INSTITUTE FOR JUSTICE

September 23, 2022

Via Electronic Mail
John C. Strickland
Mayor of Pinehurst Village
395 Magnolia Road
Pinehurst, NC 28374
jstrickland@vopnc.org
publiccomments@vopnc.org

Pinehurst Village Council
395 Magnolia Road
Pinehurst, NC 28374
ppizzella@vopnc.org
lboesch@vopnc.org
jmorgan@vopnc.org
jhogeman@vopnc.org

RE: Pinehurst Village's Amortization of Short-Term Rental Properties

Dear Mayor Strickland and Pinehurst Village Council Members,

It has come to my attention that the town of Pinehurst 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] Pinehurst's 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 eliminate a use that was lawful when it began 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. This is objectively unfair.

[1] *Schroeder v. City of Wilmington*, 2022-NCCOA-210, 872 S.E.2d 58 (N.C. App. 2022).

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

From a legal perspective, there are other problems. My suspicion is that the town council may be 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***.

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 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)).

Few other cities have attempted what Pinehurst is considering. 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. Austin*, 615 S.W. 3d 172 (Tex. App. 2019), involved a ***six-year*** amortization of short-term rentals in Austin, Texas. Austin lost. And significantly, 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 Pinehurst, by law, will likely be responsible for paying should someone mount 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 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 inherently 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."). Indeed, there is no other way to keep track of which uses enjoy lawful, non-conforming status during the amortization period than to require that they be registered and permitted. Importantly, this is precisely the statute that was at issue in the *Schroeder v. Wilmington* matter.[2] And Wilmington's error in legal judgment in construing that statute has since cost it over $305,000 in attorneys' fees and costs.[3]

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 necessarily demands the creation of a permitting or registration 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, if (or, more likely, when) it must defend its unlawful permitting/amortization scheme in court.

---

[2] Wilmington's attorneys attempted to defend its interpretation by relying on the supposed novelty of the issue, arguing that the statute at issue did not *unambiguously* foreclose their legal position in the *Schroeder* matter. Pinehurst will not have that luxury. To the extent there was doubt before, the Court of Appeals' decision in *Schroeder* eliminated it. Indeed, whereas the City of Wilmington violated only unambiguous statutory language, Pinehurst is considering violating both unambiguous statutory language ***and*** case law affirming that statutory language's meaning.

[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 Pratts, *Wilmington's short-term rental restrictions already cost taxpayers, could now cost more in legal fees*, WECT, June 21, 2022, *available at* https://tinyurl.com/4abemwrp.

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

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

Ari Bargil
Attorney
INSTITUTE FOR JUSTICE

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