
Coates' Canons Blog: Understanding the Legal Basis for the Strike Down of Wilmington's Short-Term Rental Ordinance

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To understand the Superior Court judge's rationale for striking down the city of Wilmington's whole-house lodging ordinance (Sec. 18-329), it is helpful to review the law that served as the basis for the decision. As discussed in this previous blog post, S.L. 2017-73 clarified that properties subject to the Vacation Rental Act, including short-term rentals (STRs), are also subject to the requirements set forth in the Periodic Inspections statutes (previously G.S. 160A-424 & 153A-364, now G.S. 160D-1207). The Periodic Inspection statutes afford owners of residential rental properties certain protections because the law limits local government authority to conduct periodic inspections, prohibits the registration of residential rental property, limits permitting, and bans the imposition of taxes and fees not likewise charged to commercial rental properties.

With the recent adoption of Chapter 160D, the limitations outlined in the Periodic Inspection statutes have been relocated from the statutes on general building inspections to the statutes on housing code enforcement. The legislature also amended subsection (c) of 160D-1207 to clarify the restrictions on permitting and registration of residential rental properties:

"In no event may a local government do any of the following: (i) adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission under Article 11 or Article 12 of this Chapter from the local government to lease or rent residential real property or to register rental property with the local government" S.L. 2019-111 (emphasis added).

The added reference to Articles 11 and 12 indicates that the prohibition on requiring permits for residential rental property is specific to building code or the housing code permits (i.e., Articles 11 and 12). However, rental *registries* continue to be unlawful—the legislature did not amend 160D-1207 to provide otherwise. Thus, a local government may not require an owner to participate in a registration program for rental residential property, nor may a local government require owners to obtain extra permitting under building code or housing code in order to rent residential property (Articles 11 and 12). Importantly, the amended statute does not divest local governments of their authority to regulate different land uses through zoning. Therefore, it is reasonable to conclude that local officials may require a zoning-compliance permit or other zoning approval in order to commence a short-term-rental land use.

The Wilmington Case

The recent New Hanover County Superior Court case, *Schroeder v. City of Wilmington* (19-CVS-4028), supports the above interpretation of the law. The judge held that state law clearly preempted the city's requirement that STR owners *must register* their rental property with the city annually: "No local government may adopt or enforce any ordinance that would require any owner or manager of rental property to register rental property with the local government." Notably, the judge also concluded, "[t]he amendments made to G.S. 160A-424 in 2019 S.L. 111 limit the prohibition on permits and permissions to Articles 11 and 12 of that chapter but no such limiting language was made applicable to the prohibition on the registration requirement." Thus, the judge also interpreted the law as requiring a broad prohibition on registration, but the prohibition on permitting requirements is narrower and limited to Articles 11 and 12.



It is worth noting the judge struck down in its entirety the city's whole-house lodging ordinance as being preempted by state law, but that ordinance is more than just a registration requirement. It includes a 400-foot separation between STR properties, a 2% cap, a lottery for permits, amortization of unpermitted uses, and more. It is unclear if or why these other provisions are directly preempted by state law, but nonetheless they were struck down along with the registration requirement. This uncertainty has caused some local officials to ask what exactly is lawful when it comes to regulating STRs? Why didn't the judge simply strike the registration requirement?

For the time being, there are more questions than answers. The judge has agreed to a stay and it seems reasonable that an appeal may be forthcoming. Given the ongoing interest in short-term rentals across the state, it is likely we will get more clarity and refinement of the authority of North Carolina local governments to regulate short-term rentals soon.

What now?

In the meantime, land use regulations such as zoning remain, and local governments may continue to use their zoning authority to regulate STRs as a separate land use. In doing so, a local government will want to define short-term rentals as a separate land use within the code, just as they would define conventional bed-and-breakfasts as a separate land use. Further, because G.S. 160D-1207 does not limit the issuance of *permits* under zoning, it seems reasonable for a local government to require a basic zoning permit for the land use should it wish to do so. Importantly, local officials must remember to avoid adopting a property *registration* requirement—this is where the city of Wilmington ran into trouble. Had the city simply issued zoning permits to regulate this land use, the judge probably couldn't have struck down the ordinance on the basis the city violated G.S. 160A-424(c) (i.e. G.S. 160D-1207(c)).

Links

- library.municode.com/nc/wilmington/codes/code_of_ordinances?nodeId=PTIITECO_CH18LADECO_ART6SUDERE_DIVIPRCOSPUSPRACUSST_S18-331WHUSLOUSREMUHIDI
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_160D.html
- www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2019-111.pdf