

# allen stahl+ kilbourne

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August 24, 2022

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Dear Town of Highlands:

Today is the one-year anniversary of the Town voting to interpret the current UDO as prohibiting short-term rentals. This vote prompted our clients' legal action and led to a cascade of events – and continued Town missteps – that is on course to culminate in yet another vote on the regulation of vacation rentals in the Town of Highlands.

This vote is likely one of the most important votes in Highlands' history. The Town has an opportunity to either: 1) vote on common-sense legal regulation of vacation rentals; or 2) pass an ordinance that will trample individual property rights, gut the local economy, and lead to continued litigation that will take years to resolve.

Our clients urge the Town take option one and put to bed the dispute that has fractured the Town. In so urging, I will summarize below where we have been, where we are, and what will happen next, depending on the choice the Town makes.

## **1. Where we have been.**

Highlands is a tourist town and always has been. Tourists and second homeowners abound, leading to a vibrant economy that benefits everyone from

contractors and tradesman, to shop owners and restaurants, to housekeepers and landscapers. Vacation rentals are a crucial part of that economy and always have been.

Consequently, short-term rentals have always been allowed in Highlands. Town officials stated numerous times that short-term rentals were allowed in all zoning districts. People who otherwise could not afford property in Highlands bought homes based on those representations, renting them out to pay their mortgage.

The Town's surprise vote of August 24, 2021, to interpret the UDO as prohibiting short-term rentals was a complete about face and shock to these homeowners. For many, the vote meant they would have to sell their home as they could not afford it without the support of renters. For others, like those in real estate management, it meant the loss of their livelihood. Both groups – not to mention lower income residents in the service industry who depend on the vacation rental market – faced dire economic loss because of the Town's August 24 vote.

More importantly, the vote was flat out illegal. The UDO did not prohibit vacation rentals, and the Board of Commissioners had no authority to interpret the UDO and order enforcement effective January 3, 2022. To protect their rights and prevent the Town's clear overreach of its authority, our clients were forced to sue at significant expense. As a result of this lawsuit, the Town backtracked and rescinded its illegal actions of August 24, 2021.

Returning to square one, the Town proceeded through the administrative review process to consider a newly drafted ordinance. The Town first presented a draft ordinance to the Planning Board, which met with and sought input from our clients. After the Planning Board submitted a proposed, revised ordinance to the Board of Commissioners, the Town held a public hearing on February 24, 2022. Our clients presented comments at the public hearing summarizing their position on the proposed ordinance. Further, by letter of March 4, 2022, our clients highlighted various legal and practical concerns with the proposed ordinance, and provided a redlined version of the proposed ordinance that represented a compromise position on vacation rental regulation. Progress was being made. There was collective community engagement.

Then we heard nothing. Dialogue stopped. Rather than engage in discussion on a potential compromise, the Town hired its third law firm to "get a second opinion." Behind closed doors, the Town scrapped the Planning Board's hard work, ignored our clients' compromise position, and created a brand-new ordinance published only days before the May 19, 2022, vote to adopt the same. Just as it did on August 24, 2021, the Town sneakily tried to pass new regulations before

Highlands residents could voice their positions. Indeed, the Town even decided to include an entirely new concept of R-2 restrictions during the May 19 meeting.

Once again, the Town acted illegally and, once again, this firm, at significant legal expense, had to notify the Town of its legal error. Consequently, the Town had to scrap yet another vote and go back to the drawing board.

And while the Town could have taken this opportunity to engage with proponents of vacation rentals or explore compromise, it instead doubled down on its illegal choices. Once more, it worked behind closed doors to devise even stricter regulations via its alternative, July 8, 2022, proposed ordinances.

One of these alternatives includes an amortization provision, which, as noted by Ari Bargil of the Institute for Justice, is manifestly illegal. He is the attorney who successfully sued the City of Wilmington, causing it to refund over \$500,000 to its residents, and likely costing it at least an additional \$300,000 in legal fees (on top of what it already paid its attorneys).

The other alternative, proposed ordinance is likewise problematic. It imposes significant limitations on existing short-term rentals, all of which violate established principles of property law. The proposed ordinance also prescribes a constitutionally flawed formula purporting to determine the existence and scope of established short-term rentals.

In short, neither alternative, proposed ordinance properly protects our clients' vested rights to maintain their existing short-term rentals. But it is not too late for the Town to heed our clients' rights and its obligation to govern within the bounds of its authority.

## **2. Where we are.**

That brings us to the present. The public hearing is tomorrow, and the vote on the ordinance will be at a meeting in the future, presumably September 15, 2022. Our clients have always only wanted the Town to do one thing: comply with the law. The Town did not do that on August 24, 2021. The Town did not do that on May 19, 2022. The upcoming vote is the Town's third attempt to adopt legally enforceable regulations on vacation rentals. This is the Town's third opportunity to get it right.

Unfortunately, the Town seems intent on illegality. Like the first two attempts, the various versions of the ordinance for approval still require registration/permitting, and attack the constitutional and statutory vested rights of homeowners in the Town. Those are the two glaring issues with the Planning Board's proposal and the July 8, 2022, alternative proposals.

For their part, our clients proposed an ordinance on March 4, 2022, that regulates vacation rentals without registration and protects valid, non-conforming uses. That proposal remains a viable solution to the purported, but factually unsupported, vacation rental “issues” in the Town. A clean copy of our proposed ordinance is enclosed herein (note: the redlined and highlighted text are those of the Planning Board).

Strengthening nuisance laws is another alternative our clients are amenable to. The Town may pursue many other options to regulate vacation rentals short of implementing illegal registration requirements and an unlawful amortization scheme. Any other option, in fact, that does not entail a registration scheme and that recognizes valid, non-conforming uses is up for discussion.

Our clients have always been willing to have that discussion. Even now, the offer remains for each Commissioner and the Mayor to meet with our group, with or without legal counsel, to hear their concerns and ideas. A collective community decision can then be made rather than the one advocated by the vocal minority of second home owners and retirees such as those in the Neighborhood Coalition, who can afford property in Highlands without rental income and seek to diminish the presence of vacationers.

### **3. What is going to happen.**

Our clients, of course, cannot make Town officials meet with them. Neither can our clients make the Board of Commissioners pass an ordinance that complies with the law. All our clients can do is continue to fight for their rights.

That is what they will do if the Town passes an ordinance that requires registration/permitting and attacks valid, non-conforming uses. Specifically, we will proceed as follows:

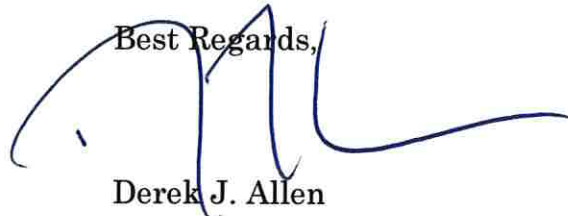
1. Notice for hearing the enclosed Motion for Attorneys’ Fees, which we will file today. The attorneys’ fees incurred by our clients are in excess of six figures and continue to grow.
2. Proceed with deposing Joshua Ward, the Mayor, and each of the Board of Commissioners. Notices of deposition are enclosed.
3. Litigate the Town’s failure to comply with the public records request. Many documents remain pending, specifically texts and emails from Commissioners.

Additionally, any ordinance that requires registration/permitting and fails to protect valid, non-conforming uses will be met with a new lawsuit setting aside the ordinance and seeking legal fees. This second lawsuit will likely follow the same path as the *Schroeder v. Wilmington* lawsuit in time, cost, and result. (The Schroeder lawsuit was filed on October 2019). We feel as confident in this second lawsuit as we did in the current lawsuit, and in our June 7, 2022, letter, notifying the Town of the procedural defects with the May 19 vote. That is to say, very confident.

One year ago today, the Town unambiguously exceeded its authority and backed down only after our clients were forced to file legal action. The blunders have continued over the last year, delaying the implementation of reasonable regulation and allowing others time to establish their valid, non-conforming uses. With multiple problematic ordinances on the table, the Town appears poised to commit yet another legal error that will keep the Town and its residents in lengthy and contentious litigation.

Our clients implore the Town to choose compromise and common sense over continued conflict. Choosing unambiguously illegal action again would give our clients no choice but to continue the fight for their legal rights, a fight they are very willing and able to have.

Best Regards,



Derek J. Allen

Enclosures

cc: Jay Coward (jkcoward@chspa.com)  
Craig Justus (cjustus@vwlawfirm.com)  
Bob Hagemann (rhagemann@poynerspruill.com)

(Planning Board Final Draft)  
**EXHIBIT A: CHANGES TO THE UDO**

1. **Section 2.3 Definitions.** Particular terms, as hereinafter set forth, within the Section 2.3 Definitions are hereby amended or added to the list of defined terms to read as follows:

- **Building, Multi-Family:** Any building, other than a motel, hotel, tourist home or whole house short term rental as defined in this Ordinance, containing more than one (1) dwelling unit. This term includes single-family attached dwellings, duplexes, and apartments.
- **Duplex:** A building containing two (2) dwelling units located on the same lot or parcel.
- **Dwelling, Multi-Family:** A dwelling unit designed, intended or used by more than one (1) family for human habitation.
- **Lodging:** The use of a building, or any portion thereof, for someone to live or stay temporarily, often for periods of less than thirty (30) consecutive days in return for the payment of compensation. Lodging includes a hotel, motel, tourist home and whole house short term rental.
- **Multi-Family Residential Use:** The use of a lot or parcel for human habitation by more than one (1) family for periods that are not temporary guest occupancy within a multi-family building or a multi-family dwelling unit. This term does not include lodging uses such as a hotel, motel, tourist home or whole house short term rental.
- **Single-Family Residential Use:** The use of a single-family dwelling unit by a single family for human habitation for periods that are not temporary guest occupancy. This term does not include lodging uses such as a hotel, motel, tourist home, transient dwelling lodging or whole house short term rental.
- **Temporary Guest Occupancy:** The use of a dwelling unit in return for compensation where the occupancy of the structure by the paying guest or guests is for a period of less than thirty (30) consecutive days.
- **Tourist Home:** A building or part thereof, not including a motel, hotel or whole house short term rental, where sleeping accommodations or lodging of not more than four (4) ~~rooms~~ **bedrooms** are provided to guests paying compensation, where the owner, operator or manager also stays on the same parcel during any period of guest occupancy. This term includes bed and breakfast homes, inns, rooming or boarding houses or homestays.

- **Transient Dwelling Lodging:** The use of a dwelling unit for lodging for compensation whereby the entire dwelling unit is rented or occupied by a paying guest or guests for a period of less than seven (7) consecutive days.
- **Whole House Short Term Rental:** The use of a detached dwelling unit for lodging in return for compensation whereby the entire dwelling unit is rented or occupied by a paying guest or guests for a period of less than thirty (30) consecutive days but no less than a minimum duration of seven (7) days. It does not include transient dwelling lodging.

2. **Section 2.3 Definitions, “Family”.** The term “Family” is hereby amended to substitute the number three (3) for the number five (5) in the first sentence of subsection B.

3. **Sec. 4.7.1 Applicability** is hereby amended to read as follows:

No person shall commence or proceed with construction of any new building ~~fence or wall~~, or **structure** as defined herein, or with the reconstruction, alteration, repair, moving, or demolition of any existing building, or change the use of property, in any Zoning District, or as otherwise expressly noted in this Ordinance, prior to the issuance of a Zoning Certificate in accordance with the following procedures.

4. **Section 6.2 Use Table** is hereby amended to replace the Use Category Section entitled “**Residential Uses**” in its entirety with the following:

KEY: "P" = PERMITTED "S" = SPECIAL "L" = LIMITED X = NOT ALLOWED		RESIDENTIAL			NONRESIDENTIAL					
USE CATEGORY	SPECIFIC USE	R-1	R-2	R-3	B-1	B-2	B-3	B-4	GI	NOTES:
<b>RESIDENTIAL USES</b>										
HOUSEHOLD LIVING	Single-family dwellings detached	P	P	P	P	P	P	P	X	Sec. 6.3.1.A
	Single-Family Residential Use	P	P	P	P	P	P	P	X	
	Modular homes	P	P	P	P	P	P	P	X	Sec. 6.3.1.B
	Manufactured homes	X	L	L	X	X	X	X	X	Sec. 6.3.1.C
	Multi-family building, including duplexes, apartments and single-family attached dwelling	X	X	P	X	X	X	X	X	
	Multi-family dwelling	X	X	P	X	X	X	X	X	Sec. 6.3.2
	Multi-Family Residential Use	X	X	P	X	X	X	X	X	

ACCESSORY USES	Customary accessory outbuildings	L	L	L	L	L	L	L	X	Sec. 6.3.3.A
	Storage outbuildings on vacant lots	L	X	X	X	X	X	X	X	Sec. 6.3.3.B
	Fences	L	L	L	L	L	L	L	L	Sec. 6.3.3.C
	Exterior residential security & area lighting	L	L	L	L	L	L	L	L	Sec. 6.3.3.D
	Camping trailer, motor home, or similar recreational vehicle	L	L	L	X	X	X	X	X	Sec. 6.3.3.E
	Customary incidental home occupations	X	L	L	X	L	L	L	X	Sec. 6.3.3.F

5. **Section 6.2 Use Table** is hereby amended to replace the Use Category Section classifying "Overnight Accommodations" in its entirety with the following:

KEY: "P" = PERMITTED "S" = SPECIAL "L" = LIMITED X = NOT ALLOWED		RESIDENTIAL			NONRESIDENTIAL					
USE CATEGORY	SPECIFIC USE	R-1	R-2	R-3	B-1	B-2	B-3	B-4	U	NOTES:
<b>COMMERCIAL</b>										
OVERNIGHT ACCOMMODATIONS- <b>LODGING</b>	Hotels and motels	X	X	X	X	L	L	X	X	Sec. 6.5.9
	Tourist homes (bed and breakfast)	X L	L	P	P	P	P	L P	X	Sec. 6.5.10
	Whole House Short Term Rental	X L	L	P	P	P	P	L P	X	Sec. 6.5.18
	Transient Dwelling Lodging	X	X L	X P	P	P	P	X P	X	Sec. 6.5.19

6. **Section 6.3.2 Multi-family Dwelling** is hereby amended to rename the heading "Multi-family building or dwelling" and to replace the first paragraph in its entirety with the following:

Multi-family buildings or dwellings are permitted in accordance with sec. 6.2, Use Table (with the added exception of being allowed as an accessory use for Golf and Tennis Clubs) with the following requirements:

7. **Section 6.3.3 Residential Accessory Uses and Structures** is hereby amended to replace subsection A in its entirety with the following:

A. Customary Accessory Outbuildings: Appurtenant to single-family dwellings such as private garages, noncommercial buildings such as greenhouses and workshops. No residential or lodging use of any kind is allowed.



8. **Sec. 6.3.3 Residential Accessory Uses and Structures** is hereby amended to replace subsection E in its entirety with the following:

E. Recreation Vehicle. Only one (1) camping trailer, motor home, or similar recreational vehicle may be parked on a lot or parcel within a designated approved parking space. No residential or lodging use is allowed, nor may it be connected to any water, sewerage, or power supply.

9. **Sec. 6.5 Commercial Uses** is hereby amended to replace Section 6.5.10 Tourist Homes in its entirety with the following:

6.5.10 Tourist Homes

The term Tourist Home may also mean Bed and Breakfast Home or Rooming/Boarding house.

A Tourist Home may be permitted in the Zoning Districts identified in Sec. 6.2, Use Table, and with the issuance of a Zoning Certificate.

10. **Sec. 6.5 Commercial Uses** is hereby amended to add a new subsection 6.5.18 for Whole House Short Term Rental use to read as follows:

6.5.18 Whole House Short Term Rental.

A. Whole House Short Term Rentals. Short term rentals of an entire dwelling unit known as Whole House Short Term Rentals (WHSTR) are hereby recognized as an authorized use within the planning jurisdiction of the Town of Highlands.

B. Exceptions. The following activities and / or uses shall be excepted from the application of this Section.

1. Incidental whole house short term rentals, defined to mean no more than two such rentals in any calendar year where the total annual rental period for both rentals does not exceed two weeks.

C. Use Conditions. The following requirements shall apply to any WHSTR.

1. Occupancy Limits. On those occasions when the property is being utilized for WHSTR activity, the overnight occupancy shall not exceed two persons per bedroom plus two additional persons. Provided, however, the number of bedrooms permitted for a WHSTR shall not exceed the number of bedrooms approved for the dwelling on the sewage permit issued for each property. For unpermitted properties, occupancy shall be the lesser of the total determined by the foregoing formula or twelve persons. Bedrooms used in calculating occupancy limits shall be taken from the application as affirmed by the owner/operator/manager and shall be the same as the number of bedrooms as listed on the Macon County Revenue Department's

Property Information Card to also assure the sufficiency of the wastewater system on site.

2. ~~Maximum number of weeks. In the R-2 and B-4 zoning districts, the maximum number of weeks that are allowed for WHSTR use on a lot is 25 weeks per calendar year. The intent of this provision is to only allow WHSTR as an accessory use within properties zoned R-2 or B-~~
3. Display of Contact Information. Operators of WHSTR shall prominently display on the exterior of the property the name and 24-hour per day, 365 days-per-year telephone number for the WHSTR operator who will take and resolve complaints regarding operation of the WHSTR and its occupants and guests. The Town will prescribe the form of this display which shall also include a telephone number to report violations of this section to the Zoning Administrator.
4. Vehicles parked in undesignated areas, or in the street so as to violate the Town's street or parking ordinances, shall be subject to towing at the vehicle owner's expense. ~~No more than four (4) cars shall be allowed to be parked on a lot being used as a WHSTR.~~ **The owner shall provide one (1) on-site parking space per one (1) bedroom.**
5. Trash Disposal. Household trash ~~must~~ **shall** be bagged and disposed of in trash receptacles. Trash receptacles shall be the size and number authorized by existing refuse contracts and shall be animal resistant. The WHSTR use ~~must~~ **shall** comply with Chapter 12 of the General Code of Ordinances, Solid Waste Management.
6. Noise Ordinance. The WHSTR use ~~must~~ **shall** comply with the Town's Noise Ordinance, Article II of the General Code of Ordinances.
7. Nonconforming WHSTR Compliance with Restrictions. Notwithstanding anything to the contrary in the Town's ordinances, a vested or legal nonconforming use of property as a WHSTR ~~must~~ **shall** at all times comply with Section C and Section E, subsections 4, 5, and 6.

D. Contract Addendum. Every contract for a WHSTR shall contain an addendum, in a form prepared by the Town, setting forth the requirements of this Section and other applicable provisions of law. The operator shall obtain a signed acknowledgment from the renter(s) that they have received such addendum prior to delivering possession of the dwelling unit. This requirement shall be deemed satisfied if the provisions of the addendum are included as part of the rental contract.

E. Duties of the Operator to Respond to Complaints. To assure prompt response to complaints and issues concerning a WHSTR, the operator shall comply with the following:

1. ~~Maintain a call center that is staffed by a live person and fully responsive at any time that the property is used as a WHSTR. The owner or operator shall be reachable any time the property is used as a WHSTR.~~
2. Continuously maintain on file with the Town the operator's current address, telephone number, and facsimile number and/or email address.

F. Non-Compliance with WHSTR Zoning Permit and Regulations.

1. Failure to comply with the standards and regulations as found in this Section shall be enforced by the remedies and penalties as provided in Chapter of the Code of Ordinances of the Town of Highlands.
2. ~~If three (3) violations are committed within a twelve (12) month period, the WHSTR owners' rights shall be suspended for six (6) consecutive months.~~

#### 6.5.19 Transient Dwelling Lodging

A. Transient Dwelling Lodging. Short term rental of an entire dwelling unit known as Transient Dwelling Lodging (TDL) is hereby recognized as an authorized use within the planning jurisdiction of the Town of Highlands. Except as provided herein, on and after \_\_\_\_\_, it shall be a violation of these zoning regulations to operate a TDL without a development approval from the Town (i.e., Zoning Certificate).

B. Use Conditions. The following requirements shall apply to any TDL.

1. Occupancy Limits. On those occasions when the property is being utilized for TDL activity, the overnight occupancy shall not exceed two persons per bedroom plus two additional persons. Provided, however, the number of bedrooms permitted for a TDL shall not exceed the number of bedrooms approved for the dwelling on the sewage permit issued for each property. For unpermitted properties, occupancy shall be the lesser of the total determined by the foregoing formula or twelve

persons. Bedrooms used in calculating occupancy limits shall be taken from the application as affirmed by the owner/operator/manager and shall be the same as the number of bedrooms as listed on the Macon County Revenue Department's Property Information Card to also assure the sufficiency of the wastewater system on site.

2. Display of Contact Information. Operators of TDL shall prominently display on the exterior of the property the name and 24-hour per day, 365 days-per-year telephone number for the TDL operator who will take and resolve complaints regarding operation of the TDL and its occupants and guests. The Town will prescribe the form of this display which shall also include a telephone number to report violations of this section to the Zoning Administrator.
3. Parking. Occupants or guests of any TDL shall not park vehicles on the property other than within parking area(s) designated on the application for the TDL Zoning Certificate and in compliance with Article IV of the General Code of Ordinances, Stopping, Standing and Parking and Article 9 of this Ordinance. Vehicles parked in undesignated areas, or in the street so as to violate the Town's street or parking ordinances, shall be subject to towing at the vehicle owner's expense. The owner shall provide one (1) on-site parking space per one (1) bedroom.
4. Trash Disposal. Household trash shall be bagged and disposed of in trash receptacles. Trash receptacles shall be the size and number authorized by existing refuse contracts and shall be animal resistant. The TDL use shall comply with Chapter 12 of the General Code of Ordinances, Solid Waste Management.
5. Noise Ordinance. The TDL use shall comply with the Town's Noise Ordinance, Article II of the General Code of Ordinances.
6. Nonconforming TDL Compliance with Restrictions. Notwithstanding anything to the contrary in the Town's ordinances, a vested or legal nonconforming use of property as a TDL shall at all times comply with Section B and Section D, subsections 4, 5, and 6.
7. Rental's of less than 14-days in the R-2 zoning district, shall be regulated by location and adjacent land use.

- C. Contract Addendum. Every contract for a TDL shall contain an addendum, in a form prepared by the Town, setting forth the requirements of this Section and other applicable provisions of law. The operator shall obtain a signed acknowledgment from the renter(s) that they have received such addendum prior to delivering possession of the dwelling unit. This requirement shall be

deemed satisfied if the provisions of the addendum are included as part of the rental contract.

- D. Duties of the Operator to Respond to Complaints. To assure prompt response to complaints and issues concerning a TDL, the operator shall comply with the following:
  - 1. The owner or operator shall be reachable any time the property is used as a TDL.
  - 2. Continuously maintain on file with the Town the operator's current address, telephone number, and facsimile number and/or email address.
- E. Non-Compliance with TDL Zoning Permit and Regulations.
  - 1. Failure to comply with the standards and regulations as found in this Section shall be enforced by the remedies and penalties as provided in Chapter\_of the Code of Ordinances of the Town of Highlands.
  - 2. If three (3) violations are committed within a twelve (12) month period, the WHSTR owners' rights shall be suspended for six (6) consecutive months.

11. **Section 7.1.1 Purpose** is hereby amended to add a new sentence at the end that reads: "The provisions of this Section are intended and designed to limit substantial investment in nonconformities and to bring about eventual elimination or lessen their impact upon surrounding conforming uses in order to preserve the integrity of the area in which it is located."

Section 2. SEVERABILITY. Should any section or provision of this ordinance be declared invalid by any court of competent jurisdiction, such declaration shall not affect the validity of any ordinance as a whole or any part thereof which is not specifically declared to be invalid. If any court of competent jurisdiction invalidates the application of any provision of this ordinance, then such judgment shall not affect the application of that provision to any other building, structure or use not specifically included in that judgment.

Section 3. EFFECTIVE DATE. This Ordinance shall take effect and be in force from the date of its adoption by Town Council.

READ, APPROVED AND ADOPTED this the      day of      , 2021.

\_\_\_\_\_  
TOWN CLERK

\_\_\_\_\_  
MAYOR

Approved as to form:

\_\_\_\_\_  
TOWN ATTORNEY

N.C.P.I.–Civil 102.11  
 NEGLIGENCE ISSUE-DEFINITION OF COMMON LAW NEGLIGENCE.  
 GENERAL CIVIL VOLUME  
 REPLACEMENT JUNE 2018  
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102.11 NEGLIGENCE ISSUE—DEFINITION OF COMMON LAW NEGLIGENCE.

Negligence refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary care to protect himself and others from [injury] [damage]. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from [injury] [damage]<sup>1</sup> A person's failure to use ordinary care is negligence.<sup>2</sup>

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<sup>1</sup> *Pinyan v. Settle*, 263 N.C. 578, 582, 139 S.E.2d 863, 866 (1965); *Barnes v. Caulbourne*, 240 N.C. 721, 725, 83 S.E.2d 898, 901 (1954).

<sup>2</sup> "The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Williamson v. Clay*, 243 N.C. 337, 343, 90 S.E.2d 727, 731 (1956), quoting *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951). *But see Stacy v. Jedco Const., Inc.*, 119 N.C. App. 115, 120, 457 S.E.2d 875, 879 (1995) (citing 57A Am. Jur.2d *Negligence* § 954 (1989) (now 57B Am. Jur.2d *Negligence* § 863 (2018) for the general principle that "one who is so insane or devoid of intelligence as to be totally unable to apprehend danger and avoid exposure to it is not a responsible human agency and cannot be guilty of contributory negligence.") As contributory negligence is merely primary negligence committed by the plaintiff, see *Meinck v. City of Gastonia*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 798 S.E.2d 417, 423 (2017), this general principle as to contributory negligence applies to primary negligence as well.

However, a different rule applies where the person whose conduct is in question has diminished mental faculties not amounting to insanity or total incompetence. *Stacy*, 119 N.C. App. at 120, 457 S.E.2d at 879. Rather than being held to the objective reasonable person standard, such a person is "held only to the exercise of such care as ... a person of like mental capacity under similar circumstances." *Id.* The burden is on the person claiming the lack of mental capacity to show that a "specific 'diminished mental capacity'" rendered him unable to perceive and avoid a particular harm. *Proffitt v. Gosnell*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 809 S.E.2d 200, 208 (2017).