

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF MACON

FILE NO. 21-CVS-612

JENNIFER HUFF and husband, )  
 BRANDON HUFF; CHARLES ALBERT )  
 STEPHENS and wife, JANE VITRE )  
 RAVENEL STEPHENS; KRISTY )  
 FAVALLI and husband, CHRISTIAN B. )  
 FAVALLI; MIRROR LAKE HOLDINGS, )  
 LLC; 662 WYANOAK, LLC; PETER )  
 LOVELACE, and wife, EMILY )  
 LOVELACE; NANTAHALA )  
 CONCIERGE SERVICES, LLC d/b/a )  
 HIGHLANDS VACATION RENTALS & )  
 BUYERS AGENCY; J & M )  
 INVESTMENTS, LLC; DUSTIN )  
 HIRSCHFELD, and wife, SARAH )  
 HIRSCHFELD; ALLISON FOREHAND, )  
 individually and as attorney-in-fact for )  
 JACQUELINE B. ANTHONY; MICHAEL )  
 RAMSEY, as co-trustee of THE MARY L. )  
 RAMSEY RESIDUARY TRUST II; )  
 Plaintiffs / Petitioners, )  
 )  
 v. )  
 )  
 TOWN OF HIGHLANDS, NORTH )  
 CAROLINA; )  
 Defendant / Respondent. )

**Complaint and Petition for  
Writ of Certiorari**

FILED  
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Plaintiffs Jennifer Huff and husband, Brandon Huff; Charles Albert Stephens and wife, Jane Vitre Ravenel Stephens; Kristy Favalli and husband, Christian B. Favalli; Mirror Lake Holdings, LLC; 662 Wyanoak, LLC; Peter Lovelace, and wife, Emily Lovelace; Nantahala Concierge Services, LLC d/b/a Highlands Vacation

Rentals & Buyers Agency; J & M Investments, LLC; Dustin Hirschfeld, and wife, Sarah Hirschfeld; Allison Forehand, individually and as attorney-in-fact for Jacqueline B. Anthony; Michael Ramsey, as co-trustee of the Mary L. Ramsey Residuary Trust II (collectively “Plaintiffs”), by and through the undersigned counsel and pursuant to Rule 3 of the North Carolina Rules of Civil Procedure, hereby complain of Defendant Town of Highlands, North Carolina (“the Town” or “Highlands”) by making the allegations contained herein and petitions for a writ of certiorari pursuant to N.C. Gen. Stat. § 160D-1402.

### **INTRODUCTION**

1. Without public notice, in violation of the Town’s recently adopted land use plan, and in furtherance of at least one Commissioner’s undisclosed personal financial interests, the Town Board of Commissioners on August 24, 2021, by a “consensus vote” of 4-1, re-interpreted the Town’s Unified Development Ordinance to prohibit “short-term vacation rentals” in the residentially zoned districts of the Town and ordered the Town to engage in punitive enforcement action against residential property owners starting January 3, 2022. This “vote” was illegal. The Board of Commissioners lacked any authority to make such a decision and the Town violated the unambiguous state and federal constitutional and statutory rights of the Town’s residents, not to mention its own UDO. The Board of Commissioners’ interpretation of the UDO was legally incorrect and so vague that it left citizens wondering how the Town defines “short-term rentals” and whether or not they are in the Town’s crosshairs. This action primarily seeks to enjoin the Town from its

illegal actions and restore the Town's firmly established position that vacation rentals are allowed in the residentially zoned districts of Highlands.

### **PARTIES AND JURISDICTION**

2. Plaintiffs Jennifer Huff and Brandon Huff ("the Huffs") are residents and citizen of Mecklenburg County, North Carolina. They own residential property in Highlands located at 51 Pine Lane.

3. Plaintiffs Kristy J. Favalli and husband Christian B. Favalli ("the Favallis") are residents and citizens of Georgia. They own residential property in Highlands located at 845 Wilson Road and 849 Wilson Road. The Favallis are members of Plaintiffs Mirror Lake Holdings, LLC and 662 Wyanoak, LLC. Mirror Lake Holdings, LLC owns residential property in Highlands located at 1209 Hickory Hill Road. 662 Wyanoak, LLC owns residential property located in Highlands located at 662 Wyanoak Road.

4. Plaintiffs Peter and Emily Lovelace ("the Lovelaces") are residents and citizens of Georgia. They own residential property in Highlands located at 61 Holt Circle and 65 Holt Circle.

5. Plaintiff Nantahala Concierge Services, LLC is a North Carolina Limited Liability Company with its principal office located in Macon County, North Carolina that does business as Highlands Vacation Rentals & Buyers Agency.

6. Plaintiff J & M Investments, LLC is a North Carolina Limited Liability Company with its principal office located in Union County, North Carolina. It owns

residential properties in Highlands located at 121 Raoul Road, 125 Raoul Road, 275 Foreman Road, and 279 Foreman Road.

7. Plaintiffs Dustin Hirschfeld and Sarah Hirschfeld (“the Hirschfelds”) are residents and citizens of Macon County, North Carolina. They own residential property in Highlands located at 746 Hickory Hill Road.

8. Plaintiff Allison Forehand (“Forehand”) is a resident and citizen of South Carolina. She and her mother, Jacqueline B. Anthony, owns residential property in Highlands located at 59 Big Bear Pen Road. Ms. Forehand has a power of attorney and is authorized to act on behalf of Anthony in this matter.

9. Plaintiffs Charles Albert Stephens and Jane Vitre Ravenel Stephens (“the Stephens”) are residents and citizens of South Carolina. They own residential property in Highlands located at 960 Hudson Road.

10. Plaintiff The Mary L. Ramsey Residuary Trust II (“the Ramsey Trust”) is a Georgia trust that owns residential property in Highlands located at 22 Ramsey Lane. Michael Ramsey is a co-trustee of the Ramsey Trust and is authorized to take legal action on its behalf.

11. Defendant the Town of Highlands, North Carolina (“the Town or Highlands”) is located in Macon County, North Carolina and is a municipal corporation organized under the laws of the State of North Carolina for the better government of the people within its jurisdiction and having the powers, duties, privileges, and immunities conferred by law on cities, towns, and villages. N.C. Gen. Stat. § 160A-1(2).

12. The court has subject matter and personal jurisdiction in this matter.

13. Macon County, North Carolina is the appropriate venue for this matter.

### **FACTS**

#### **Vacation Rentals are Part of the Fabric of Highlands**

14. Highlands has long been a destination for families, newlyweds, and tourists of all stripes, particularly out of state tourists, who visit the town on a short-term basis to experience the beauty, weather, and diverse culture of the Town.

15. This history of the Town was recently recounted in the 2021 Highlands Community Plan (“the 2021 Plan”), which was an update to the Town’s 2005 Land Use Plan. A true and accurate copy of the 2021 Plan without the appendix is attached as Exhibit A to the Complaint.

16. The 2021 Plan noted that the Town was incorporated in 1879 and founded by two out-of-state venturers as a destination for out-of-state visitors, particularly the “well-to-do [of Atlanta] who needed to escape and relax.” The 2021 Plan further stated: “[s]tarting around the 1950s, lovers of the Town began buying second homes there. Many residents share a similar story of visiting Highlands and then deciding to make it their primary or secondary residence. Today seasonal residents and tourists are keystones of Highlands’ economy, with the population swelling by many thousands in the high season.”

17. The 2021 Plan states that the Town population swells from 3,000 residents in the off season to 18,000 in the high season. The Town’s hotels and inns have never been able to host such a large swell in seasonal residents. Consequently,

local property owners have long opened their homes and cottages to out of town visitors both as a form of hospitality and to generate income. As a matter of fact, the Town, in the 2021 Plan, estimated that 1,473 homes and 2,223 housing units in the Town are used as seasonal residences or rentals in the Town. These homes and housing units used for seasonal residence or rentals may from time to time be referred to herein as “vacation rentals.”

18. For decades, vacation rentals have been integral to the economic success of the Town and its businesses. They provide the necessary infrastructure to house the swell in population that supports retail shop owners, restaurants, service industry jobs, contractors, housekeepers, landscapers, outdoor guides, and others that are part of the makeup of the Town. Vacation rentals also allow full and part time residents to participate in the tourist economy that brings so much money to business owners and the Town.

19. A recent economic study concluded that banning vacation rentals in Highlands would conservatively result in the loss of \$3.8 million in occupancy taxes to the Town, \$116 million in direct spending in Highlands, and \$19 million of spending in retail shops in Highlands. The study also found that approximately 295 jobs would be lost as part of such a ban.

### **The UDO Permits Vacation Rentals**

20. Over at least the last 40 years, the Town has implicitly and explicitly allowed vacation rentals in recognition of the significant role vacation rentals have played in the Town’s thriving and prosperous tourist economy.

21. The Town also has a history of regulating land use with a land use or zoning ordinance in place since 1970.

22. On June 19, 2014, the Town significantly revised and published a new version of its unified development ordinance and titled it “Unified Development Ordinance of the Town of Highlands, North Carolina.” This new ordinance has been amended at least eleven times since its adoption. This 2014 ordinance, together with its subsequent revisions, comprise the current Unified Development Ordinance of the Town of Highlands, North Carolina and shall be referred to herein as “the UDO”.

23. Importantly, Section 1.11.1 of the UDO expressly repealed *all* prior unified development and zoning ordinances and specifically the previous zoning ordinance, i.e. Chapter 16 of the Code of Ordinances.

24. The UDO describes the three residential zoning districts, R-1, R-2, and R-3. Section 5.2 as follows:

## **Sec. 5.2 Residential District Intent Statements**

### **5.2.1 R-1 Residential District**

The R-1 Residential District is exclusively a low-density residential district for single-family dwellings with customary accessory outbuildings, together with such other related uses which are of a residential character or contribute to the residential character of the district.

### **5.2.2 R-2 Residential District**

The R-2 Residential District is a medium-density residential district for single-family dwellings, with customary accessory outbuildings, including manufactured homes and home occupations, together with such other related uses which are of a residential character or contribute to the residential character of the district. Tourist homes and private schools are permitted as Special Uses.

### **5.2.3 R-3 Residential District**

The R-3 Residential District is a high-density residential district for single-family dwellings, with customary accessory outbuildings, including home occupations, together with such other related uses which are of a residential character or contribute to the residential character of the district. Multi-family dwellings are permitted as a Special Use.

25. These three zoning districts are described in a substantially similar manner in previous iterations of the UDO.

26. Section 201.10 of the prior zoning ordinance purportedly restricted “the use of short-term rental property” in the R-1 District with “short-term” defined as being “less than three months.” The language of 201.10 was repealed and is not contained in the UDO. Even when section 201.10 existed, upon information and belief, the Town never enforced this provision of the ordinance to regulate or restrict the use of short-term rentals, but rather freely allowed owners of property in the R-1, R-2, and R-3 zoning districts to rent all or a portion of their residential property for periods less than three months.

27. The Town repealed this section 201.10 of the prior zoning ordinance in 2014 with the adoption of the UDO.

28. Unlike the section 201.10, the UDO does not contain or otherwise define the words “short term” or “short-term.”

29. The UDO does not restrict the seasonal and vacation rental of residential property in the R-1, R-2, and R-3 zoning districts.

### **The Town Requires Registration of Vacation Rentals**

30. The UDO does not require or in any way provide for the registration of vacation rentals.

31. State law expressly forbids local governments from requiring any owner or manager of rental property to register that rental property or from “adopt[ing] or enforce[ing] any ordinance that would require any owner or manager



of rental property to obtain any permit or permission...from the local government to lease or rent residential real property.” N.C. Gen. Stat. § 160D-1207(c).

32. The Town has nevertheless historically required and currently requires those who rent their residential property to complete a form entitled “Short-Term Rental Registration.”

33. This form was available on the Town’s website until September 2021. The Town removed it from the website after vacation rental owners expressed their intent to take legal action against the Town.

34. The form requires the owner of the property to acknowledge as follows:

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**Acknowledgement**  
*If the Property Owner, Operator, or Local Contact information changes, it is the responsibility of the before mentioned of the Short-Term Rental Property to notify the Town of Highlands immediately to update the registration information. Operating a Short-Term Rental without a valid emergency contact is a violation of the required conditions of the registered use.*

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*By signing this registration form, I am acknowledging that this Short-Term Rental Property is subject to all Town of Highlands Ordinances.*

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35. Over the last two years, owners and managers of vacation rentals in the R-1, R-2, and R-3 residential zoning districts have registered at least 150 properties with the Town by and through the completion and return of this form to the Town.

36. Because of the information contained in these completed forms, the Town has known the locations and identity of the owners of these vacation rentals, as well as the number of bedrooms and baths, the platforms hosting the rentals, e.g., Airbnb, VRBO, private property manager, etc., and whether the owners carry liability insurance.

37. Upon information and belief, the Town has never taken any enforcement action against any property owners or managers who completed the Short-Term Rental Registration form.

38. The Town has never taken any enforcement action against Plaintiffs for their use and management of vacation rentals.

39. Upon information and belief and since the adoption of the UDO, the Town has never taken any enforcement action against any property owner for renting their residential property to vacationers.

**The Town Allows Vacation Rentals and  
Represents that They are Allowed**

40. Since the adoption of the UDO, the Town has permitted those owning property in the R-1, R-2, and R-3 zoning districts to rent all or a portion of their residential property on a short- and long-term basis to families and vacationers.

41. The Town's staff and elected officials have repeatedly represented privately and publicly that vacation rentals are allowed in the R-1, R-2, and R-3 zoning districts.

42. Specifically, property owners, prospective property owners, and agents for the same have asked Town Manager Josh Ward ("Town Manager Ward") on multiple occasions whether vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts.

43. Town Manager Ward responded to such requests by unequivocally stating that vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts.

44. Town Manager Ward's response to these requests was truthful.

45. Property owners, prospective property owners, and agents for the same reasonably relied on Town Manager Ward's representations that vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts. In reliance on those representations, they invested significant amounts of money purchasing, restoring, and improving their properties for use as vacation rentals.

46. Upon information and belief, Town Manager Ward was and is also the Planning and Development Director for the Town.

47. Prior to August 24, 2021, Town Manager Ward was advised that the UDO did not regulate short-term vacation rentals and that the Town could not regulate of short-term vacation rentals under the current UDO without a formal amendment.

48. Town Manager Ward's representation that vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts to these individuals is consistent with the UDO and the history of allowing vacation rentals in these zoning districts.

49. Town Manager Ward's representation that vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts was correct.

50. Property owners, prospective property owners, and agents for the same have also asked the Assistant Planning and Development Director for the Town, Michael Mathis ("Mathis") on multiple occasions whether vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts.

51. Mathis responded to such requests by unequivocally stating that vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts.

52. Mathis' response to these requests was truthful.

53. Property owners, prospective property owners, and agents for the same reasonably relied on Mathis' representations that vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts. Based on those representations, they invested significant amounts of money purchasing, restoring, and improving their properties.

54. Mathis' representation that vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts to these individuals is consistent with the UDO and the history of allowing vacation rentals in these zoning districts.

55. Mathis' representation that vacation rentals were allowed in the R-1, R-2, and R-3 zoning districts was correct.

56. An example of such a representation occurred over email on May 19, 2021, when a real estate agent asked Mathis about vacation rentals. She represented a purchaser who planned to also use the property as a vacation rental. She asked, "have [there] been any changes to the Town ordinance with regard to vacation rentals, or if anything[sic] changes are planned?" Mathis responded, "as for short-term rentals, the town has not developed any regulation restricting them." A true and accurate copy of this email exchange is attached as Exhibit B to this Complaint.

57. Elected representatives of the Town have also represented and engaged in actions that illustrate the Town's position that vacation rentals are allowed in the R-1, R-2, and R-3 zoning districts.

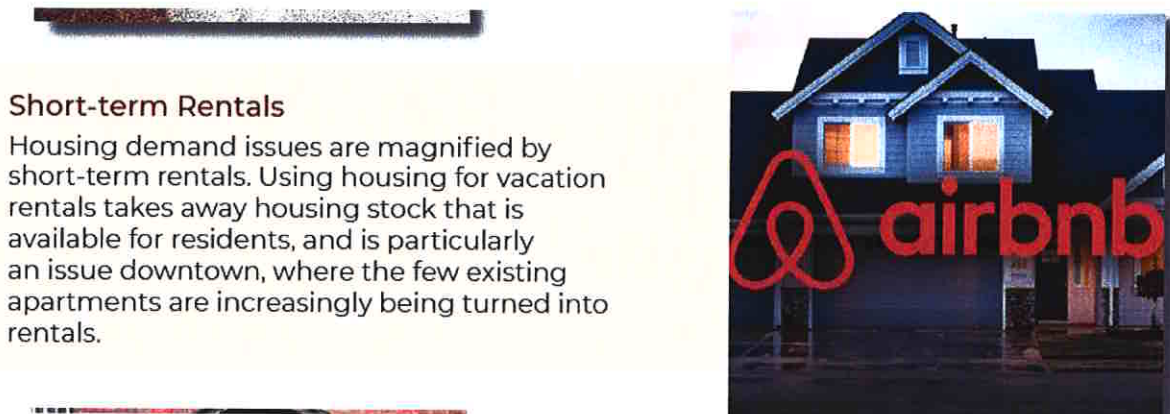
58. Commissioner John Dotson, for example, is a real estate agent and owner of a real estate agency called Preferred Properties of Highlands, Inc. (“Preferred Properties”). He and Preferred Properties have sold residential properties in the R-1, R-2, and R-3 zoning districts. Upon information and belief, he and Preferred Properties have told buyers who they represent in a fiduciary capacity that vacation rentals are allowed in the R-1, R-2, and R-3 zoning districts.

59. In a written “Q & A” published on October 10, 2019, Commissioner Dotson, Commissioner Marc Hehn, and Commissioner Brian Stiehler all acknowledged the prevalence and allowance of vacation rentals in the Town. A true and accurate copy of this “Q & A” is attached as Exhibit C to this Complaint.

60. On March 17, 2020, the Town issued an official proclamation that all current “operators of short-term rentals such as vacation cabins, home rentals and rentals thru Air-BNB, Homeaway, VRBO, etc. shall register with the Town, informing it that they intend to operate after the effective date of this Proclamation.” This proclamation applied to residences in the R-1, R-2, and R-3 zoning districts.

61. The Town expressly adopted and made part of the same proclamation the Vacation Rental Housekeeping Professionals (VRHP) and the Vacation Rental Management Association (VRMA) Cleaning Guidelines for COVID-19. This proclamation and these cleaning guidelines attached thereto are attached as Exhibit D to the Complaint.

62. The 2021 Plan acknowledged the prevalence and allowance of vacation rentals in R-1, R-2, and R-3. While noting the effect vacation rentals had on housing demand, this graphic from the 2021 Plan referenced short term rentals and Airbnb, a popular vacation rental website:



63. The Town in the 2021 Plan acknowledged the importance of tourism related rentals to the Town and adopted as a policy to “[e]ncourage lodging and tourism related rentals while limiting negative impacts on existing residents and businesses” and to “[m]onitor and mitigate the impact of short-term rentals (STRs) on the Highlands community.”

64. The 2021 Plan further noted that the current UDO did not regulate short-term vacation rentals. The 2021 Plan adopted as a policy to “[c]onsider updating land use regulations to define short-term rentals as a use.” The 2021 Plan further recommended that the Town “[c]onsider updates to regulations to prohibit full-time short-term rentals or require special use permits in residential zoning districts (R-1, R-2, R-3), allow STRs in business districts (B- 1, B-2, B-3, and B-4 districts).”

65. Presumably in order to aid in the consideration of vacation rentals in the future, the 2021 Plan briefly stated the law on defining and regulating short-term vacation rentals as follows:

#### DEFINING AND REGULATING SHORT-TERM RENTALS

Short-Term Rentals can be defined as: the rental or lease of an attached or detached residential dwelling unit to guests for a duration not to exceed thirty (30) consecutive days. North Carolina has unique strict laws regarding how local governments can regulate short-term rentals. Many regulations utilized in other states are not legal here, increasing the challenge of regulating STRs. The state regulates STRs through the Vacation Rental Act, and updated it in 2020 with new limitations. Highlights from the act include:

- » Requiring rentals to register is unlawful
- » Local governments cannot levy a tax or fee on residential rental property that is not levied against other commercial and residential properties

It is argued that the Vacation Rental Act leaves room for regulating STRs via local zoning, which is similar to Asheville's strategy. For more information on short-term rentals see the recommendations above and the Appendix.

#### **Plaintiffs Rely on UDO and Representations and Conduct of Town**

66. Plaintiffs have all purchased and/or managed vacation rental property in reliance on the UDO, the representations of the Town through its authorized officials, and the Town historically allowing vacation rentals in the residential zoning districts.

#### **Jennifer and Brandon Huff**

67. Jennifer Huff is a military veteran and Brandon Huff is still in the armed services. Brandon is often away for months at a time. The Huffs were married at the Old Edwards Inn. After the wedding, Jennifer joked to Brandon that they were never leaving Highlands because she loved it so much.

68. The Huffs purchased property in Highlands located at 51 Pine Lane in the R-2 residential zoning district for the purposes of having a vacation rental ("the Huff Property"). Jennifer resigned from her job to manage the Huff Property full

time so that she would have the flexibility to be with Brandon when on leave from service yet still have a steady income stream. Their vacation rental would also fund their retirement, and they plan to eventually retire in their home at 51 Pine Lane.

69. The Huffs invested \$100,000 into their rental property using local contractors and laborers to turn it into a vacation rental. The Huffs told their realtor their intent to turn it into a vacation rental and their realtor told them the property “should do very well” as a vacation rental. They also knew from past experience that Highlands allowed vacation rentals in the residentially zoned districts.

70. The Town has never informed the Huffs that vacation rentals were illegal or enforced the UDO as prohibiting the Huffs from using their property as short-term vacation rentals.

71. The Huffs have used the Huff Property since 2018 as a vacation rental and employ two local residents to help manage the Huff Property for vacation rental. They have had three cancellations for 2022 since August 24, 2021.

Kristy and Christian Favalli

72. The Favallis have three children and regularly visit Highlands. Kristy has been visiting Highlands since she was a child always staying in vacation rentals. She has a lifelong love of Highlands.

73. This love of Highlands caused the Favallis to invest in three different properties in Highlands with four different residences located at 845 Wilson Road,



849 Wilson Road, 1209 Hickory Hill Road, and 662 Wyanoak Road (“the Favalli Properties”). The Favalli Properties are all in the R-2 residential zoning district.

74. Kristy manages these and other vacation rentals in Highlands as a full-time job. The Favallis rely on the income generated from the Favalli Properties to provide for their family and to save money for their children’s schooling.

75. Kristy Favalli met with Town Manager Ward in late 2017 or early 2018 and asked him if there were any regulations against short-term vacation rentals. He said there were not any such regulations. The Favallis continued to invest in the vacation rental market based on this representation.

76. The Favallis have owned vacation rentals in Highlands since 2014 and currently employ fifteen local residents to help manage the Favalli Properties for vacation rental. They have had multiple cancellations for 2022 since August 24, 2021, costing them income in the approximate amount of \$20,000. One rental said they cancelled because they felt unwanted and did not want to give their business to the Town.

77. Kristy Favalli registered all of the Favallis’ vacation rentals with the Town by completing four Short Term Rental Registration Forms and returning them to the Town.

78. The Town has never informed the Favallis that vacation rentals were illegal nor has it enforced the UDO as prohibiting the Favallis from renting their property for short-term vacation rentals.

Peter and Emily Lovelace

79. The Lovelaces have three young girls and have for years been visiting Highlands. Peter first visited Highlands when he was a boy when his parents had rented a vacation rental. In adulthood, the Lovelaces regularly visited Highlands often staying in vacation rentals for family vacations. Part of their love of Highlands relates to its natural beauty. Being residents of a large city, they invested in Highlands because they want their three girls to experience the beauty of nature. Additionally, they often give away free stays to charitable organizations so that others who would not otherwise be able to afford Highlands could experience it.

80. For these reasons and others, the Lovelaces recently purchased two properties in Highlands for use as vacation rentals located at 61 Holt Circle and 65 Holt Circle (“the Lovelace Properties”). The Lovelace Properties are all in the R-1 residential zoning district.

81. The Lovelaces invested approximately \$150,000 into their rental properties using local contractors and laborers for purpose of turning them into vacation rentals. The Lovelaces employ two local residents to help manage the Lovelace Properties for vacation rental.

82. The Lovelaces told their realtor their intent to use the Lovelace Properties as vacation rentals, and the realtor gave assurances that vacation rentals were allowed in the R-1 zoning district. They also knew from past experience that Highlands allowed vacation rentals in the residentially zoned districts.

83. The Lovelaces would not financially have been able to purchase and renovate the Lovelace Properties without the rental income generated from those properties.

84. The Lovelaces purposefully rent the Lovelace Properties at a moderate rate so that a diverse group of people – and not just the wealthy – could experience Highlands.

85. The Town has never informed the Lovelaces that vacation rentals were illegal nor has it enforced the UDO as prohibiting the Lovelaces from renting their property for short-term vacation rentals.

#### Highlands Vacation Rentals & Buyers Agency

86. Highlands Vacation Rentals & Buyers Agency (“HVR”) is a business located in Highlands that manages vacation rentals in Highlands and the surrounding area. It is owned by David Bee, a thirty-year local resident and longtime business owner in Highlands.

87. HVR has managed vacation rentals since 2005 with the implicit and explicit permission from the Town. The vacation rental business was handed to HVR in 2005 by another realty company that also managed vacation rentals and had for quite a while. HVR took over a thriving vacation rental business that has continued.

88. HVR manages approximately 13 rentals in the R-1 zoning district, 23 rentals in the R-2 zoning district, and one rental in the R-3 zoning district.

89. HVR directly employs seven people and has eight others that assist in the management of the vacation rental properties. Approximately one third of HVR's business would be lost if vacation rentals in the R-1, R-2, and R-3 residential zoning districts were no longer able to be used as vacation rentals.

90. HVR, by and through Bee, has registered numerous vacation rentals with the Town by completing numerous Short Term Rental Registration Forms and returning them to the Town.

91. The Town has always allowed HVR to manage vacation rentals. The Town has never informed HVR or Bee that vacation rentals were illegal, and the Town has never ever enforced the UDO as prohibiting vacation rentals against HVR.

#### Scott and Nan Vuncannon

92. Scott and Nan Vuncannon ("the Vuncannons") are members of J & M Investments, LLC. They are both graduates of nearby Western Carolina University where they fell in love with the Town and became regular visitors. The Vuncannons began coming to Highlands in the early 1990s and have rented many different vacation homes. They bought their first properties at 275 and 279 Foreman Road with the intent on retiring to Highlands. Renting their property was going to provide them the opportunity to retire within the next 5 years.

93. Scott owes his life to Highlands. He was bitten by a rattlesnake in 2018 and is only alive today because of the Town's Fire and Rescue Department. In 2020, Scott and Nan's home at 275 Foreman Road burned down and the same Fire &

Rescue Department was able to save their guest cottage at 279 Foreman Road. The Vuncannons have a personal, lifelong connection to the Town.

94. The Vuncannons, through J & M Investments, LLC, purchased four different properties in the R-2 zoning district with the intent to use the properties as vacation rentals (“the Vuncannon Properties”). At least one of the properties had already been used as a vacation rental at the time they purchased the property. They also knew from their past experiences that Highlands allowed vacation rentals in the residentially zoned districts.

95. The Vuncannons have invested \$1.1 million into the Vuncannon Properties and plan to invest an additional \$900,000 to \$1.2 million more all using local contractors and laborers for purpose of using the Vuncannon Properties as vacation rentals.

96. The Vuncannons currently employ five local residents to help manage the Vuncannon Properties for vacation rental. They have had multiple cancellations for 2022 since August 24, 2021, costing them income in the approximate amount of \$20,000 to \$36,000.

97. The Town has never informed the Vuncannons that vacation rentals were illegal or enforced the UDO as prohibiting the Vuncannons from using their property as short-term vacation rentals.

Allison Forehand

98. Forehand spent her honeymoon in Highlands twenty-five years ago and has returned regularly often staying in vacation rentals. It has always been her dream to own a home in Highlands.

99. Earlier this year, her mother decided to sell her vacation home in South Carolina and used most of the proceeds to purchase a vacation rental property for Forehand in Highlands by and through a 28 U.S.C. § 1031 exchange (“the Forehand Property”). Her mother chose Highlands because of Forehand’s love of the Town.

100. The Forehand Property is located in the R-1 zoning district. Forehand is required to use the property as a vacation rental per the restrictions of a 1031 exchange. She therefore intends and is required to use the Forehand Property as a vacation rental.

101. The Forehand Property has a long history of being used as a vacation rental, and she chose to purchase the Forehand Property for that reason. Forehand’s decision to buy the Forehand Property was exclusively motivated by her intention to use the Forehand Property as a vacation rental, as the price, size, and location of the Forehand Property were otherwise untenable for her family.

102. Forehand would have never purchased the Forehand Property had she had known she would be prohibited from using the property as a vacation rental.

#### Cal and Vitre Stephens

103. The Stephens have been visiting Highlands for over twenty years and love the Town. Cal grew up in upstate South Carolina and has been coming to

Highlands for over 40 years. His parents made use of vacation rentals going back to the 1980s. Vitre's relatives, Samuel Prioleau Ravenel and his wife, were some of the earliest settlers of Highlands.

104. The Stephens purchased their property located in the R-1 residential zoning district on April 30, 2021, via a 28 U.S.C. § 1031 exchange as part of their retirement plan ("Stephens Property"). They intend and are required to use the Stephens Property solely as a vacation rental. They depend upon the rental to fund their eventual retirement to the Stephens Property.

105. The Stephens have invested roughly \$40,000 in improvements to the Stephens Property and plan to invest an additional \$30,000 to \$40,000 in improvements to the Stephens Property in Fall 2021 to use as a vacation rental. The Stephens have used and plan to continue to use local contractors and laborers for these improvements. Additionally, the Stephens have engaged Highlands Country Club Properties to manage and rent the Stephens Property.

106. The Town has never informed the Stephens that vacation rentals were illegal or enforced the UDO as prohibiting the Stephens from using their property as short-term vacation rentals

Dustin and Sarah Hirschfeld

107. Dustin and Sarah Hirschfeld ("the Hirschfelds") have been visiting Highlands for over 11 years. With the move to remote work, they decided to move to Highlands with their two-year-old son for a different change of pace from busy Atlanta.

108. For these reasons and others, the Hirschfelds in March 2021 purchased their property in Highlands located at 746 Hickory Hill Road to live in full time and renovated a detached garage into a vacation rental (“the Hirschfeld Property”). The Hirschfeld Property is in the R-2 residential zoning district.

109. The Hirschfelds decided to make the Hirschfeld Property their primary, permanent residence based upon the supplemental income they would derive from using the garage apartment as a vacation rental.

110. The Hirschfelds’ neighbors also rent their property for purposes of vacation rental.

111. The Town has never informed the Hirschfelds that vacation rentals were illegal nor has it enforced the UDO as prohibiting the Hirschfelds from renting their property for short-term vacation rentals.

#### The Ramsey Trust

112. The Ramsey Trust owns property located in the R-2 residential zoning district (“the Ramsey Property”). Michael Ramsey’s grandfather originally purchased the Ramsey Property in 1944, and it has remained in the family since.

113. In or around 2017, financial hardship jeopardized the ownership of the Ramsey Property. The Ramsey Trust therefore began using the Ramsey Property as a vacation rental to offset its maintenance, upkeep, and carrying costs, which allowed the Ramsey Property to remain in the family. Without the ability to use the Ramsey Property as a vacation rental, the family would have to sell the Ramsey Property.



**Dog Mountain POA Lobbies the Town to End “Short-Term Rentals”**

114. On December 9, 2019, the Dog Mountain Property Owners Association, LLC (“the Dog Mountain POA”), a North Carolina non-profit subdivision located in the R-1 zoning district, sent an email and letter to Town Manager Ward expressing its opposition to short-term rentals in the R-1 zoning district. A true and accurate copy of this email and letter is attached as Exhibit E to this Complaint.

115. Upon information and belief, the Town considered this email and the concerns of Dog Mountain POA in formulating the 2021 Plan.

116. On July 29, 2021, the Dog Mountain POA sent an unsigned legal memorandum to the Town titled “Analysis of Legality of Short-Term Rentals in the Town of Highlands.” A true and accurate copy of this memorandum is attached as Exhibit F to this Complaint.

117. The Dog Mountain POA made the legal argument that the current UDO prohibited short-term vacation rentals, citing articles written by Rebecca Badgett of the University of North Carolina School of Government. In support of this argument, the Dog Mountain POA urged the Town to change its long-time interpretation of the UDO and start enforcing the UDO as prohibiting short-term vacation rentals in the R-1 zoning district.

118. This memorandum constituted “lobbying” as that term is used by the Internal Revenue Code and is in violation of the Dog Mountain POA’s non-profit, 501(c)(3) status.

119. On August 6, 2021, the Dog Mountain POA passed a resolution authorizing the officers of the Dog Mountain POA to act on behalf of the Dog

Mountain POA and to, among other things, “demand that the Town issue cease and desist orders and impose fines against any property owners whose properties are being used for short-term rental.” A true and accurate copy of this resolution is attached as Exhibit G to this Complaint.

120. Upon information and belief, officers of Dog Mountain POA engaged in actions consistent with this authorization.

121. Upon information and belief and after Dog Mountain POA passed this resolution, its officers held private meetings with the Town staff members and elected representatives of the Town regarding short-term vacation rentals, urged the Town to interpret the UDO as prohibiting short-term vacation rentals, and demanded that the Town enforce the UDO consistent with that interpretation. Upon information and belief, Dog Mountain POA threatened legal action against the Town if the Town did not do as demanded.

### **The Town Meets on August 19**

122. The Town Board of Commissioners (“Board of Commissioners”) held their regular public meeting on August 19, 2021, by videoconference.

123. The agenda for the meeting listed 14 agenda items. The only item that referenced any intended discussion on short-term vacation rentals was item 13, which stated that short-term rentals would be discussed with the Town Attorney in closed session. Item 13 of the agenda specifically stated as follows:

13. Closed Session: Pursuant to NCGS §143-318.11(a)(3):  
Attorney Client Privilege: Short Term Rental Discussion

124. The Town did not disclose what would be discussed concerning short-term vacation rentals or give any indication that it intended to vote on short-term vacation rentals and the UDO. An open discussion or vote on short-term vacation rentals was not on the August 19 agenda. A true and accurate copy of the August 19, 2021, agenda and the notice of meeting for that meeting are attached as Exhibit H to the Complaint.

125. Officers and representatives of the Dog Mountain POA spoke on behalf of the Dog Mountain POA at the August 19 meeting.

126. Dog Mountain POA's objections and talking points regarding the Town's alleged non-enforcement of the UDO with respect to short-term vacation rentals dominated the public comment period at the August 19 meeting. Of those that spoke, most were against short-term vacation rentals, reflecting an obvious organized effort by opponents of short-term vacation rentals to present only one side of the issue. The Town facilitated these efforts by failing to provide any notice to the public that short-term vacation rentals were a topic for discussion thereby ensuring that only one side of the issue would be heard.

127. Because they had no notice that short-term vacation rentals would be a topic for discussion at the August 19 meeting, proponents and owners of vacation rentals were largely absent and, thus, effectively silenced and marginalized, leaving the Board of Commissioners only hearing one side of the issue.

128. Consistent with their past conduct and resolution, representatives of Dog Mountain POA, on behalf of Dog Mountain POA, argued that short-term

rentals were illegal under the UDO and demanded that the Town start enforcing the UDO as written to prohibit short-term vacation rentals in the R-1 zoning district.

129. The statements of the officers and representatives on behalf of the Dog Mountain POA at this meeting constituted lobbying as defined by the Internal Revenue Code and was in violation of Dog Mountain POA's non-profit, 501(c)(3) status.

130. The August 19, 2021, meeting of the Board of Commissioners ended with the Mayor and the Board of Commissioners reconvening in closed session to discuss short-term vacation rentals per the agenda. Commissioner Mark Hehn voted against going into closed session. Due to the late hour, the Commission recessed the August 19 meeting to be completed the following week.

131. After the August 19, 2021, meeting of the Board of Commissioners, Commissioner Hehn asked Rebecca Badgett of the University of North Carolina School of Government to interpret the UDO to determine whether it prohibited short-term vacation rentals. Ms. Badgett teaches, researches, and advises on the topic of short-term vacation rental regulation and co-authored the book Regulation and Taxation of Short-Term Rentals. Her writings were cited by Dog Mountain POA as purportedly supporting its legal argument that the UDO prohibited short-term vacation rentals.

132. She reviewed the UDO and responded to Commissioner Hehn's inquiry on August 23, 2021, stating that "STRs would be allowed" under the UDO in the R-1

zoning district. She also informed Commissioner Hehn that short-term vacation rentals are a residential use, not a commercial use. A true and accurate copy of this email from Ms. Badgett to Commissioner Hehn is attached as Exhibit I.

**The Town Votes to “Enforce” the UDO**

133. On August 24, 2021, the Town Board of Commissioners reconvened, stating that the August 24 meeting was a continuation of the August 19 meeting.

134. Upon information and belief, Commissioner Hehn shared Ms. Badgett’s August 23 email to the Mayor, the Board of Commissioners, and the Town Attorney prior to the August 24 meeting.

135. The Town did not publish an agenda for the August 24, 2021, meeting, but rather treated the August 24 meeting as a resumption of the August 19 meeting.

136. The public hearing notice did not describe what would be discussed at the August 24 meeting and provided no notice that the Board of Commissioners intended to deliberate and vote on any new regulation of vacation rental properties, including short-term vacation rentals. A true and accurate copy of this notice is attached as Exhibit J to the Complaint.

137. During the August 24 meeting, Board of Commissioners did not allow any public comment or participation regarding the regulation of short-term rentals. Proponents of the continued allowance of vacation rental properties thus had no opportunity to rebut Dog Mountain POA’s previous lobbying efforts to inhibit citizens’ real property rights.

138. Instead of open discussion or community engagement on the issue, the Commissioners discussed among themselves whether to interpret the current zoning regulations as prohibiting short-term vacation rentals and whether to instruct the staff to start enforcing the UDO in that manner. They discussed Ms. Badgett's August 23 email stating that the UDO did not prohibit short-term vacation rentals.

139. During the course of their discussions, several commissioners remarked that the Town had allowed owners to rent property on a short-term basis in the R-1 zoning district for many years and that the current Board of Commissioners, as well as several of its predecessor Board of Commissioners had known and allowed the practice for decades.

140. Commissioner Hehn urged the Commission to delay any vote and retain an outside zoning expert to review the zoning ordinance before proceeding. The Commission declined to do so, claiming that the UDO was "black and white" on this issue and "as long as you have lawyers you will have different opinions."

141. The Commissioners also remarked that it would take months and be hard to amend the ordinance. Thus, they opted to interpret the UDO as prohibiting the use of vacation rentals in the residential zoning districts rather than following the amendment process.

142. None of the items on the August 19 agenda were discussed during the August 24, 2021, meeting even though the August 24 meeting was a supposed carryover from the August 19 meeting.

143. At the close of the August 24, 2021, meeting and at approximately 7:00 p.m., the Board of Commissioners, by a vote of 4-1, reached a “verbal consensus” to direct the Town staff to enforce the UDO as purportedly written in order to prohibit short-term vacation rentals in the residential zoning districts. The enforcement was to begin January 3, 2022.

144. The same day, immediately after the evening vote, the Dog Mountain POA issued an already prepared press release lauding the decision of the Board of Commissioners. A true and accurate copy of this press release is attached as Exhibit K to this Complaint.

145. The Town’s “verbal consensus” vote to interpret the UDO to prohibit short-term vacation rentals was contrary to the legal opinion of Ms. Badgett expressed in Exhibit I.

146. The Town’s “verbal consensus” vote to interpret the UDO to prohibit short-term vacation rentals was contrary to the decades long pattern and practice of the Town that has been relied upon by property owners and property buyers up to the date of the vote.

147. The vote caused a great deal of confusion in the community as to which residential zoning districts were prohibited from being used as vacation rentals.

148. The day after the vote, August 25, 2021, a resident asked Mayor Patrick Taylor whether the UDO prohibited short-term rentals in “just R-1 or are other zones effected.” Mayor Taylor responded that “R-1, R-2, R-3” would be

affected. A true and accurate copy of this email is attached as Exhibit L to this Complaint.

149. The same day, another resident similarly asked “if there are any plans to restrict other zones in the city limits other than R1, like R2.” Mayor Taylor responded that “[t]he focus of contention is on R1 and 2. B zones are good to go. If there are any changes it will probably be in R2.” He also could not explain to the resident in a subsequent email what the Town considered “short term.” A true and accurate copy of these emails are attached as Exhibit M to this Complaint.

150. On or around September 6, 2021, the Town posted a statement on its website “clarifying” that the Town would start enforcing the UDO in the R-1 residential zoning district only. A true and accurate copy of this letter is attached as Exhibit N to this Complaint.

### **The Town Acted Contrary to the UDO**

151. Section 3.2 of the UDO states that the powers and duties of the Board of Commissioners are as follows:

#### **Sec. 3.2 Board of Commissioners**

##### **3.2.1 Powers and Duties**

- A. Amendments to the adopted Land Use Plan;
- B. Amendments to the text of this Ordinance;
- C. Amendments to the zoning map; and
- D. Appoint other Boards and Commissions.

152. The Board of Commissioners does not have the power to interpret the UDO under the UDO.



153. The UDO gives the sole power to interpret the UDO to the “Planning and Development Director” who is hired by and serves at the pleasure of the Town Manager.

154. The powers and duties of the Planning and Development Director include the following:

**3.5.4 Powers and Duties**

The Planning and Development Director is granted the authority to administer and enforce the provisions of this Ordinance, exercising in the fulfillment of his responsibility the full police power of the Town.

- A. *Issuance of certificates.* The Planning and Development Director shall have the sole authority to issue Zoning Certificates and Certificates of Compliance for the construction, alteration, or moving of any structure or for the accomplishment of any other improvement or modification or change of use of real property subject to the jurisdiction of this Ordinance.

155. Section 4.1.1 of the UDO states that “the Planning and Development Director generally shall make all interpretations of this Ordinance.”

156. The UDO provides for a process for the interpretation of the UDO. That process is as follows:

**4.1.2 Request for Interpretation**

A request for interpretation shall be submitted in writing.

**4.1.3 Action by Planning and Development Director**

- A. The Planning and Development Director shall:
  - 1. Review and evaluate the request in light of the text of this Ordinance, the Official Land Use Map and any other relevant information;
  - 2. Consult with Macon County or Jackson County inspection departments and coordinate with other Town staff, including the Town Attorney, as necessary; and
  - 3. Render an opinion.
- B. The interpretation shall be provided to the applicant in writing.

**4.1.4 Official Record**

The Planning and Development Director shall maintain an official record of all interpretations. The record of interpretations shall be available for public inspection during normal business hours.

**4.1.5 Appeal**

Final action on an official interpretation of this Ordinance by the Planning and Development Director may be appealed in accordance with Sec. 4.19.1, Appeal of Administration Decision to Zoning Board of Adjustment.

157. The Town failed to follow the process for interpretation laid out in the UDO.

158. On September 16, 2021, counsel for Plaintiffs, on behalf of Plaintiffs, requested under Section 4.1.2 an interpretation of the UDO from the Planning and Development Director as to the UDO's purported prohibition of short-term vacation rentals. A true and accurate copy of this request is attached as Exhibit O to the Complaint.

159. As of this date, the Planning and Development Director has not responded to this request.

160. Under the UDO, the Zoning Board of Adjustment shall hear all appeals from decisions related to the UDO. Specifically, the UDO provides as follows:

**4.19.1 Appeal of Administrative Decision to Zoning Board of Adjustment**

- A. *Types of Appeals.* The Zoning Board of Adjustment shall hear and decide all appeals from requirements of this Ordinance and review any order, requirement, decision, or determination made by the Planning and Development Director and Stormwater Administrator. In deciding appeals, it may hear both those based upon an allegedly improper or erroneous interpretation of the ordinance and those based upon alleged hardship resulting from strict interpretation of this Ordinance.
- B. *Procedure for Filing Appeals*
  - 1. No appeal shall be heard by the Zoning Board of Adjustment unless a written notice of appeal is filed within thirty (30) days after the interested party or parties receive notice of the order, requirement, decision, or determination by the Planning and Development Director and Stormwater Administrator. Appeals shall be made upon the form furnished for that purpose, and all information required thereon shall be complete before an appeal shall be considered as having been filed.
  - 2. Appeals shall be addressed and submitted to the Zoning Board of Adjustment and shall be delivered to the office of the Planning and Development Director and Stormwater Administrator. All documents, pleadings, and transcripts or certified copies thereof, constituting the record upon which the action being appealed from was taken, shall forthwith be transmitted to the Zoning Board of Adjustment by the Planning and Development Director and Stormwater Administrator. Upon service of the notice of appeal, accompanied by the supporting documents, upon the Chairman or Vice Chairman of the Zoning Board of Adjustment, the Board shall forthwith fix a date within a reasonable time thereafter for the hearing of the appeal or for a hearing upon any other matter properly referred to it; the Zoning Board of Adjustment shall call a public hearing as outlined in Sec. 4.2.4, Notice and Public Hearings, shall give due notice thereof to the parties in interest, and render a decision upon the same within a reasonable time after the hearing. At the hearing, any party may appear in person or be represented by his authorized agent or attorney.

161. The Board of Commissioners plays no role in this appeal process.

162. In an abundance of caution and seeking to exhaust its administrative remedies for litigation purposes, Plaintiffs Huff, Favalli and HVC, through legal counsel filed an administrative appeal from the August 24, 2021, Board of Commissions decision and the September 6, 2021, letter posted on the Town's website pursuant to 4.19.1 of the UDO. A true and accurate copy of this appeal is attached as Exhibit P to this Complaint.

163. Town Manager Ward rejected this administrative appeal by letter dated September 22, 2021, and received on September 29, 2021. A true and accurate copy of this rejection letter is attached as Exhibit Q to this Complaint.

**FIRST CLAIM FOR RELIEF-**  
**Requests for Declaratory Judgment**

164. Plaintiffs re-allege and incorporate by reference all allegations previously set out herein.

165. N.C. Gen. Stat. § 160D-1401 provides that “[c]hallenges of legislative decisions of governing boards, including the validity or constitutionality of development regulations adopted pursuant to this Chapter, and actions authorized by G.S. 160D-108(h) or (i) and G.S. 160D-1403.1 may be brought pursuant to Article 26 of Chapter 1 of the General Statutes.”

166. N.C. Gen. Stat. § 1-254 of the North Carolina Declaratory Judgment Act (Article 26 of Chapter 1 of the General Statutes) provides that “[a]ny person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute,

municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.”

167. Pursuant to N.C. Gen. Stat. § 160D-1401, N.C. Gen. Stat. § 160D-1403.1, Rule 57 of the North Carolina Rules of Civil Procedure, and Article 26 of Chapter 1 of the General Statutes, Plaintiffs request that the Court enter multiple declaratory judgments in the manner requested below.

**First Request for Declaratory Judgment**  
**The UDO Does Not Prohibit Short-Term and/or Vacation Rentals**

168. The Town has taken the legal position that the UDO prohibits short-term vacation rentals on properties located in the R-1, R-2, or R-3 zoning districts.

169. This position is contrary to the plain text of the UDO.

170. Plaintiffs hereby request that the Court enter a declaratory judgment declaring that the UDO does not prohibit short-term or any other type of vacation rentals of properties located in the R-1, R-2, or R-3 zoning districts.

**Second Request for Declaratory Judgment**  
**Short-term Rentals are a Residential Use**

171. The Town has taken the legal position that short-term vacation rentals of residential real property is a commercial use and not a residential use.

172. Short-term vacation rentals are in North Carolina are considered a residential use of real property and not a commercial use of real property. *Russell v. Donaldson*, 222 N.C. App. 702, 731 S.E.2d 535 (2012).

173. Plaintiffs hereby request that the Court enter a declaratory judgment declaring that short-term vacation rentals of residential real property is a residential use and not a commercial use.

**Third Request for Declaratory Judgment**  
**Ultra Vires**

174. N.C. Gen. Stat. § 160D-1403-1(a)(2) provides that “a person with standing...may bring an original civil action seeking declaratory relief, injunctive relief, damages, or any other remedies provided by law or equity, in superior court or federal court to challenge the enforceability, validity, or effect of a local land development regulation...[if] [t]he ordinance, either on its face or as applied, is ultra vires, preempted, or otherwise in excess of statutory authority.”

175. The Board of Commissioners is a legislative body of the Town.

176. The Board of Commissioners, as a legislative body, did not have authority to interpret the UDO.

177. The UDO further did not provide authority to the Board of Commissioners to interpret the UDO.

178. The only government actor that can interpret the UDO under the express language of the UDO is the Planning and Development Director and the Zoning Board of Adjustment.

179. The UDO provides an administrative process whereby the Board of Commissioners can request an interpretation of the UDO to the Planning and Development Director and the Zoning Board of Adjustment.

180. The Board of Commissioners did not follow that process.

181. The Board of Commissioners, by interpreting the UDO as prohibiting short-term vacation rentals in the R-1, R-2, and R-3 zoning districts, impermissibly engaged in actions exceeding its legislative authority.

182. Additionally, the Town, being creature of statute, only has authority expressly delegated to it by the North Carolina Legislature or the Constitution of the State of North Carolina.

183. The Town was not authorized and lacked any authority to enact a zoning ordinance, or to adopt a de facto interpretation of an existing zoning ordinance that prohibits short-term vacation rentals when such an ordinance was clearly contrary to established North Carolina law prohibiting limitations upon property based upon the ownership status (rented or owned) of such property.

184. The Town was not authorized and lacked any authority to enact a zoning ordinance, or to adopt a de facto interpretation of an existing zoning ordinance, prohibiting short-term vacation rentals when the General Assembly has indicated its intention to completely regulate residential vacation rentals for periods of less than ninety (90) days in North Carolina through the Vacation Rental Act, N.C. Gen. Stat. § 42A-1 *et. seq.*

185. The Town was not authorized and lacked any authority to enact a zoning ordinance, or to adopt a de facto interpretation of an existing zoning ordinance, prohibiting short-term vacation rentals when such short-term residential vacation rentals are expressly allowed by the Vacation Rental Act, N.C. Gen. Stat. § 42A-1 *et. seq.*

186. Because there has been no grant of authority to the Town and the Board of Commissioners to place limitations on the ownership status of residential vacation property, no authority for the Town to regulate and/or prohibit short-term vacation rentals that are regulated by the Vacation Rental Act, and no authority under the UDO to regulate or prohibit short-term vacation rentals that are expressly allowed by the Vacation Rental Act, the Town's interpretation of the UDO and its attempts to regulated vacation rentals are facially invalid as exceeding its statutory authority.

187. Plaintiffs hereby request the Court enter a declaratory judgment declaring that the Town's interpretation of the UDO is facially invalid as exceeding its statutory authority.

**Fourth Request for Declaratory Judgment**  
**Preemption**

188. While the Town may enact ordinances and by-laws relating to the health, safety, or welfare of its citizens, such power is limited when the Town enacts an ordinance that is inconsistent with state or federal law.

189. N.C. Gen. Stat. § 160A-174(b) provides that a municipal ordinance is invalid if it purports to regulate a field for which the State of North Carolina has shown legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation, or if the local ordinance makes unlawful an act, omission, or condition which is expressly made lawful by State law.

190. The North Carolina Vacation Rental Act, N.C. Gen. Stat. § 42A-1 *et. seq.* ("Vacation Rental Act"), regulates vacation rentals in the State.

191. The North Carolina General Assembly has provided a complete and integrated regulatory scheme regarding the regulation of vacation rentals in the State. *See* N.C. Gen. Stat. § 42A-3(a) (“The provisions of this Chapter shall apply to any person, partnership, corporation, limited liability company, association, or other business entity who acts as a landlord or real estate broker engaged in the rental or management of residential property for vacation rental as defined in this Chapter.”).

192. The Vacation Rental Act was enacted to address “the growth of the tourism industry in North Carolina” and to provide laws for “regulating the competing interests of landlords, real estate brokers, and tenants” in the State. N.C. Gen. Stat. § 42A-2.

193. The Vacation Rental Act defines “vacation rental” as “[t]he rental of residential property for vacation, leisure, or recreation purposes for fewer than 90 days by a person who has a place of permanent residence to which he or she intends to return.”

194. The Vacation Rental Act therefore regulates all vacation rentals for less than ninety (90) days in North Carolina except for specific exceptions of (1) hotels, motels, tourist camps, and other places subject to regulation under Chapter 72 of the General Statutes; (2) rentals to business travelers; (3) rentals to persons having no other place of primary residence; and (4) rentals for which no more than nominal consideration is given. N.C. Gen. Stat. § 42A-3.

195. The language of the Vacation Rental Act makes clear that the General Assembly has shown clear legislative intent to provide a complete and integrated



regulatory scheme for all vacation rentals under ninety (90) days and that local counties and municipalities may not enact ordinances that conflict with such regulatory scheme.

196. The Town's interpretation of the UDO conflicts with the Vacation Rental Act by prohibiting short-term vacation rentals of residential property in the R-1, R-2, and R-3 zoning districts.

197. Because the Town's interpretation of the UDO is inconsistent with the Vacation Rental Act in that it seeks to provide more restriction and regulation in an arena where the General Assembly has indicated its intent to provide a complete and regulatory scheme, it is preempted by the Vacation Rental Act and is void.

198. In addition, the Vacation Rental Act states that short-term vacation rentals of property 30 days or less are lawful. See N.C. Gen. Stat. § 42A-23(a) (regulating the eviction proceedings for vacation rentals of "30 days or less").

199. Upon information and belief, the Town proposes to make vacation rentals of less than thirty (30) days unlawful.

200. Because the Town purports to make the act of residential vacation rentals of less than thirty (30) days unlawful and the Vacation Rental Act specifically indicates that such act is lawful, the UDO is preempted by the Vacation Rental Act and is invalid.

201. Plaintiffs hereby request that the Court enter a declaratory judgment declaring that the UDO, as interpreted by the Town, is preempted by the North Carolina Vacation Rental Act, N.C. Gen. Stat. § 42A-1 *et. seq.*, and is therefore

invalid.

**Fifth Request for Declaratory Judgment**  
**Constitutionality**

202. N.C. Gen. Stat. § 160D-1403-1(a)(2) provides that “a person with standing...may bring an original civil action seeking declaratory relief, injunctive relief, damages, or any other remedies provided by law or equity, in superior court or federal court to challenge the enforceability, validity, or effect of a local land development regulation...[if] [t]he ordinance, either on its face or as applied, is unconstitutional.”

203. The prohibition of short-term vacation rentals under the Town’s interpretation of the UDO is a total prohibition on guest or tenant occupancy of Plaintiffs’ property for an arbitrary period of time. Zoning restrictions that limit the use of land based on the identity or status of the owner or occupant are invalid and violate the constitutional rights of due process and equal protection. *City of Wilmington v. Hill*, 189 N.C. App. 173,657 S.E.2d 670 (2008).

204. The restriction on short-term vacation rentals under the Town’s interpretation of the UDO impermissibly limits Plaintiffs’ ownership of their Property based on the identity or status of the owner or occupant. There is no material difference between occupancy of the property by guests or tenants of Plaintiffs on a short-term basis and occupancy of the same property by a guest or tenant of Plaintiffs on a long-term basis. Because the UDO impermissibly regulates the occupancy of a dwelling and for other reasons set out herein, it is unconstitutional.

205. Plaintiffs request and are entitled to a declaration that the Town's interpretation of the UDO is unconstitutional.

**SECOND CLAIM FOR RELIEF-**  
**Constitutional Violations (42 U.S.C. § 1983 Claims)**

206. Plaintiffs re-allege and incorporate by reference all allegations previously set out herein.

207. The Town is a state actor.

208. The Town's interpretation of the UDO and its decision to enforce the same as of January 3, 2022, constitutes state action.

209. The Town's interpretation of the UDO and its decision to enforce the same as of January 3, 2022, deprived Plaintiffs of rights secured by the Constitution of North Carolina and the United States Constitution.

210. The Town acted under color of state law when it deprived Plaintiffs of their constitutional rights as set out below.

211. The Town took this wrongful action despite the contrary conclusion and recommendation of Rebecca Badgett of the University of North Carolina School of Government, and contrary to statements Town officials made to one another, as well as public and private statements they made on multiple occasions to property owners, real estate agents, and property managers concerning the legality of short-term rentals in residential zones.

**First Violation of Constitutional Rights**  
**North Carolina and U.S. Constitutions - Substantive Due Process**

212. Article I, Section 19 of the Constitution of North Carolina provides that

“[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws.”

213. The prohibition of short-term rentals and imposition of fines for the same unreasonably deprives Plaintiffs of a liberty or property interest guaranteed under the Constitution of the State of North Carolina, to wit: the ability to use land regardless of the identity or status of the owner or occupier of such land.

214. Plaintiffs have a fundamental property interest in the real property that the Town is attempting to unlawfully regulate and restrict with regard to vacation rentals.

215. Plaintiffs are deprived of their fundamental property interest by government action that has no rational relation to a valid municipal objective since the Town has no authority to declare short-term vacation rentals unlawful pursuant to North Carolina law, among other reasons.

216. The Town’s interpretation of the UDO to prohibit short-term vacation rentals and the Town’s efforts to regulate short-term vacation rentals is unreasonable, arbitrary and capricious, and is in violation of Article I, Section 19 of the Constitution of North Carolina and the Fourteenth Amendment of the United States Constitution and principles of substantive due process.

217. N.C. Gen. Stat. § 160D-501 requires a municipality to adopt a land use plan that they consider in an advisory basis.

218. The 2021 Plan is such a plan adopted pursuant to N.C. Gen. Stat. § 160D-501. The 2021 Plan indicates the Town will prioritize only monitoring and mitigating the impact of short-term vacation rentals on the community and does not provide for the elimination of short-term vacation rentals in the residential zoning districts. The Town's interpretation of the UDO is thus arbitrary and capricious, and is in violation of Article I, Section 19 of the Constitution of North Carolina and the Fourteenth Amendment of the United States Constitution and principles of substantive due process.

219. The Town and its agents have acted under color of state law and the municipal code to deprive Plaintiffs of their rights, privileges, and immunities secured by state law and guaranteed under the Constitution of the State of North Carolina and the Fourteenth Amendment of the United States Constitution.

220. The Town and its agents' violation of Plaintiffs' right of substantive due process is in violation of Article I, Section 19 of the North Carolina Constitution.

221. Upon information and belief, the Town and its agents were aware of Plaintiffs' clearly established rights when they interpreted the UDO to prohibit short-term vacation rentals and were aware that its actions violated those rights.

222. Plaintiffs do not have an adequate state law remedy to redress the damages caused by the Town. Given the absence of an adequate state law remedy, Plaintiffs, whose state constitutional rights have been abridged, have a direct claim against the Town under the North Carolina Constitution and the United States Constitution.

223. As a proximate result of the Town's violation of the Plaintiffs' right of substantive due process, Plaintiffs have been damaged and are entitled to recover from the Town restitution and monetary damages, plus interest and costs in an amount to be determined.

**Second Violation of Constitutional Rights**  
**North Carolina and U.S. Constitutions – Procedural Due Process**

224. The UDO provides for a procedure contesting an interpretation of the UDO by the Town.

225. The Town did not follow that procedure.

226. Plaintiffs were provided no procedure by the Town for its decision to start enforcing the UDO as prohibiting the use of residential property for short-term vacation rentals.

227. The Town violated Plaintiffs' right to procedural due process.

228. As a proximate result of the Town's violation of Plaintiffs' right to procedural due process, Plaintiffs have been damaged and are entitled to recover from Defendant restitution and monetary damages, plus interest and costs in an amount to be determined

**Third Violation of Constitutional Rights**  
**North Carolina and U.S. Constitutions – Equal Protection**

229. The Town's interpretation of the UDO prohibits Plaintiffs' short-term vacation rental of residential property yet simultaneously treats the rental of real property by similarly situated property owners in residential districts as lawful.

230. The short-term rental ban also discriminates against certain property

owners, in favor of other property owners. This includes, for example, property owners in zones R1, R2, and R3 who operate commercial ventures out of their homes, including the manufacture and sale of pottery, the creation and sale of artwork, the sale of bake goods, etc.

231. The short-term rental ban also discriminates against property owners' ability to use their property as they see fit, while providing favorable treatment to those who use their properties for other income-earning ventures.

232. The Town's interpretation of the UDO constitutes discrimination in that it does not apply equally to all similarly situated persons and does not reflect a rational distinction between such persons and therefore violates equal protection as guaranteed by Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution.

233. Upon information and belief, these distinctions are not rationally related to a legitimate purpose of the Town.

234. The Town's interpretation of the UDO is facially invalid and unenforceable as it violates equal protection as guaranteed by the North Carolina Constitution and the federal Constitution. *See* N.C. Gen. Stat. § 160A-174(b)(1).

235. As a proximate result of the Town's violation of Plaintiffs' right to equal protection, Plaintiffs have been damaged and are entitled to recover from Defendant restitution and monetary damages, plus interest and costs in an amount to be determined.

**Fourth Violation of Constitutional Rights**  
**North Carolina and U.S. Constitutions – Vested Rights**

236. Plaintiffs incurred substantial expenditures and/or contractual obligations incidental to or as part of the use and maintenance of their properties as vacation rentals.

237. Plaintiffs incurred these expenditures and/or contractual obligations prior to the Town's August 24, 2021, interpretation of the UDO and decision to enforce the same as of January 3, 2022.

238. Plaintiffs incurred these expenditures and/or contractual obligations with an honest, good-faith belief that using and maintaining their properties as vacation rentals would not violate declared public policy.

239. Plaintiffs incurred these expenditures and/or contractual obligations in reasonable reliance upon the Town's representations that it permitted the use and maintenance of vacation rentals in the R-1, R-2, and R-3 zoning districts, and the absence of any provision in the UDO prohibiting the use and maintenance of vacation rentals in the R-1, R-2, or R-3 zoning districts.

240. The Town's interpretation of the UDO and decision to enforce the same as of January 3, 2022, works a detriment to Plaintiffs and violates their vested rights because it will preclude Plaintiffs from using and maintaining their properties as vacation rentals.

**THIRD CLAIM FOR RELIEF-**  
**The UDO and Town Decision Void for Vagueness**

241. Plaintiffs re-allege and incorporate by reference all allegations previously set out herein.



242. A law violates the North Carolina and Federal Constitution and fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.

243. A law is unconstitutionally vague if a person of ordinary intelligence must guess as its meaning.

244. Similarly, a law is unconstitutionally vague if it authorizes or encourages arbitrary and discriminatory enforcement.

245. The Town interpreted the UDO as prohibiting “short-term rentals.”

246. The Town’s interpretation of the UDO retains the force and effect of law because, effective January 3, 2022, the Town will exercise its authority to enforce its interpretation of the UDO against Plaintiffs.

247. Nevertheless, the Town did not define the term “short-term rental” nor did the Town specify the zoning districts in which it would prohibit “short-term rentals.”

248. The Town’s interpretation thus lacks sufficient standards to place the public on notice of the conduct it prohibits.

249. People of ordinary intelligence, including Plaintiffs, must divine the Town’s definition of “short-term rental” and the zoning districts in which the Town will preclude “short-term rentals.”

250. The lack of defined standards in the Town’s interpretation also authorizes or encourages arbitrary and discriminatory enforcement.

251. For the foregoing reasons, the Town's interpretation of the UDO is impermissibly vague in violation of the North Carolina Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

**FOURTH CLAIM FOR RELIEF-**  
**Injunction – Preliminary and Permanent**

252. Plaintiffs re-allege and incorporates by reference all allegations previously set out herein.

253. Plaintiffs and other similarly situated property owners typically schedule the vacation rental of their real property well in advance of the actual rental.

254. Plaintiffs are booking properties for rent well into 2022 and after the Town plans to start enforcing the UDO as prohibiting the use of residential property for vacation rental.

255. One or more of Plaintiffs and other similarly situated property owners have had renters who have booked their property for rent in 2022 and have subsequently cancelled their rental contract because of the Town's decision to start enforcing the UDO as prohibiting the use of residential property for vacation rental.

256. Because of the Town's announced January 3, 2022, enforcement date, several Plaintiffs and other similarly situated property owners have blocked off all rental availability after January 3 on their rental platforms and are losing, and will continue to lose, bookings for 2022.

257. Plaintiffs will suffer immediate and irreparable injury, loss, or damage unless the Court enjoins the Town's enforcement of the UDO as prohibiting the use of residential property for vacation rentals.

258. Entering such an injunctive order maintains the status quo and does not cause any injury to the Town.

259. The equities favor Plaintiffs in the entering of a preliminary injunction

260. The preliminary injunctive relief sought herein is statutorily mandated by N.C. Gen. Stat. § 160D-405(f).

261. Plaintiffs therefore request that the Court enter a preliminary and permanent injunction enjoining the Town's enforcement of the UDO as prohibiting the use of residential property for vacation rentals and ordering that the Town's vote on August 24, 2021, and letter posted on September 6, 2021, are null and void and should be vacated.

### **PETITION FOR WRIT OF CERTIORARI**

262. The Town's decision to enforce the UDO as prohibiting the use of residential property for short-term vacation rentals and other acts set out herein constituted a quasi-judicial or administrative decision and is appealable to the North Carolina Superior Court pursuant to N.C. Gen. Stat. § 160D-1402 by way of a petition for writ of certiorari.

263. Plaintiffs have standing to petition for a writ of certiorari under N.C. Gen. Stat. § 160D-1402(c).

264. The Board of Commissioners made an error to vote to start enforcing the UDO as prohibiting the use of residential property for short-term vacation rentals for the reasons stated herein.

265. According to public records produced by the Town, Commissioner Dotson owns short-term vacation rental property in the B-2 commercial zoning district. Few of those who completed the Town's Short-Term Vacation Rental form owned property outside the R-1, R-2, and R-3 zoning districts. Prohibiting short-term vacation rentals in the R-1, R-2, and R-3 zoning districts would leave Commissioner Dotson as one of the few owners of vacation rentals in Highlands with the ability to rent his property for vacation rental. Commissioner Dotson was in the minority of Commissioners who advocated for a complete prohibition of short-term vacation rentals in all residential zoning districts. During the August 24, 2021, meeting Commissioner Dotson stated that the issue was "black and white, there's no doubt about [the UDO prohibits vacation rentals] for all residential districts." Commissioner Dotson realized a financial benefit in voting to direct the Town staff to start enforcing the UDO as prohibiting the use of residential property for short-term vacation rentals.

266. Mitchell's Lodge and Cottages ("the Lodge") is a hotel and inn located in Highlands that caters to vacationers. The Lodge had been for sale prior to and after the Board of Commissioners August 24, 2021, vote. Commissioner Dotson represented, and continues to represent, the Lodge as its real estate agent. Both the

Lodge and Commissioner Dotson would financially benefit from the sale of the Lodge

267. Just days after the vote of August 24, 2021, Commissioner Dotson successfully negotiated a contract for sale on behalf of the Lodge with a local buyer.

268. Commissioner Dotson had a conflict of interest in violation of N.C. Gen. Stat. §§ 160A-86 and 160D-109, in voting to start enforcing the UDO as prohibiting the use of residential property for short-term vacation rentals thereby violating N.C. Gen. Stat. § 160D-1402(b)(3).

269. The relief sought by Petitioners pursuant to N.C. Gen. Stat. § 160D-1402(b)(3) is that relief contained in the prayer for relief below.

**ATTORNEYS' FEES**  
N.C. Gen. Stat. § 6-21.7

270. N.C. Gen. Stat. § 6-21.7 provides as follows:

In 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. In any action in which a city or county is a party, upon finding by the court that the city or county took action inconsistent with, or in violation of, G.S. 160D-108(b) or G.S. 143-755, the court shall award reasonable attorneys' fees and costs to the party who successfully challenged the local government's failure to comply with any of those provisions. In all other matters, the court may award reasonable attorneys' fees and costs to the prevailing private litigant. For purposes of this section, "unambiguous" means that the limits of authority are not reasonably susceptible to multiple constructions.

271. The Town has violated a statute and case law that sets unambiguous limits on its authority.

272. Consequently, the Court **shall** award reasonable attorneys' fees and costs to Plaintiffs pursuant to N.C. Gen. Stat. § 6-21.7.

273. The Town took action inconsistent with and in violation of N.C. Gen. Stat. § 160D-108(b).

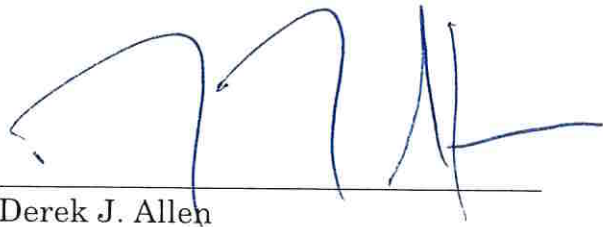
274. Consequently, the Court **shall** award reasonable attorneys' fees and costs to Plaintiffs pursuant to N.C. Gen. Stat. § 6-21.7.

275. Plaintiffs demand the award of their reasonable attorneys' fees and costs against the Town.

WHEREFORE, Plaintiffs pray that this Court:

1. Enter an order awarding Plaintiffs the declaratory relief demanded herein;
2. Enter the injunctive relief demanded herein;
3. Enter an order rendering null and void the Town's vote on August 24, 2021, and letter posted on September 6, 2021, and to vacate the same;
4. Award damages to Plaintiffs in an amount in excess of \$25,000.00;
5. Award reasonable attorneys' fees and costs to Plaintiffs pursuant to 42 U.S.C. § 1988 and N.C. Gen. Stat. § 6-21.7;
6. For such other or further relief as this court shall deem just and appropriate.

This the 13<sup>th</sup> day of October, 2021.



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