No. COA22-910 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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ERIC P. PLOW, TRUSTEE, OR HIS SUCCESSOR IN TRUST, OF THE ERIC P. PLOW REVOCABLE TRUST DATED OCTOBER 20, 2015, Plaintiff, v. TOWN OF CHAPEL HILL, NORTH CAROLINA, Defendant.	)	From Orange County No. 21 CVS 988

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES

Cases:

Former Statutes

Ordinances

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ERIC P. PLOW, TRUSTEE, OR HIS SUCCESSOR IN TRUST, OF THE ERIC P. PLOW REVOCABLE TRUST DATED OCTOBER 20, 2015,	)	From Orange County No. 21 CVS 988
Plaintiff,	)	
v.	)	
TOWN OF CHAPEL HILL, NORTH CAROLINA,	)	
Defendant.	)	

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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INTRODUCTION

This case poses a simple issue: Defendant-Appellee Town of Chapel Hill did not have statutory authority to enact the Short-Term Rental Ordinance to regulate zoning and land use based on where the owner or owner's agent lives or doesn't live, and for what length of time.

For a defense of this ultra vires ordinance, the Town is trying to create issues that may look friendlier to its position but are not part of this case.

One such non-issue is to mischaracterize Plaintiff's challenge to the unlawful owner-agent residency requirement in the ordinance as a nonsensical attempt to regulate the type of person (e.g., human or entity) that can own real property.

A second is an attempt to create two standards for construction of ordinances, based on whether they involve fees. The Town argues that ordinances that do not involve fees can be construed more broadly, without regard to the enabling statutes. No authority is presented in support of this proposition, because there is none.

Finally, the Town characterizes the owner-agent residency requirement in the STR Ordinance as merely another type of land use, such as single-family or multi-family. If successful, this would be a fundamental change in the nature of land use regulation.

In short, the Town is seeking reversal of well-settled law. What the authorities cited by the Town for these propositions actually stand for is the

principle that all municipal authority is limited by the enabling statutes, such that the STR Ordinance is ultra vires.

ARGUMENT

I. THE RESIDENCY REQUIREMENT IN THE STR ORDINANCE DOES NOT REGULATE THE TYPE OF OWNER. WHAT THE ORDINANCE REGULATES IS WHERE ANY STR OWNER OR AGENT CAN LIVE.

In an attempt to substitute an issue friendlier to its position instead of the real issue in this case, the Town uses *City of Wilmington v. Hill,* 189 N.C.App. 173, 657 S.E.2d 2d 670, 673 (2008). This friendlier issue is that the STR Ordinance "does not regulate the nature of ownership of the legal estate in which the STR operates." (Town brief, p. 16.)

Actually, the types of legal entities (such as human or LLC) that can own real estate is not specified in the STR Ordinance. The real issue is that the STR Ordinance determines whether an owner of any type can offer short-term rentals based on the residence of the owner or owner's agent.

The Town did acknowledge the actual holding in the *Wilmington* case in a parenthetical:

> (invalidating requirement that only owners of property who live on the property may maintain a garage apartment as an accessory use.)

(*Id.*) This is exactly analogous to this case, and the Town does not even attempt to show how this holding can be distinguished.

Plaintiff is asking the Court to do the same as in the Town's *Wilmington* parenthetical, invalidate the requirement that zoning for short-term rentals depends on whether or not the owners of property or their agents live on the property.

In this same line of argument, the Town also states that the STR Ordinance "has no owner-occupancy requirement." (Town brief, p 17.) However, the Town then discredits its own statement:

> The whole premise of this use designation is that the *owner of the dwelling is choosing* not to use the dwelling as a primary residence for the owner or anyone else.

(*Id.* (emphasis by the Town).

Exactly. The heart of the STR Ordinance is the ultra vires provision that whether an STR is allowed on property is where its owner lives, or to use the Town's new phrase, chooses to live, or appoint an agent to live.

This is indeed an owner-agent occupancy requirement — regardless of whether the owner is a human being, an LLC, or a corporation. For a primary residence STR to be allowed in certain zoning districts, even an

LLC has to appoint an agent to live on the property for at least half the year. (R pp 31-33.) For a dedicated STR rental to be allowed in certain zoning districts, the owner of whatever kind is required to *not* reside on the property. (*Id.*)

The Town used one of its own lost causes to support this issue confusion, *Graham Court Associates v. Town of Chapel Hill,* 53 N.C.App. 543, 281 S.E.2d 418 (1981). This is one of the cases the Court relied on in *City of Wilmington. E.g., City of Wilmington,* 189 N.C.App. at 175, 657 S.E.2d at 672.

However, not only did the Town fail to explain the claimed distinction between *Graham Court Associates* and this case, but, just as with the *Wilmington case,* it included a parenthetical for *Graham Court Associates,* which affirms the principle on which the STR Ordinance should be invalidated:

> (invalidating a requirement that an owner obtain government approval before converting multi-family apartments to condominiums because the residential use was the same whether the units were *tenant occupied or owner occupied*).

(Town brief, p 16 (emphasis added).)

The same is so in this case. Use of land is exactly the same regardless of the type of owner or whether or for how long the owner, agent, or tenant lives there. The Town does not have the authority to require or prohibit owner residency, such that the STR Ordinance is ultra vires.

II. MUNICIPAL AUTHORITY IS DEFINED BY THE ENABLING STATUTES, REGARDLESS OF THE TYPE OF CASE.

The Town now attempts to create a separate category of ordinances that can be construed beyond the enabling statutes, those that do not involve fees. (Town brief, pp 11-12.) This is not the law of this State, and the authorities cited do not support this proposition.

The Town itself was the defendant in two cases cited, *King v. Town of Chapel Hill,* 367 N.C. 400, 758 S.E.2d 364 (2014), and *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 757 S.E.2d 302, *rev. denied,* 367 N.C. 519, 758 S.E.2d 874 (2014) (both, Town brief, p 11.) Both affirmed the principle:

> Municipalities are vested with general police power to regulate or prohibit acts detrimental to their citizens' health, safety, or welfare. *Even so, that authority is limited in scope, constrained by State and federal laws, as well as by inherent fundamental rights.*

King, 367 N.C. at 402, 758 S.E.2d at 367 (emphasis added.)

King was brought by the owner of a towing company, challenging the Town's authority to create a towing fee schedule, regulate drivers' use of cell phones, and prohibit companies from charging credit card fees. *Id.* The Supreme Court upheld or invalidated these parts of the ordinance on the basis of whether they were within the enabling statutes, irrespective of whether they involved fees.

The court held that Chapter 20 did not grant municipalities any power to regulate nonconsensual towing from private lots, such that certain provisions of the Chapel Hill ordinance were ultra vires on that basis. *Id.* at 405-406, 758 S.E.2d at 369.

However, the court held that the Town did have authority from Chapter 160A to regulate such towing, because this "flows from" the statutory authority to protect the public welfare — safety for drivers whose cars were towed and left without transportation. *Id.* at 407, 758 S.E.2d at 370.

The court also ruled that the Town did not have authority to create the fee schedule. The reasoning was not whether fees were involved, but on

the basis that even an "expansive reading" of Chapter 160A did not give the Town authority to create the fee schedule. *Id.* at 409, 758 S.E.2d at 371.

The court likewise held that the Town did not have statutory authority to prevent tow operators from charging credit card fees — because it "exceeds Chapel Hill's general authority to regulate nonconsensual towing from private lots," *id.* 409, 758 S.E.2d at 372, not because it was a fee issue.

The court also held that the Town had no authority to prohibit drivers from using cell phones, on the basis that this was pre-empted by a comprehensive regulatory scheme at the state level. *Id.* at 412, 758 S.E.2d at 374. No fees were involved in that issue.

Fees were involved in *Daedalus, LLC v. City of Charlotte*, 282 N.C. App. 452, 2022-NCCOA-203, *rev. denied,* 382 N.C. 228, 876 S.E.2d 290 (2022) (Town brief, p 11.) But the Court made it clear that its decision was not based on any fee-no-fee distinction: "'*All acts* beyond the scope of power granted to a municipality are void.'" *Id. at* ¶ 22 (citation omitted) (emphasis added).

The focus was an adequate public facilities ordinance in *Union Land Owners Association v. County of Union,* 201 N.C.App. 374, 377, 689 S.E.2d 504 (2009), *rev. denied,* 364 N.C. 442, 703 S.E.2d 148, *rev. dismissed,* 364 N.C. 442,

703 S.E.2d 149 (2010); and *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012) (Town brief, pp 11-12).

Impact fees were involved, but both cases turned on the lack of statutory authority to enact the ordinance, not any fee-no-fee distinction. *Union Landowners Association,* 201 N.C.App. at 379-80, 689 S.E.2d at 506-07; *Lanvale Properties,* 366 N.C. at 155, 731 S.E.2d at 809.[1]

Turning to *Patmore* (Town brief, p 11), the Town ordinance at issue capped the number of cars that could be parked on a residential lot in a district where many residents were university students. *Patmore,* 233 N.C.App. at 135, 757 S.E.2d at 302.

The Court ruled that this ordinance was valid — based on express statutory authority. The purpose of that ordinance was enacted to prevent too many students from being crowded into too-small quarters. *Id.* at 141-42, 757 S.E.2d at 307. The Court found that there was specific statutory

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[1] In both cases, the purpose of the ordinance was to ease overcrowding in the schools. But this could not substitute for statutory authority. *Union Landowners Association,* 201 N.C.App. at 377, 379-80, 689 S.E.2d at 506; *Lanvale Properties,* 366 N.C. at 155, 731 S.E.2d at 810.

Even the laudable goal of highway safety could not provide authority for the Chapel Hill ordinance in *King.* 367 N.C. at 409, 758 S.E.2d at 372.

There were no such laudable purposes claimed for the STR Ordinance. Only the generic LUMO language was used.

authority in Chapter 160A, "'to prevent the overcrowding of land; [and] to avoid undue concentration of population.'" *Id.* at 143, 757 S.E.2d at 307. No fee-no-fee distinction was noted.

The same was true in *River Birch Associates of Raleigh v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538(1990) (Town brief, p 11) The ordinance provided for conveyance of a recreation area to a homeowners association pursuant to a subdivision plat. *Id.* at 104, 388 S.E.2d at 540.

The court found that there was statutory authority for requiring the conveyance, specifically, that G.S. § 160A-372, "contemplates that a city ordinance may provide for the conveyancing of property so long as the conveyance promotes the establishment of recreation areas within the immediate neighborhood of the subdivision." *Id.* at 109, 388 S.E.2d at 543. The court concluded that a requirement for such a conveyance was "'reasonably necessary or expedient' to carry into effect the legislative intent to secure the residents of the subdivision the benefits of the recreation areas." *Id.*

The basis for this conclusion was that "we are to construe in a broad fashion the *provisions and grants of power contained in chapter 160A*."

Id. (emphasis added). Any conditions imposed for approval of a project, the court said, "*must be authorized by statute*." *Id.* at 118, 388 S.E.2d at 548 (emphasis added). No fee issue was discussed.

The same principle was applied in *Homebuilders Association of Charlotte, Inc.*, 336 N.C. 37, 442 S.E.2d 45(1994) (Town brief, p 11). The builders contended that there was no "specific enabling legislation" authorizing the City to impose user fees. *Id.* at 38, 442 S.E.2d at 47. The Supreme Court held that the power to regulate implies the power to impose a fee sufficient to cover the cost of the regulation. *Id.* at 42, 442 S.E.2d at 49.

But again, the court held that powers granted to municipalities must be within the "general authority to adopt ordinances conferred on cities by [statutes in Chapter 160A]." *Id.* The court approved the fees expressly because "the services for which user fees are charged are *all related to some express authority of the City* to regulate the development of land," not because fees were involved. *Id.* (emphasis added).

There is no separate category for some ordinances to be broadly construed regardless of the enabling statutes. There is no basis on which the STR Ordinance can be construed beyond the Town's legislative

authority. What the Town is seeking is reversal of well-settled law in order to save the ultra vires STR Ordinance.

III. RESIDENCE OF A LANDOWNER OR OWNER'S AGENT DOES NOT CONSTITUTE A *USE* OF THE LAND.

A further effort by the Town to prop up the STR Ordinance is to confuse land *use* with *residence* and *tenancy*. The Town argues that short-term rentals are just "uses under LUMO and other ordinances throughout North Carolina." (Town brief, p 15.) This general statement of land *use* is intended to conceal the ultra vires nature of the owner-agent residency requirement.

In the Chapel Hill LUMO, no other *use* is defined to include residence of the owner or owner's agent. For example, "single-family lot" is defined as "[a]lot that is located in a subdivision within a zoning district that allows single-family dwelling units, and does not include covenants, restrictions, or conditions of approval that prohibit construction of a single-family dwelling on the lot." LUMO, Appendix A (Definitions). Apart from the STR Ordinance, the LUMO does not mention where the owner lives or require that the owner appoint an agent to live on the property.

For short-term rentals, however, the owner-agent residency is the sole factor that determines whether the rental is allowed in particular zoning districts. This is ultra vires.

CONCLUSION

Plaintiff-Appellant respectfully requests that this Court reverse the Order of 1 July 2022, which granted summary judgment in favor of the Defendant Town and denied Plaintiff's motion. Plaintiff-Appellant requests that the Court grant Plaintiff's motion and find that the STR Ordinance is not valid, legal, or enforceable.

Respectfully submitted, this 15th day of February, 2023.

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CERTIFICATE OF COMPLIANCE

This certifies that the foregoing brief complies with Rule 28(j) of the North Carolina Rules of Appellate Procedure. The brief, excluding the cover page, index, table of authorities, signatures, this certificate, and the certificate of service, does not exceed 3,750 words, pursuant to the word count reported by the word-processing software.

This 15th day of February, 2023.

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