). The registration prohibition is then read in context not to encompass all permits, but instead to prohibit any ordinance that requires the landowner to register as a residential rental with the government under any article and however imposed. *See City of Asheville v. Frost*, 370 N.C. 590, 592, 811 S.E.2d 560, 562 (2018) ("In interpreting a statute, a court must consider the statute as a whole and determine its meaning by reading it in its proper context and giving its words their ordinary meaning."). *Cf. Jeffries*, 259 N.C. App. at 493, 817 S.E.2d at 50 ("The interpretative canon of *noscitur a sociis* instructs that 'associated words explain and limit each other' and an ambiguous or vague term 'may be made clear and specific by considering the company in which it is found, and the meaning of the terms which are associated with it." (citation omitted)).

Thus, Wilmington asserts that Sections 160A-424(c) and 160D-1207(c) prohibit, among other things, "permission[s]. . . to register" under Articles 11 and 12. But Wilmington's able counsel conceded in oral argument that no statute in Article 11 or 12—or anywhere else in the General Statutes—references a "permission to register" scheme.

¶ 36 Counsel for Wilmington offered a singular example of a "permission to register" regime, contending a city could restrict short-term rentals to certain zoning districts and then require short-term rental operators to register. In such a circumstance, only those in the proper zoning district would have "permission to register" as a short-term rental.[11] But this example—the only one put forward by Wilmington—is self-defeating: if "permission to register" only arises through the exercise of a local government's Article 7 zoning powers, there would be no need for the General Assembly to prohibit "permission to register" under Articles 11 and 12. We will not read the statute as prohibiting something that does not appear to exist. Such a reading runs counter to the mandate that "a statute must be construed, if possible, to give meaning and effect to all of its provisions." *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990). *See also*

[11] Even this example does not align with the statute when its words are given their common and ordinary meaning, as a zoning ordinance allowing for certain uses in a district would not put any positive burden on the landowner "to *obtain* . . . permission" to engage in those uses.

Estate of Jacobs v. State, 242 N.C. App. 396, 402, 775 S.E.2d 873, 877 (2015) (declining to adopt an interpretation rendering a statute's provisions "superfluous or nonsensical").

E. The Trial Court Erred in Invalidating the Entire Ordinance

¶ 37 Though we hold that the trial court correctly concluded that the Ordinance is invalid to the extent that it is preempted by Section 160D-1207(c), we disagree that the entirety of the Ordinance fails as a result.

¶ 38 Section 14 of the Ordinance states, "if any . . . portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed severable and such holding shall not affect the validity of the remaining portions thereof." We will give effect to this clause to preserve any provisions that are "not so interrelated or mutually dependent" on the invalid registration requirements that their enforcement "could not be done without reference to the offending part." *Fulton Corp. v. Faulkner*, 345 N.C. 419, 422, 481 S.E.2d 8, 9 (1997). Non-offending sections of the Ordinance that are "complete in [themselves] and capable of enforcement" will remain in effect. *Id.* Stated differently, "[w]e will sever a provision of an otherwise valid ordinance when the enacting body would have passed the ordinance absent the offending portion." *King*, 367 N.C. at 410, 758 S.E.2d at 372 (citation omitted).

¶ 39 Several provisions of the Ordinance are so intertwined with the invalid

registration requirement that they are likewise preempted by Section 160D-1207(c), namely: (1) the cap and distance requirements and their predicate registration provisions, *i.e.,* the entirety of Secs. 18-331.2 and 18-331.4;[12] (2) the proof of shared parking or parking space rental and the submission of all shared parking agreements to the city attorney for approval prior to registration, as found in Sec. 18-331.5; (3) the registration termination provisions, *i.e*, the entirety of Secs. 18-331.8-.9 and .13; (4) the requirement that a registration number be posted in a short-term rental, as found in Sec. 18-331.14(d); (5) Sec. 18-331.7's limited application to "registered" uses only; and (6) the amortization of short-term rentals without a registration, *i.e.*, the entirety of Sec. 18-331.17.

¶ 40 The remainder of the Ordinance does not require registration to be enforceable and gives effect to Wilmington's intent in enacting the Ordinance. For example, the requirement that each short-term rental operator provide one off-street parking space per bedroom does not require registration to be effective or enforceable; a customer may rent a short-term rental assuming compliance with this provision and inform Wilmington of a violation should parking prove inadequate. Similarly, the prohibition against cooking in bedrooms or the requirement that operators

[12] To avoid possible confusion, our citations refer to Section 18-331 of Chapter 18, Article 6 of Wilmington's Land Development Code, as amended by the Ordinance and set forth in the record on appeal.

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE #: 19-CVS-4028

DAVID SCHROEDER and
PEGGY SCHROEDER,

Plaintiffs,

v.

CITY OF WILMINGTON and
CITY OF WILMINGTON BOARD OF
ADJUSTMENT,

Defendants.

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

Peg and David Schroeder won. After litigating with the City of Wilmington for over two years, both this Court and the Court of Appeals held that the City exceeded its authority and unlawfully interfered with Peg and David's property rights. In light of this victory, Peg and David now respectfully move this Court to award them their attorneys' fees and costs. They do so under N.C. Gen. Stat. § 6-21.7, which entitles litigants to their fees and costs when, as here, they have successfully challenged a city's actions as violating an unambiguous statutory limit. Peg and David have computed their attorneys' fees to be $380,705.25 and their total costs to be $2,055.26.[1] However, in an exercise of sound billing judgment, Plaintiffs' counsel seeks only $304,564.20.

[1] Per the Court's order of October 15, 2020, the deadline to file a motion for attorneys' fees was "extended to thirty (30) days after the conclusion of all appellate proceedings in this case." Because the Court of Appeals issued its mandate on April 25, 2022, the deadline to file is May 25, 2022.

BACKGROUND

Peg and David Schroeder are lifelong residents of Wilmington, North Carolina. In early 2018, not long after they retired, Peg and David decided to purchase and renovate a property in Wilmington for the dual purpose of using it as a part-time short-term rental and part-time personal residence. They made the purchase based on the (now-vindicated) belief that the Wilmington City Council could not pass any laws requiring them to register, or obtain permission, to use the property in the way they planned. But soon after Peg and David bought the property and began offering it for use as a short-term rental, the City adopted a new ordinance to regulate short-term rentals like Peg and David's. The new ordinance, which amended Chapter 18, Article 6 of the City Code, capped and regulated short-term rentals with an elaborate registration and lottery system.

Three components of the ordinance are relevant here. First, it required individuals who wished to operate a short-term rental to register with the City. Wilmington City Code § 18-331(d). Second, it capped the number of permits issued to 2% of all residential properties in the City, *id.* § 18-331(b), creating a lottery system to determine who could operate as part of that 2%, *id.* § 18-331(d)(8). And third, it required short-term rentals to be at least 400 feet apart. *Id.* § 18-331(b). In short, the City created a raffle for property rights. And for rental-property owners who weren't lucky enough to draw the winning ticket, the City ordered them to shut down within a year.

The City's registration scheme, however, was unlawful from the start. Years earlier, the North Carolina General Assembly enacted a statute that prohibited cities from requiring owners of rental property to register or to obtain permits or permission to rent out their properties. That statute specifically prohibited local governments from "requir[ing] 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. N.C. Gen. Stat. § 160A-

424(c) (2017) (emphasis added). Despite the clear import of this language, the City pressed forward with its cap-and-lottery system, forcing those who did not "win" the lottery to phase out their properties' rental use. *See* Wilmington Code § 18-331(q). So after Peg and David entered the lottery and lost, they filed this suit, challenging the City's short-term-rental ordinance as preempted by state law.

Peg and David's preemption challenge to the Wilmington ordinance succeeded. On summary judgment, this Court agreed that the state statute preempted the City's new zoning ordinance. Specifically, this Court found that the statute was "clear and unambiguous" and concluded that "[t]he provisions of Wilmington Code § 18-331 [were] preempted by N.C. Gen. Stat. § 160A-424(c) and N.C. Gen. Stat. § 160D-1207(c) and [were] therefore invalid." *Schroeder v. City of Wilmington*, 2020 WL 10731860, at *2 (N.C. Super. Ct. Oct. 15, 2020). Accordingly, the Court granted summary judgment in favor of Peg and David and declared Wilmington Code § 18-331 "void and unenforceable." *Id.*

The North Carolina Court of Appeals agreed and affirmed. "[W]e hold," the Court of Appeals said, "that Wilmington's registration requirements for rentals, and those provisions of the ordinance inseparable from them, are prohibited by state statute and therefore invalid[.]" *Schroeder v. City of Wilmington*, 2022-NCCOA-210, ¶ 21. As the Court of Appeals explained, the state statute forbidding Wilmington's ordinance was "in no way ambiguous," and therefore the City's "Ordinance [was] prohibited by the statute's straightforward language to the extent it requires [Peg and David] to 'register rental property with the city.'" *Id.* ¶ 23 (quoting N.C. Gen. Stat. § 160A-424(c) (2017)).

Therefore, because both this Court and the Court of Appeals held that the City violated an unambiguous statutory limit on its authority, the question is not so much whether Peg and David

are entitled to attorneys' fees and costs. The question is how much they are owed.

ARGUMENT

This motion proceeds in two parts. First, this motion establishes that Plaintiffs meet the standard under N.C. Gen. Stat. § 6-21.7 to recover their attorneys' fees and costs. And second, Plaintiffs show that those fees and costs are reasonable.

I. Plaintiffs are Entitled to Attorneys' Fees and Costs under § 6-21.7.

Under North Carolina law, litigants are entitled to their fees and costs where, as here, they successfully challenge a city's actions as violating an unambiguous statutory limit:

> In any action in which a city or county is a party, upon a finding that the city or county ***violated a statute*** or case law ***setting forth unambiguous limits on its authority, the court shall award reasonable attorneys' fees and costs*** to the party who successfully challenged the city's or county's action. . . . For purposes of this section, "unambiguous" means that the limits of authority are not reasonably susceptible to multiple constructions.

N.C. Gen. Stat. § 6-21.7 (emphasis added). There is no question that the City is a party to this action, nor is there any question that the City violated a state statute. The only issues deserving of the Court's attention here are thus: (1) whether the statute the City violated was "unambiguous" and (2) whether Peg and David are considered "successful" parties. For these two questions, the answers are clear and the same: yes.

A. The City violated an unambiguous statutory limit on its authority.

First, the statutory limit the City exceeded was unambiguous. Both this Court and the Court of Appeals expressly held as much. On summary judgment, this Court recognized that "[t]he language used [in the state statute] is clear and unambiguous . . . ." *Schroeder*, 2020 WL 10731860, at *2. And on appeal, the Court of Appeals repeatedly affirmed that view—*ten times*:

- "Section 160A-424(c) Unambiguously Prohibited Wilmington's Registration Ordinance." *Schroeder*, 2022-NCCOA-210, ¶ 23.

- "[B]ecause Section 160A-424(c) is unambiguous, our analysis begins and ends with the plain meaning of the text . . . ." *Id.* ¶ 24.
- "Our review of Section 160D-1207(c), in context with the rest of Chapter 160D and together with Section 160A-424(c)'s prior unambiguous language, leads us to hold that the registration provisions of the Ordinance are invalid. *Id.* ¶ 25.
- "This reading of Section 160D-1207(c) . . . continues to treat 'permit or permission . . . to lease or rent' as a single category of prohibited regulatory action separate from 'registrations'—just as was demanded by the unambiguous language of its predecessor statute." *Id.* ¶ 26.
- "But every interpretation before this Court results in some substantive alteration, as each imposes some restriction where the prior unambiguous language of Section 160A-424(c) contained none." *Id.* ¶ 28.
- "In other words, Section 160A-424(c) unambiguously restricted permits or permissions to the same and equal extent . . . ." *Id.* ¶ 29.
- "[N]either interpretation of Section 160D-1207(c) suggested by the parties allows for this same symmetry when compared to the original, unambiguous language contained in Section 160A-424(c)." *Id.*
- "The language added in Section 160D-1207(c) does not suggest that the legislature intended to modify the structure of the previous unambiguous statute precluding registrations generally . . . ." *Id.* ¶ 30.
- "The provisions of Wilmington's Ordinance requiring such a registration . . . are preempted by Section 160D-1207(c) and its unambiguous predecessor Section 160A-424(c)." *Id.*
- "[T]he unambiguous language of Section 160A-424(c) only imposed *two* [categories of restrictions]—(1) permits or permissions, and (2) registrations." *Id.* ¶ 34.

Thus, for purposes of this motion, the Courts definitively held that the General Assembly imposed an unambiguous limit on the City's authority, and the City exceeded it.

Indeed, a cursory textual comparison of the ordinance and the statute show their

irreconcilability. Where the ordinance *required* rental-property owners to register with the city ("The property owner shall register each establishment with the City of Wilmington"[2]), state law *prohibited* it ("In no event may a city . . . require any owner or manager of rental property to . . . register rental property with the city."[3]). And where the ordinance *required* permission from the City to use property for short-term rentals (permitting property owners to only rent out their property through "a lottery method . . . based on the cap and separation requirements"[4]), state law *prohibited* it ("In no event may a city . . . require any owner or manager of rental property to obtain any permit or permission from the city to lease or rent residential property"[5]). So, in the words of the statute entitling Peg and David their fees and costs, "the city . . . violated a statute . . . setting forth unambiguous limits on its authority." N.C. Gen. Stat. § 6-21.7.

B. Peg and David successfully challenged the City's ordinance.

Second, Peg and David were successful parties in challenging the City's action. Again, both this Court and the Court of Appeals expressly held as much. This Court first stated that it granted "summary judgment in favor of the Plaintiffs"—Peg and David. *Schroeder*, 2020 WL 10731860, at *2. The Court of Appeals then affirmed that judgment, agreeing with Peg and David's argument that state law preempted the City's short-term rental registration regime. *Schroeder*, 2022-NCCOA-210, ¶ 42.

In the end, then, Peg and David got exactly what they asked for: an injunction that the City no longer enforce its registration requirement, its cap-and-separation provisions, its amortization

---

[2] Wilmington Code § 18-331(d)(1).

[3] N.C. Gen. Stat. § 160A-424(c).

[4] Wilmington Code § 18-331(d)(8).

[5] N.C. Gen. Stat. § 160A-424(c).

provision, and its 400-foot proximity ban. And as a direct result of that success, Peg and David can now rent out their property as they originally intended. They are thus, in a word, successful. *Cf. H.B.S. Contractors, Inc. v. Cumberland Cnty. Bd. of Educ.*, 122 N.C. App. 49, 57, 468 S.E.2d 517, 522–23 (1996) ("[P]ersons may be considered prevailing parties for the purposes of attorney's fees if they succeeded on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit.").

Peg and David were so successful, in fact, that the benefits of their lawsuit have rippled far beyond their property line. Their victory means that many other Wilmington residents who likewise sought to use their property for short-term rental will be reimbursed for the more than $500,000 in fees they paid into the City's registry.[6] And in recognition of Peg and David's decisive victory, other cities in the state are now reconsidering their own ordinances. Because of "Wilmington's unfavorable ruling," one report says, "the city of Asheville is reviewing its ordinances," and the "city of Charlotte [is] throwing out all of its proposed [short-term rental] regulations, citing the recent Wilmington decision and potential legislation."[7] Peg and David's victory has thus brought statewide change.

In sum, Peg and David meet the criteria under Section 6-21.7. They successfully brought

---

[6] Michael Praats, *Wilmington No Longer Requires Short-Term Rental Registration Following Court Decision*, WECT (Apr. 29, 2022, 11:08am), https://www.wect.com/2022/04/29/city-will-return-short-term-rental-fees-paid-by-homeowners-following-appeals-court-ruling-with-interest/ (attaching by pdf the city manager's proposed appropriation ordinance "allocating funding for the refund of fees paid to the City for the registration of short-term rental units").

[7] Johanna F. Still, *City Won't Appeal Order, To Return STR Registration Fees*, WILMINGTONBIZ (May 2, 2022), https://www.wilmingtonbiz.com/government/2022/05/02/city_won%E2%80%99t_appeal_court_order_to_return_str_registration_fees%C2%A0/23155 ("In the meantime, illegally collected registration and convenience fees, plus 6% interest, will be immediately returned to the property owners. This amount to roughly $511,000, which council will vote Tuesday to set aside from its general fund."). That vote has since taken place and that appropriation—$511,000 in reimbursement for unlawfully required registrations—was made.

an action in which this Court and the Court of Appeals held that the City violated an unambiguous statutory limit on its authority. They are accordingly entitled to their attorneys' fees and costs.[8]

II. Calculation of Attorneys' Fees and Costs

Having established that Peg and David are entitled to their fees and costs under Section 6-21.7, the next issue is the amount of those fees and costs that Peg and David should recover. *See GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 244, 752 S.E.2d 634, 655 (2013) ("After concluding that it is statutorily authorized to award attorneys' fees, the trial court must make findings of fact regarding the reasonableness of the award."). Based on supporting documentation and application of the lodestar method, Peg and David submit that their reasonable (pre-discounted) attorneys' fees are $380,705.25 and their costs are $2,055.26.

A. Attorneys' Fees

The customary method for determining a permissible award of attorneys' fees is the lodestar method. *See, e.g.*, *Middleton v. Russell Grp., Ltd.*, 126 N.C. App. 1, 17, 483 S.E.2d 727, 736 (1997). The lodestar is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rate. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 594, 525 S.E.2d 481, 486 (2000). North Carolina courts evaluate the reasonableness of fees by consulting the eight factors found in Rule 1.5 of the Revised Rules of Professional Conduct:

---

[8] Unlike other statutes providing for attorneys' fees and costs, Section 6-21.7 does not provide courts mere discretion to award them. It instead provides that "the court *shall* award reasonable attorneys' fees and costs." N.C. Gen. Stat. § 6-21.7 (emphasis added). *See TAC Stafford v. Town of Mooresville*, 2022-NCCOA-217, ¶ 27 ("Thus, § 6-21.7 provides for mandatory attorneys' fees through its use of the word 'shall.'"); *see also Internet E., Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 405–06, 553 S.E.2d 84, 87 (2001) ("The word 'shall' is defined as 'must' or 'used in laws, regulations, or directives to express what is mandatory.'") (internal citation omitted); *Etheridge v. County of Currituck*, 235 N.C. App. 469, 477–48, 762 S.E.2d 289, 295–96 (2014) (holding that the award of attorneys' fees was mandatory because the statute providing them used the word "shall").

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.

Ehrenhaus v. Baker, 216 N.C. App. 59, 96–97, 717 S.E.2d 9, 33–34 (2011) (quoting N.C. Rev. R. Prof. Conduct 1.5); *see also Owensby v. Owensby*, 312 N.C. 473, 476–77, 322 S.E.2d 772, 774 (1984).

Ultimately, whether fees charged are "reasonable" is a "decision . . . largely left to the discretion of the trial judge, who has 'intimate knowledge' of the facts and circumstances of the case." *Okwara*, 125 N.C. App. at 594, 483 S.E.2d at 486. That decision should be based on "contemporaneous records showing the number of hours expended and the hourly rates for the attorneys charged." *Ehrenhaus*, 216 N.C. App. at 98, 717 S.E.2d at 34. More succinctly put, a trial court must make "findings of fact supported by competent evidence concerning the time and labor expended, skill required, customary fee for like work, and the experience or ability of the attorney based on competent evidence." *Perry v. GRP Fin. Servs. Corp.*, 196 N.C. App. 41, 52, 674 S.E.2d 780, 787 (2009).

Taking the above factors into account, Peg and David have determined the following reasonable hourly rates:

- Ari Bargil: $475/hour. Mr. Bargil is an attorney with 11–13 years of experience during this case. He graduated from Florida State University College of Law, clerked for Florida's Fifteenth Judicial Circuit, has successfully argued before multiple state and federal courts of appeal, and has extensive experience litigating property-rights cases. *See* Exhibit A, Affidavit of Ari Bargil ¶¶ 2, 5–6. For work performed from August 2020 to April 2022, Mr. Bargil dedicated 407.75 hours to this case. *Id.* ¶ 9. This work included researching and drafting various pleadings, motions, and briefing before this Court and the Court of Appeals. *Id.* ¶ 7.
- Robert Johnson: $475/hour. Mr. Johnson is an attorney with 11–13 years of experience during this case. He graduated from Harvard Law School, clerked on the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit, and has extensive experience litigating in federal courts of appeal. *See* Exhibit B, Affidavit of Robert Johnson ¶¶ 3–4. For work performed from August 2020 to November 2021, Mr. Johnson dedicated 52.25 hours to this case. *Id.* ¶ 10. This work included partial drafting of summary judgment briefing before this Court and briefing before the Court of Appeals. *Id.* ¶ 8.
- Robert Frommer: $475/hour. Mr. Frommer is an attorney with 16–18 years of experience during this case. He graduated from the University of Michigan Law School, has successfully litigated class-action lawsuits, and has repeatedly argued before state high courts. *See* Exhibit C, Affidavit of Robert Frommer ¶¶ 2, 6. For work performed from August 2020 to April 2021, Mr. Frommer dedicated 45.50

hours to this case. *Id.* ¶ 9. This work included research and partial drafting of the proposed amended complaint, the motion for summary judgment, and the briefs before the Court of Appeals. *Id.* ¶ 7.

- Adam Griffin: $275/hour. Mr. Griffin is an attorney with 0–2 years of experience during this case. He graduated from the University of North Carolina Law School and has second-chair experience litigating property-rights cases, among others. *See* Exhibit D, Affidavit of Adam Griffin ¶¶ 2–4. For work performed from August 2020 to July 2021, Mr. Griffin dedicated 392.50 hours to this case. *Id.*¶ 7. This work included extensive research, drafting of pleadings and motions before this Court, and helping draft the briefs before the Court of Appeals. *Id.* ¶ 6.
- Daniel Rankin: $275/hour. Mr. Rankin is an attorney with 2 years of experience during this case. He graduated from the University of Texas School of Law, clerked on the Supreme Court of Texas and the U.S. District Court for the Southern District of Texas, and has second-chair experience litigating suits against the state and federal government. *See* Exhibit E, Affidavit of Daniel Rankin ¶¶ 2, 5–6. For work performed during May 2022, Mr. Rankin dedicated 47.5 hours to this case. *Id.* ¶ 9. This work included researching and drafting this motion for attorneys' fees and costs. *Id.* ¶ 7.[9] His affidavit is attached as Exhibit E.
- John Branch: $300/hour. Mr. Branch is an attorney with 17 years of experience

[9] As North Carolina courts recognize, "[t]he majority of federal circuit courts have held that, where a party is entitled to a statutory award of fees, 'the time expended by attorneys in obtaining a reasonable fee is justifiably included in . . . the court's fee award,' including both the 'time spent preparing the fee petition and time devoted to litigating the amount of the award at the fee hearing.'" *Morris v. Scenera Rsch., LLC*, 2017 WL 2380230, at *15 (N.C. Super. Ct. 2017) (quoting *Bagby v. Beal*, 606 F.2d 411, 416 (3d Cir. 1979)).

during the course of his involvement in this case. He is an attorney with the law firm of Nelson Mullins LLP, a national law firm with offices in Raleigh, North Carolina. Mr. Branch provided advisory counsel in this matter at a discounted rate. The Nelson Mullins firm has been paid in full by the Institute for Justice in connection with Mr. Branch's participation in this matter. Accordingly, fees paid to the Nelson Mullins firm are incorporated in this request. Invoices reflecting Mr. Branch's representation are attached to Mr. Bargil's affidavit as Exhibit 1.

- Andrew Brown: $275/hour. Mr. Brown is an attorney with 9 years of experience during the course of his involvement in this case. He is an attorney with the law firm of Nelson Mullins LLP, a national law firm with offices in Raleigh, North Carolina. Mr. Brown provided advisory counsel in this matter at a discounted rate. The Nelson Mullins firm has been paid in full by the Institute for Justice in connection with Mr. Brown's participation in this matter. Accordingly, fees paid to the Nelson Mullins firm are incorporated in this request. Invoices reflecting Mr. Brown's representation are attached to Mr. Bargil's affidavit as Exhibit 1.

The total hours dedicated to the case by Institute for Justice attorneys only is 945.5.[10] These hours reflect all the work necessary to win this case. The above attorneys had to take this case over from prior counsel with no extensions of time, thus compelling them to work on tight filing deadlines and seek assistance from other attorneys in the firm. And other than Mr. Griffin, who left the firm in 2021, none of the above attorneys are barred in North Carolina, so reliance on local counsel, John Branch and Andrew Brown, was essential. Additionally, while Peg and David obtained a clear victory, the nature of the claims they made were complex in light of the both the

[10] This is separate from time expended by local counsel.

relative newness of the statute and the City's novel position regarding its apparent meaning. That complexity was compounded by virtue of the General Assembly amending the relevant state statute midway through litigation. And lastly, counsel for Peg and David had to prepare this case for oral argument in the Court of Appeals—an atypical opportunity that requires considerable preparation.[11]

Using the lodestar method—again, multiplying the number of hours reasonably expended by the reasonable hourly rate—the total amount of attorneys' fees Peg and David are eligible to seek is $361,112.75, plus fees paid to local counsel.

In support of this figure, Peg and David provide this Court with the affidavit of Alexander C. Dale, a partner with the Wilmington law firm Ward and Smith, P.A., attesting to the reasonableness of these rates relative to those in the New Hanover community. His affidavit is attached as Exhibit F. Along with considering "the customary fee for similar work in the community," *Okwara*, 136 N.C. App. at 594, 525 S.E.2d at 486, Mr. Dale accounted for each of the above attorneys' education, years of practice, prior legal employment, and relevant legal experience in opining on their respective rates—all of which can be found in the attorneys' affidavits filed along with this motion.

Mr. Dale's opinion on the rates of each attorney is further supported by the factors listed above in Rule 1.5 of the Revised Rules of Professional Conduct.

First, the issues counsel litigated were novel and significant. The legal questions were the

---

[11] Fees incurred defending a position on appeal are included in recoverable attorneys' fees. *See City Fin. Co. of Goldsboro, Inc. v. Boykin*, 86 N.C. App. 446, 449, 358 S.E.2d 83, 85 (1987) (explaining that once the trial court finds "that [the prevailing party is] entitled to attorney's fees in obtaining their judgment, any effort by [that party] to protect that judgment should likewise entitle them to attorney's fees."); *see also id.* at 450, 358 S.E.2d at 85 (noting that statutes awarding attorneys' fees "should be construed liberally in order to accomplish the purpose of the Legislature.").

first of their kind in North Carolina, as they arose under a recently codified statute. And because they implicated the validity of all residential rental regimes statewide, they were of major importance to residential property owners and every municipality in the state.[12] The difficulty and complexity of the case was also compounded by the fact that the statute preempting the City's ordinance was amended midway through litigation.

Second, the time limitations imposed by the circumstances were difficult. Plaintiffs' counsel took the case over from prior counsel and, following this Court's denials of their motion to continue and motion to amend the complaint, had to work to prepare briefs in response to dispositive motions on an abnormally tight turnaround—seven days.[13] These challenges were compounded by opposing counsel's strategy to expedite the case, beginning with its opposition to Plaintiffs' motion to amend the complaint. That strategy continued on appeal, for example, where the City routinely filed briefs early to trigger more immediate responsive deadlines for Plaintiffs' counsel.[14]

Third, the labor required for this case was increased by preparation for oral argument on appeal, which is not a routine practice in the Court of Appeals.

---

[12] While this case directly involved a registration for short-term rentals, the statute at issue was not limited to only that type of rental arrangement. Rather, it established a prohibition on registration or permitting for *all* forms of residential real property rentals statewide.

[13] This Court denied Peg and David's motion to amend on September 3, 2020. Soon after, this Court set Defendant's motion for summary judgment for hearing on September 14, 2020. Plaintiffs' counsel prepared both a response to Defendant's motion and a cross motion of its own and filed them one week later, on September 10, 2020.

[14] The City's opening brief was due on April 23, 2021, but filed on April 19, 2021. And the City's response to Plaintiff's cross-appeal was due on May 26, 2021, but filed two weeks early, on May 12, 2021. As a result, Plaintiffs' counsel was forced to prepare both a response to the City's appeal (due May 24, 2021) and a reply to the City's response (due June 1, 2021) at largely the same time.

And fourth, counsel obtained optimal results for their clients and countless others—in Wilmington and statewide. Peg and David not only got exactly what they sought from this lawsuit, but their victory also resulted in the appropriation of $511,000.00 back to the property owners who paid fees into the City's an unlawful property-registration system. And Peg and David's victory likely halted the imposition of Wilmington-like registration schemes elsewhere in North Carolina.

These rates, moreover, are well within the range prior cases have deemed reasonable. *E.g.*, *In re Pike Corp. S'holder Litig.*, 2015 WL 5918183, at *8 (N.C. Super. Ct. Oct. 8, 2015) (finding $550.00/hour for lead counsel reasonable, $375.00/hour for partner hours reasonable, and $250.00/hour for associates reasonable for commercial litigation); *Nakatsuka v. Furiex Pharms, Inc.*, 2015 WL 4069818, at *8 (N.C. Super. Ct. July 1, 2015) (noting that rates of approximately $300.00 to $550.00 per hour are typical of litigation in North Carolina); *Out of the Box Devs., LLC v. Doan Law, LLP*, 2014 WL 4298329, at *12 (N.C. Super. Ct. Aug. 29, 2014) (finding rates between $180 and $495 reasonable for associates and partners, respectively); *Vitaform, Inc. v. Aeroflow, Inc.*, 2021 WL 6049878, at *5 (N.C. Super. Ct. Dec. 15, 2021) (finding $400/hour, $350/hour, and $235/hour reasonable for a partner with seventeen years' experience, a partner with thirteen years' experience, and an associate with three years' of experience, respectively); *In re PokerTek Merger Litig.*, 2015 WL 270210, at *9 (N.C. Super. Ct. Jan. 22, 2015) (concluding that fees "in the range of $250–$450 per hour" were "consistent with the Court's own experience").

And, out of exercise of conservative billing judgment, Plaintiffs' counsel have declined to seek recovery of all the time dedicated to this case. To that end, in the exercise of good billing judgment, Institute for Justice attorneys have reduced the actual time they spent on this case by roughly 15 percent.[15] Additionally, Plaintiffs' counsel have also preemptively declined to seek

[15] This discount, to be sure, does not reflect the fact that Plaintiffs' counsel happen to be public-

recovery of the fees attributable to the work of Rebekah Ramirez, a paralegal at the Institute for Justice who spent hundreds of hours on this case. *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 691, 695, 374 S.E.2d 868, 871 (1989) (courts may also consider "the services expended by paralegals" in awarding attorneys' fees). Finally, on top of that hourly decrease and decision to not seek fees for Institute for Justice paralegal time, Plaintiffs' counsel's final request reflects *a 20 percent reduction* in the amount to which Plaintiffs are entitled.[16]

Based on the foregoing, the fees Peg and David seek are reasonable, and the Court need not downwardly depart from their request.

B. Costs

Section 6-21.7 also expressly authorizes an award of costs to the successful party. Peg and David seek $2,055.26 in costs. Such costs include filing fees, printing, consulting, transcripts, service of process, as incurred by both the Institute for Justice and local counsel. *See* Aff. of Ari Bargil, Ex. 1. A completed Bill of Costs with receipts attached thereto accompanies this motion.

III. Conclusion and Request for Relief

Based on the foregoing, Plaintiffs Peg and David Schroeder respectfully request that the Court award them **$304,564.20 in attorneys' fees** and **$2,055.26 in costs** pursuant to its authority under N.C. Gen. Stat. § 6-21.7.

---

interest attorneys. Federal courts across the nation have rightly rejected any distinction between public-interest attorneys and attorneys in private practice for purposes of awarding and calculating attorneys' fees. *E.g.*, *Ramos v. Lamm*, 713 F.2d 546, 551–52 (10th Cir. 1983) (collecting cases). Like federal law, the North Carolina statute entitling Peg and David to their attorneys' fees and costs, N.C. Gen. Stat. § 6-21.7, does not distinguish "between the compensation to be awarded private lawyers and that to be awarded to lawyers working in public interest law firms." *Id.* at 551.

[16] As Plaintiffs' counsel has argued, they are entitled to reasonable fees in the total amount of $380,705.25, which reflects fees for services provided by both the Institute for Justice and Nelson Mullins. This request seeks 80 percent of that amount, or $304,564.20, plus costs.

Respectfully submitted this 25th day of May, 2022.

Dated: May 25, 2022

John E. Branch III
Andrew D. Brown
NELSON MULLINS RILEY & SCARBOROUGH, LLP
4140 Parklake Ave., 2nd Floor
Raleigh, NC 27612
Tel: (919) 329-3828
Fax: (919) 329-3799
John.branch@nelsonmullins.com
Andrew.brown@nelsonmullins.com

Ari Bargil (FL Bar No. 71454)*
INSTITUTE FOR JUSTICE
2 South Biscayne Blvd., Suite 3180
Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601
abargil@ij.org

*Admitted *Pro Hac Vice*

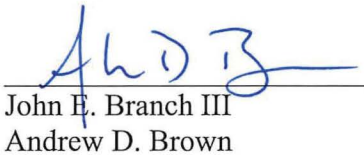
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of May 2022, a copy of the foregoing was served upon all parties to this matter by Electronic Mail on the following counsel of record:

Robert Hagemann
Chad W. Essick
N. Cosmo Zinkow
POYNER SPRUILL LLP
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601
RHagemann@poynerspruill.com
cessick@poynerspruill.com
NZinkow@poynerspruill.com

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

Counsel for Defendants



John E. Branch III
Andrew D. Brown
NELSON MULLINS RILEY & SCARBOROUGH, LLP
4140 Parklake Ave., 2nd Floor
Raleigh, NC 27612
John.branch@nelsonmullins.com
Andrew.brown@nelsonmullins.com

Counsel for Plaintiffs