INSTITUTE FOR JUSTICE
FLORIDA

July 17, 2024

Via Electronic Mail
Patrick Taylor
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Town of Highlands
Board of Commissioners
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RE: Highland's Amortization of Short-Term Rental Properties

Dear Mayor and Town of Highlands Board of Commissioners,

It has come to my attention that the town of Highlands is once again considering ordering the elimination of the town's short-term rentals through amortization. As before, 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 (still) believe they are correct.

As I explained in my previous letter to Highlands, 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*. And it also bears striking similarities to a Mauldin, South Carolina ordinance that—before being wisely withdrawn following a

[1] *Schroeder v. City of Wilmington*, 282 N.C. App. 558, 872 S.E.2d 58 (2022).

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lawsuit by IJ—would have forced the needless closure of a local U-Haul business.[2] Given many of those similarities, the town's proposal is deeply concerning.

First, forcing property owners to eliminate a lawful existing use offends the settled expectations of property owners. Many of those owners 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. Next, the town's proposal, while less complicated than its earlier iteration, still requires a de facto permitting or registration scheme to be functional. After all, if the town is unaware who *was* renting, it cannot know who must stop and when. But as discussed below, state statute does not permit registration and permitting for residential rental properties.

My understanding is that the town council is perhaps still under the mistaken impression that the amortization of non-conforming uses—a controversial land-use tool to say the least—has been categorically approved by the North Carolina Supreme Court. Given this understanding, I suspect that the town council might expect that it will be successful in a potential legal challenge to the town's use of amortization here. I recommend caution. As your city attorney publicly advised you in your commission meeting on June 24, 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 scrapyard 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***.

Again, *Joyner* marked 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 appeal) have uniformly dealt with the elimination 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. County 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; but 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

[2] *Sark et al. v. City of Mauldin*, 2022-CP-2304935 (S.C. Tr. Ct., *filed* Sept. 8, 2022).

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(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)). And as your city attorney also advised you, there is a growing trend among courts—both state and federal—favoring property owners in disputes involving abuses of this type.[3]

Then there is the issue of attorneys' fees—which Highlands, by law, will almost-surely be responsible for paying in the likely event of a successful legal challenge to the proposed ordinance. Indeed, North Carolina law, rather 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 likely be triggered because the town's proposal involves a de facto registration—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.[4] And because the appeals court in that case unequivocally concluded that Wilmington's ordinance was unambiguously foreclosed by state statute, plaintiffs' counsel successfully obtained a judgment recovering *all* of its fees sought: **$304,564.20, plus costs.**[5]

In sum, the town's proposal would deploy a legally dubious land-use tool 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

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[3] *See, e.g.*, *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. App. 2019) (striking down a ban on short-term rentals under the Texas Constitution); *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022) (striking down New Orleans' residency requirement under the U.S. Constitution).

[4] Wilmington's attorneys—the same law firm evidently retained by Highlands—could at least defend its interpretation by relying on the supposed novelty of this issue. Highlands will not have that luxury. To the extent there was doubt before, the Court of Appeals' decision in *Schroeder* eliminated it (and the trial court awarded fees accordingly). Thus, whereas the City of Wilmington violated only unambiguous statutory language, Highlands is considering violating both unambiguous statutory language *and* case law affirming that statutory language's meaning.

[5] Copies of the *Schroeder* court's Order Granting Plaintiffs' Motion for Attorneys' Fees and Costs and its Order Entering Final Judgment and Granting Plaintiffs' Motion to Dissolve Stay are enclosed.

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the proposed ordinance calls for the creation of a de facto registration or permitting system—something the North Carolina Court of Appeals struck down as unlawful in *Schroeder*. Accordingly, the proposed ordinance also exposes the town to substantial financial liability in the form of attorneys' fees, if (or, more likely, when) it must defend its unlawful permitting/amortization scheme in court.

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

Sincerely,

Ari Bargil
Senior Attorney
INSTITUTE FOR JUSTICE

Enclosures

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STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

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

FILED
2022 SEP 15 A 9:31
NEW HANOVER CO., C.S.C.
BY_____

DAVID SCHROEDER and
PEGGY SCHROEDER,

Plaintiffs,

v.

CITY OF WILMINGTON and
CITY OF WILMINGTON BOARD OF
ADJUSTMENT,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

THIS MATTER came before the undersigned Superior Court Judge in and for the County of New Hanover on the 7th day of September 2022 on Plaintiffs' Motion for Attorneys' Fees and Costs. Plaintiffs were represented by Ari Bargil of the Institute for Justice in Arlington, Virginia.[1] Mr. Bargil was joined by local counsel, John Branch, with the office of Nelson Mullins, LLP of the Wake County Bar. Defendant was represented by Robert Hagemann with the office of Poyner Spruill, LLC of the Wake County Bar.

The Court having reviewed the motion and having heard the arguments of counsel, makes the following findings:

1. The City of Wilmington is a party to this proceeding.

2. In this proceeding, the Plaintiffs challenged an ordinance enacted by the City of Wilmington to regulate short-term rentals through a registration and lottery system. The Plaintiffs alleged that the ordinance was preempted by state statute. On summary judgment, the Plaintiffs prevailed.

3. On appeal of this Court's ruling granting summary judgment in favor of Plaintiffs, the North Carolina Court of Appeals held that "Wilmington's registration requirements for rentals, and those provisions of the ordinance inseparable from them, are prohibited by

[1] Mr. Bargil is a Florida-barred attorney practicing in the Institute for Justice's Miami office. He is admitted to practice *pro hac vice* in this case.

state statute and therefore invalid[.]" *Schroeder v. City of Wilmington*, 2022-NCCOA-210, ¶21.

4. In explaining its finding, the North Carolina Court of Appeals held that state statute prohibiting the ordinance enacted by Wilmington and challenged by Plaintiffs was "in no way ambiguous," and therefore the City's "Ordinance [was] prohibited by the statute's straightforward language to the extent it requires Plaintiffs 'to register rental property with the city.' " *Id.* ¶23 (quoting N.C. Gen. Stat. § 160A-424(c) (2017)).

5. As such, the North Carolina Court of Appeals found that the ordinance, enacted by Defendant City of Wilmington and challenged by Plaintiffs, violated an unambiguous statute setting limits on the City of Wilmington's authority by requiring registration of short-term rental properties.

6. Under North Carolina law, reasonable attorneys' fees are therefore appropriate here. Per state statute:

> 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.

7. The Court finds that the elements of N.C. Gen. Stat. § 6-21.7 are satisfied here. Specifically, the City of Wilmington is a party to this action; the City violated a statute "setting forth unambiguous limits on its authority" because the statute was "not reasonably susceptible to multiple constructions"; and Plaintiffs "successfully challenged the city's . . . action."

8. The Court finds that Plaintiffs prevailed in both the trial court and at the Court of Appeals. In doing so, Plaintiffs have secured virtually all of the relief desired when this lawsuit was initiated. Additionally, Plaintiffs success has impacts beyond Plaintiffs themselves: The offensive provisions of Defendant's ordinance are unenforceable against all Wilmington properties while other municipal entities in North Carolina are also prohibited from crafting such regulations.

9. Plaintiffs submitted affidavits appending detailed records describing the time expended for their work in this case. Additionally, Plaintiffs submitted an affidavit from Alex Dale, a local practitioner who testified that the fees sought by Plaintiffs—both in terms of their hourly rate and total amount sought—are reasonable in light of the experience and expertise of Plaintiffs' counsel, the needs of this case, and are consistent with market rates.

10. Accordingly, the Court finds that the attorneys' fees sought by Plaintiffs through the Motion—$304,564.20, or approximately 80% of the amount of attorneys' fees of which Plaintiffs submitted evidence—is reasonable in light of the work performed and success obtained and are consistent with market rates.

11. The Court also finds that the total costs sought by Plaintiffs—$2,055.26—are reasonable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs are entitled to attorney fees and costs, pursuant to N.C.G.S. 6-21.7. Therefore, the Court awards attorneys' fees in the amount of $304,564.20 and costs in the amount of $2,055.26 to the Plaintiffs.

IT IS FURTHER ORDERED that payment in the amount of $306,619.46 is to be made payable to counsel for Plaintiffs no later than sixty (60) days from the date of this Order.

This the 14 day of September 2022.

Hon. Phyllis M. Gorham,
Superior Court Judge Presiding

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.

ORDER ENTERING FINAL JUDGMENT AND GRANTING PLAINTIFFS' MOTION TO DISSOLVE STAY

THIS MATTER came before the undersigned Superior Court Judge in and for the County of New Hanover on the 7th day of September 2022 on Plaintiffs' Motion for Entry of Final Judgment and to Dissolve Stay. Plaintiffs were represented by Ari Bargil of the Institute for Justice in Arlington, Virginia.[1] Mr. Bargil was joined by local counsel, John Branch, with the office of Nelson Mullins, LLP of the Wake County Bar. Defendant was represented by Robert Hagemann with the office of Poyner Spruill, LLC of the Wake County Bar. The Court having reviewed the motion and having heard the arguments of counsel finds the following:

1. This matter involved a challenge to the City of Wilmington's ordinances restricting short-term rental properties.

2. On 14 September 2020, this Court heard argument on the Defendant's Motion for Summary Judgment.

3. On 15 September 2020, this Court entered judgment in favor of Plaintiffs, holding that "[t]he provisions of Wilmington City Code § 18-331 are preempted by N.C. Gen. Stat. § 160A-424(c) and N.C. Gen. Stat. § 160D-1207(c) and are therefore invalid." Thus, this Court ordered, "Wilmington City Code § 18-331 is declared void and unenforceable."

[1] Mr. Bargil is a Florida-barred attorney practicing in the Institute for Justice's Miami office. He is admitted to practice *pro hac vice* in this case.

4. On 17 September 2020, this Court entered an order granting Defendant's Motion to Stay in this matter, thereby determining that "the Court's September 15, 2020 order granting summary judgment in favor of Plaintiffs is stayed as to all parties other than the Plaintiffs until this matter is fully resolved on appeal."

5. Upon the request of the parties, on 15 October 2020, this Court re-entered summary judgment in favor of Plaintiffs in the form of a "final judgment." The final judgment again declared that "Wilmington City Code § 18-331 is declared void and unenforceable." This Court, however, left the City's stay intact, expressly stating that the final judgment in favor of Plaintiffs remained "stayed as to all parties other than Plaintiffs until this matter is fully resolved on appeal."

6. On 10 November 2020, the Defendant timely filed its Notice of Appeal.

7. On 18 November 2020, the Plaintiffs timely filed their Notice of Cross-Appeal.

8. Both appeals were fully briefed, and on 17 November 2021, oral argument was held before the North Carolina Court of Appeals.

9. On 5 April 2022, the Court of Appeals issued its decision. The Court of Appeals concluded that it "affirm[ed] the trial court's judgment in part, reverse[d] the portion of the judgment declaring the entirety of [Wilmington City Code § 18-331] invalid, and remand[ed] for entry of a judgment consistent with [its] holdings. Plaintiffs' cross-appeal [wa]s dismissed as moot."

This Court, having fully apprised itself of the Court of Appeals decision, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, pursuant to and in light of the rationale as articulated by the Court of Appeals, Wilmington's registration requirements for rentals, and those provisions of the ordinance inseparable from them, are prohibited by state statute and therefore invalid. Those invalid provisions are: (1) The general requirement established under 18-331 that owners of short-term rental properties must "register" with the City of Wilmington; (2) the cap and distance requirements and their predicate registration provisions, *i.e.*, the entirety of Secs. 18-331.2 and 18-331.4; (3) 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; (4) the registration termination provisions, *i.e*, the entirety of Secs. 18-331.8-.9 and .13; (5) the requirement that a registration number be posted in a short-term rental, as found in Sec. 18-331.14(d); (6) Sec. 18-331.7's limited application to "registered" uses only; and (7) the amortization of short-term rentals without a registration, *i.e.*, the entirety of Sec. 18-331.17. These provisions, as declared by the Court of Appeals, are invalid and therefore remain void and unenforceable.

IT IS FURTHER ORDERED that, pursuant to and in light of the rationale as articulated by the Court of Appeals, the following provisions of the Wilmington City Code § 18-331 are *not* preempted by Section 160D-1207(c) as such provisions "do[] not require registration to be enforceable": (1) the restriction of whole-house lodging to certain zoning districts, *i.e.*, the entirety of Sec. 18-331.1; (2) the requirement that there be at least one off-street parking space per bedroom, whether on-site or off-site through shared parking or parking space rental agreements, *i.e.*, the

remaining portions of Sec. 18-331.5 not held preempted above; (3) the prohibition against variances by the board of adjustment in Sec. 18-331.6; (4) requirements that short-term operators comply with all applicable laws, disallow events and large gatherings, maintain adequate insurance, keep adequate records, ensure refuse is appropriately stored and collected, refrain from preparing and serving food, and prohibit cooking in individual bedrooms *i.e.*, the entirety of Secs. 18-331.10-.12. and .15-.16; (5) the requirement that certain information unrelated to registration be posted in the rental, *i.e.*, Secs. 18-331.14(a)-(c) and (e); and (6) any provisions of the Ordinance not otherwise held preempted above.

IT IS FURTHER ORDERED that the Plaintiffs' Motion to Dissolve Stay is hereby GRANTED. The terms of this Order constitute final judgment in this matter and, as a result of the dissolution of the Defendant's stay, shall have general applicability. Accordingly, the offending provisions of the Defendant's ordinance, as identified by the Court of Appeals and incorporated herein, are void and unenforceable.

This the 14 day of September 2022.

Hon. Phyllis M. Gorham,
Superior Court Judge Presiding