

STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

FILED  
IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
19-CVS-171

CURRITUCK COUNTY, C.T.D.  
BY W

GERALD COSTANZO, COROLLA CIVIC  
ASSOCIATION, ET AL.

Plaintiffs,

v.

CURRITUCK COUNTY, NORTH  
CAROLINA; THE CURRITUCK COUNTY  
TOURISM DEVELOPMENT AUTHORITY;  
DANIEL F. SCANLON II, CURRITUCK  
COUNTY MANAGER and BUDGET OFFICER,  
both in his official capacity and in his individual  
capacity, ET AL.

Defendants.

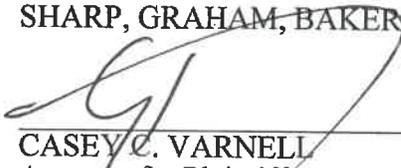
NOTICE OF HEARING ON  
MOTION FOR  
PRELIMINARY INJUNCTION

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Please take notice that the undersigned will bring on for hearing the Plaintiffs' Motion for Preliminary Injunction in the Currituck County Superior Court, Currituck, North Carolina, at **10:00 AM on Monday, August 12th, 2019**, or as soon thereafter as counsel can be heard.

This the 1st day of August, 2019.

SHARP, GRAHAM, BAKER & VARNELL, LLP



CASEY C. VARNELL  
Attorney for Plaintiffs  
P. O. Drawer 1027  
Kitty Hawk, NC 27949  
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## CERTIFICATE OF SERVICE

This is to certify that a copy of this Notice of Hearing filed in the above matter was served upon all parties in accordance with Rule 5 of the Rules of Civil Procedure by facsimile and by depositing a copy in the United States Mail, postage prepaid, addressed to:

Christopher J. Geis  
WOMBLE BOND DICKINSON (US) LLP  
One West Fourth Street  
Winston-Salem, NC 27101  
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Attorney for Defendants

David M. Palko  
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555 Fayetteville Street; Suite 1100  
Raleigh, NC 27601  
Facsimile: (919)755-6040  
Attorney for Defendants

This the 1st day of August, 2019.



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Casey C. Varnell

STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
19-CVS-171

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CURRITUCK COUNTY, C.D.C.

BY: W

GERALD COSTANZO, COROLLA CIVIC  
ASSOCIATION, ET AL.

Plaintiffs,

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CURRITUCK COUNTY, NORTH  
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TOURISM DEVELOPMENT AUTHORITY;  
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COUNTY MANAGER and BUDGET OFFICER,  
both in his official capacity and in his individual  
capacity, ET AL.

Defendants.

MOTION FOR  
PRELIMINARY INJUNCTION

NOW COMES Plaintiffs, by and through undersigned counsel, hereby motion the Court pursuant to Rule 65(a) of the North Carolina Rules of Civil Procedure for a preliminary injunction which acts to enjoin the use of any occupancy tax ("OT") proceeds by the Defendants for the purposes of funding police, emergency medical and fire services and equipment (referred to herein as "public safety services and equipment," *provided* that such term shall not be deemed to refer to lifeguard services and related equipment or any services commissioned by the County related to beach clean-up).

The Plaintiffs state that without entry of an order in favor of the preliminary injunction, the Plaintiffs will suffer irreparable loss, and said issuance is necessary for the protection of Plaintiffs' rights. Further, the Plaintiffs state that there exists a reasonable likelihood of success on the merits regarding their underlying cause of action.

WHEREFORE, Plaintiffs pray the Court for the issuance of an order enjoining the Defendants from the use of any occupancy tax ("OT") proceeds by Currituck County or its Tourism Development Authority for the purposes of funding police, emergency medical and fire services and equipment, as defined herein, in order to preserve the status quo until the rights of the parties can be fully determined at trial.

RESPECTFULLY SUBMITTED, this the 1<sup>st</sup> day of August, 2019.

SHARP, GRAHAM, BAKER and VARNELL, LLP



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Casey C. Varnell  
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P.O. Drawer 1027  
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Phone: 252-261-2126  
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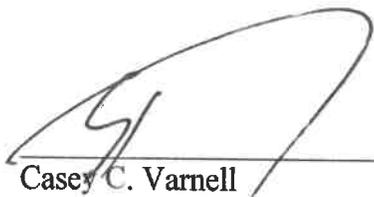
CERTIFICATE OF SERVICE

This is to certify that a copy of this Motion for Preliminary Injunction and Brief in Support of Motion filed in the above matter was served upon all parties in accordance with Rule 5 of the Rules of Civil Procedure by facsimile and by depositing a copy in the United States Mail, postage prepaid, addressed to:

Christopher J. Geis  
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Attorney for Defendants

This the 1st day of August, 2019.

  
Casey C. Varnell

FILED

2019-05-2 P 3:36  
COURT OF JUSTICE  
BY: *W*

STATE OF NORTH CAROLINA  
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GERALD COSTANZO, COROLLA CIVIC ASSOCIATION, ET AL. )

Plaintiffs, )

v. )

CURRITUCK COUNTY, NORTH CAROLINA; THE CURRITUCK COUNTY TOURISM DEVELOPMENT AUTHORITY; DANIEL F. SCANLON II, CURRITUCK COUNTY MANAGER and BUDGET OFFICER, both in his official capacity and in his individual capacity, ET AL. )

Defendants. )

BRIEF IN SUPPORT OF  
MOTION FOR  
PRELIMINARY INJUNCTION

**INTRODUCTION**

Plaintiffs, by and through undersigned counsel, have simultaneously herewith filed a motion with the Court pursuant to Rule 65(a) of the North Carolina Rules of Civil Procedure for a preliminary injunction which acts to enjoin the use of any occupancy tax (“OT”) proceeds by Currituck County or its Tourism Development Authority for the purposes of funding police, emergency medical and fire services and equipment (referred to herein as “public safety services and equipment,” *provided* that such term shall not be deemed to refer to lifeguard services and related-equipment or any services commissioned by the County related to beach clean-up).

The Plaintiffs state that without entry of an order in favor of the preliminary injunction, the Plaintiffs will suffer irreparable loss, and said issuance is necessary for the

protection of Plaintiffs' rights. Further, the Plaintiffs state that there exists a reasonable likelihood of success on the merits regarding the underlying cause of action.

### **JURISDICTION AND DISCRETION OF THE COURT**

The Complaint in this matter was filed in Currituck County Superior Court on May 7<sup>th</sup>, 2019, wherein the Plaintiffs requested a permanent injunction be issued against the Defendants regarding the use of OT proceeds for the purposes named in this motion, among other items. This Court has original jurisdiction to rule on Plaintiffs' Motion for Preliminary Injunction.

Issuance of a preliminary injunction is a matter of discretion that the trial court exercises after weighing the equities and advantages and disadvantages to the parties. *Adams v. Beard Development Corp.*, 116 N.C.App. 105, 446 S.E.2d 862 (1994).

The decision to grant or deny a preliminary injunction is ordinarily within the sound discretion of the trial court and the burden is upon the appellant to show error. *Stout v. City of Durham*, 121 N.C.App. 716, 468 S.E.2d 254 (1996).

### **PARTIES**

The individual Plaintiffs all own (or have owned during periods relevant to the allegations in this Complaint) properties in COBX that generate occupancy tax revenues. Plaintiff Corolla Civic Association ("CCA") is a nonprofit corporation duly organized and existing under the laws of the State of North Carolina with a principal place of

business in Currituck County. Its members include individuals who rent accommodations located in the County. CCA has joined in the filing of this action to protect the interests of its members who are payers of occupancy taxes.

Defendant Currituck County (hereinafter "County") is a body politic and body corporate organized and existing under the laws of the State of North Carolina. Defendant Currituck County Board of Commissioners (hereinafter "Commissioners") is the board of commissioners exercising the powers and functions of the County under the Constitution and the laws of the State. The Board consists of seven Commissioners. Defendant Tourism Development Authority (hereinafter "TDA") is a public authority organized and existing under the laws of the State which is tasked with approving expenditures of any and all OT proceeds for the statutorily-allowed uses defined herein. The voting members of the TDA are the seven County Commissioners.

### **CURRENT USE OF OCCUPANCY TAX PROCEEDS**

Since 2005 the County has unlawfully expended approximately \$23.6 Million of OT proceeds to fund public safety services and equipment through the Fiscal Year, and its proposed budget for the Fiscal Year commencing on July 1, 2019 includes \$2.86 Million for such purposes. The County is authorized to impose a 6% occupancy tax on qualified lodging rentals, under N.C. Sess. Law 2004-95, as amended (herein referred to as the "Act"), § 2. Attached hereto as Exhibit A is a copy of the cited Session Law.

The portion of the County that is located on the Outer Banks (herein referred to as the "COBX" or the "Beach"), which is separated by the Currituck Sound from the

mainland portion of the County (herein referred to as the “Mainland”), is responsible for generating over 99% of the County’s OT revenues. The COBX has over 20,000 rental bedrooms in 4,000 private homes that are rented to tourists, primarily in the Summer season, in addition to several hotels and inns, with a total of 200 rooms. The Mainland has approximately 40 rental rooms in several motels and inns and a few hundred rental campsites and RV hookups.

Section 1.1(c) of the Act provides that the TDA “shall expend the net proceeds of the tax levied under this act for the purposes provided in Section 1 of this act.” Section 1(e) authorizes use of occupancy tax revenues levied (1) under subsection 1(a) “*only* for tourism-related expenditures, including beach nourishment” and (2) under subsections 1(a) and (a2) “to promote travel and tourism,” and requires that the TDA “shall use the remainder of those funds “for tourism-related expenditures.”

The term “tourism-related expenditures” (hereinafter referred to as “TRE”) is defined in § 1(e)(4) as follows:

“Expenditures that, in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county. The term includes tourism-related capital expenditures and beach nourishment.”

### **BACKGROUND/FACTS**

In 1987, the North Carolina General Assembly authorized the County to levy a 3% occupancy tax. *See* N.C. Sess. Law 1987-209, attached hereto as Exhibit B. The

initial authorizing legislation required that at least 75% of the net proceeds of the tax be used “only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, *police protection and emergency services.*” See N.C. Sess. Law 1987-209, §1(e) (emphasis added). The remainder was to be deposited in the County General Fund and could be used “for any lawful purpose.” *Id.*

In 1999, the General Assembly modified the 1987 Session Law referenced above in passing legislation that authorized the County to levy a room occupancy tax of 1% of the gross receipts derived from the rental of accommodations taxable under Section 1(a) of N.C. Session Law 1987-209. See N.C. Session Law 1999-155, attached hereto as Exhibit C. The authorized use of the additional 1% in OT proceeds was the same as defined in Section 1(e) of N.C. Session Law 1987-209.

In 2004, the General Assembly enacted legislation with the title “TO ALLOW AN INCREASE IN THE CURRITUCK COUNTY OCCUPANCY TAX AND TO CHANGE THE PURPOSES FOR WHICH THE TAX MAY BE USED.” See N.C. Sess. Law 2004-95. The legislation became effective on July 13, 2004. See N.C. Sess. Law 2004-95, §4. In adopting the 2004 amendment, the legislature authorized the County to levy an additional 2% occupancy tax, raising the total pertinent tax rate to 6%. See N.C. Sess. Law 2004-95 § 1.

More important to the merits of the Plaintiffs’ motion, the 2004 amendment specifically changed the purposes for which occupancy tax proceeds could be used. The purpose of the 2004 amendment was to alter the manner in which the entire collection (being 6%) of occupancy tax proceeds were to be used. Under the Act that is currently in

effect, there are only two allowed uses of OT proceeds: one-third (1/3) of the net proceeds of the 6% tax must be used “to promote travel and tourism.” The remaining two-thirds (2/3) must be used for “tourism-related expenditures, including beach nourishment.” *See* N.C. Sess. Law 2004-95, §2.

In 2007, Currituck County proposed a bill that would have restored the ability of the County to use at least 75% of the net proceeds of the tax for “tourist-related purposes, including construction and maintenance of public facilities and buildings; garbage, refuse, and solid waste collection and disposal, police protection, and emergency services.” The proposed legislation also would have restored the ability of the County to deposit the remainder of the net proceeds in the County’s General Fund to be used for “any lawful purpose.” *See* House Bill 1102, §1, attached hereto as Exhibit D. However, this bill was not passed by the legislature and failed to become law.

### **Improper Funding of Public Safety Services and Equipment**

Most significantly, and as noted above, pursuant to the 2004 amendments, the General Assembly specifically **eliminated** “police protection and emergency services” as authorized expenditures, which had been permitted under the prior session law. Further, the General Assembly specifically **denied** the attempt in 2007 by the County to convert the authorized expenditures of OT proceeds to the pre-Act language, which attempt, if successful, would have allowed the Defendants to use OT revenue for police protection and emergency services.

The County’s audited financial statements for each year identify the amounts of the

County's expenditures made using OT proceeds which were transferred to the General Fund. The County has elected to classify a portion of these expenditures as being for "seasonal" public safety services (and related equipment) during the "tourist season" in COBX. The County has never defined for the general public what specific period of a fiscal year it considers to be covered by the term "tourist season". Further, the County does not distinguish the incremental amounts of "seasonal" safety service costs paid for using OT proceeds from the normal public safety coverage costs that are paid for through the collection of property tax from the almost 5,000 homes and businesses, their owners, and full time County residents in the area. The County's expenditures of OT proceeds for public safety services and equipment commencing in Fiscal Year 2005 through Fiscal Year 2019 total \$23,616,396. Such expenditures were historically funded only for the COBX area, but in Fiscal Year 2018 the County expanded its interpretation of the term "TRE" to allow for the funding of emergency medical services for the Mainland Currituck area using OT proceeds, based on the theory that "tourists" traveled on that road to their vacation destinations. The aforesaid decision by the Defendants to expand the definition of "TRE" ignores the fact that many of these travelers may be destined for Dare County. The Plaintiffs' decision to exclude lifeguard services and beach clean-up costs from the definition of "public safety services" within this Motion is founded in the principles of distinction upon which the Plaintiffs base their overall claims. There can be no doubt that the main attraction of any area located on the Outer Banks is the ocean beach. The provision of lifeguard services in the COBX by the Defendants may legitimately be regarded as a tourist "attraction", in the sense that such services have the potential to induce visitors to COBX and its beaches. The same can be said for

contracted services that are designed to keep the COBX beaches in clean condition and free of litter. This is especially true for families with small children, which comprise most of the COBX tourist market. Thus, the aforesaid excluded services arguably fall within the meaning of “TRE” under the Act.

Wherefore, the Plaintiffs maintain that the Defendants are improperly using OT proceeds to fund public safety services and equipment, in the face of the General Assembly’s explicit decision to deny the County such authorization.

### **ARGUMENT**

The standards for granting a preliminary injunction are set forth in the Supreme Court case, *Ridge Comm. Investors v. Berry*, 293 N.C. 688, 339 S.E. 2d 566, at 574 (1977), where the court stated:

“A preliminary injunction, the relief here sought, is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” [Citations omitted.]

**Likelihood that Plaintiffs Will Sustain Irreparable Loss Unless the Injunction Being Sought is Issued; Issuance of the Injunction Sought is Necessary for the Protection of Plaintiffs’ Rights During the Course of This Litigation**

On application for a preliminary injunction, the first step should be to balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant, and if a decided imbalance of hardship should appear in the plaintiff's favor, the likelihood-of-success test is displaced by the formulation that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for more deliberate investigation. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, at 195 (1977).

“When a court has before it a motion for preliminary injunction,.....the more important factors are those of probable irreparable injury to the plaintiff without a decree and of likely harm to the defendant with a decree,.....but the public interest should always be considered.” *Id.*

Issuance of a preliminary injunction is a matter of discretion that the trial court exercises after weighing the equities and advantages and disadvantages to the parties. *Adams v. Beard Development Corp.*, 116 N.C.App. 105, 446 S.E.2d 862 (1994).

Plaintiffs seek to enjoin the unlawful expenditure of \$2.86 million of OT proceeds for public safety services and equipment that the County has already budgeted for the 2019-2020 Fiscal Year, as well as any expenditures by the County for said services in the future. If unlawfully expended, those funds will be unrecoverable to fund legitimate tourism-related expenditures and promotional expenses in the near and distant future, as the OT proceeds will have already been used by the County for the aforesaid improper purposes at the time this matter is ultimately decided. Given that this action may require

the County to restore to the Tourism Development Fund the many years of past expenditures that have already violated the Act, any OT proceeds that can be preserved pending the outcome of the underlying litigation will prove to be of substantial benefit to the Plaintiffs in the event the Plaintiffs prevail on the merits of their case.

It is important to note that in the event the Court rules against the Plaintiffs' subject motion, the lack of transparency regarding incremental public safety service expenditures by the Defendants throughout the fiscal year will make the Court's task of determining the precise amount of illegally used OT proceeds claimed within the Plaintiff's Complaint even more insurmountable. Thus, if the Plaintiffs prevail on the merits, the matter at hand will be further frustrated as, not only will an inherent wrong be allowed to continue, but the relief sought by the Plaintiffs will be compromised. The purpose of a preliminary injunction is to prevent a change in circumstances during pendency of the action which would impair the court's ability to render a meaningful decision in the case or prevent it from granting proper relief. *Rankin v. Coleman*, 401 F.Supp. 664 (1975). Preliminary injunction serves as an equitable policing measure to prevent parties from harming one another during litigation; to keep parties while the suit goes on, as far as possible, in the respective positions they occupied when the suit began. *Musten v. Musten*, 36 N.C.App. 618, 244 S.E.2d 699 (1978).

In addition, failure to issue the injunction will prevent the appropriation of OT proceeds for other needed projects in COBX. A significant example is the completion of the bike path on North Carolina Highway 12, which is an important tourist attraction that will also significantly improve pedestrian safety along the highway. The County delayed completion of this project between 2012 and 2014 while using OT funds for other

questionable projects. During that period, three pedestrians were killed walking along sections of Highway 12 without an off-road path. The remaining sections without paths are among the most heavily trafficked sections along Highway 12. The availability of OT funds will also enable the funding of lighting along the path, which is heavily trafficked at night and is currently unlighted. The County could also use these funds to begin funding for beach nourishment, a statutorily created TRE, which is a much needed, costly project that has long been ignored by the County. Such an appropriation of these funds would enhance COBX property values and reduce future property tax payments for the taxpaying citizens of Currituck County. If this Court were to allow the County to proceed with future expenditures for public safety services using OT proceeds, the Plaintiffs and the general public will be substantially and irreparably harmed. As noted above, the public interest is also at the heart of this dispute, as proper use of OT proceeds would considerably benefit the general public. Conversely, the most recent financial statements produced by the County evidence that there exist substantial reserve funds to fund any and all expenditures on public safety services and equipment during the pendency of the litigation in this matter without the need to draw from any OT proceeds. This clearly establishes that the Defendants will suffer no harm in the event the preliminary injunction is issued. Using the balancing test prescribed by the *Adams* case, the Plaintiffs state that the inequities and disadvantages to the Plaintiffs and the public interest far exceed any perceived disadvantages to the Defendants in this matter.

### Likelihood of Success on the Merits

To obtain an interlocutory injunction, a plaintiff must make out at least a *prima facie* showing of a right to final relief demanded by the plaintiff. *Arey v. Lemons*, 232 N.C. 531, 61 S.E.2d 596 (1950).

Though, on a trial, a plaintiff's case can only be shown by convincing proof, a lower degree of proof is required by a party seeking a preliminary injunction; a *prima facie* case being sufficient. *Faison v. Hardy*, 114 N.C. 58, 19 S.E. 91, *affirmed on rehearing* 114 N.C. 429, 19 S.E. 701 (1894).

A litigating party is said to have a *prima facie case* when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. *Black's Law Dictionary*, 1071 (5th Ed. 2009). It is the evidence necessary to require a party to proceed with its case. *Id.*

On application for a preliminary injunction, the first step should be to balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant, and if a decided imbalance of hardship should appear in the plaintiff's favor, the likelihood-of-success test is displaced by the formulation that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for more deliberate investigation. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189 (1977).

At the preliminary injunction stage, the court need only inquire whether serious questions of law are at issue. *Flav-O-Rich, Inc. v. North Carolina Milk Com'n*, 593

F.Supp. 13 (1983).

Given the foregoing, the Plaintiffs' case is reasonably likely to succeed on the merits for a number of reasons:

1. Section 1(e) of the current Act authorizes OT proceeds to be used by the Defendants only for a) tourism-related expenditures or b) advertising and promotional expenses. Public safety services and equipment qualify as neither. "TRE" is specifically defined in §1(e)(4) as "Expenditures that, in the judgment of the . . . Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county." The Defendants have the heavy and unsustainable burden of showing why the presence of these services is "designed to increase the use of" certain "facilities" in the County by "attracting" visitors. The concept of visitors being "attracted" to the community by the presence of the subject public safety services defies the logic present within the language and intent of the Act, as it is reasonable to presume that tourists and business travelers are not basing their decision to visit the County on the availability of such services. Consequently, the Act does not authorize the use of OT proceeds to fund public safety services and equipment.

2. The pre-2004 version of the Act allowed OT proceeds to be used for "for tourist related purposes, including . . . garbage, refuse, and solid waste collection and disposal, police protection and emergency services." However, that language was deleted by the 2004 amendment, the title of which stated that it was "AN ACT . . . TO CHANGE THE PURPOSES FOR WHICH THE [OCCUPANCY] TAX MAY BE USED." *See* N.C. Sess. Law 2004-95. The County has argued that public safety expenditures constitute

“legitimate” TRE under the current Act because they were recognized as “tourist related” under the pre-2004 statutory language, and that this is equivalent to the new term “tourism-related expenditures” in the current Act. However, the Defendants’ aforesaid position is made obsolete by the chain of legislation denoted herein, as it improperly assumes that all services in the deleted clause (in quotations above) have been carried forward into the amendment as permitted uses of OT proceeds. In accepting the County’s interpretation of the current Act, this Court would be ignoring the plain and explicit purpose of the Act’s 2004 amendment, which was to **change the purposes for which the OT proceeds could be used.** Further, when assessing such interpretations of similar Acts, the North Carolina Supreme Court has held “that even when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature.” *Ray v. NC Dep’t of Transp.*, 366 N.C. 218, 727 S.E.2d 675 (2012). In light of the foregoing, the definition of “TRE” does not allow for any implication that the prior language of the Act was somehow carried forward into the amended Act. Consequently, the Act cannot be rationally construed to authorize the use of OT proceeds to fund public safety services and equipment.

3. The County may also argue that the meaning of “TRE” in the Act is based solely on the Commissioners’ “judgment” in determining what constitutes the same. However, the Commissioners’ judgment must be objectively reasonable and have a rational basis that is directly linked to the intent and purposes defined within the Act. Otherwise, their judgment would be absolute and unilateral in form, paving the way for arbitrary and capricious determinations having no rational basis under the language and intent of the Act. In the instant case, an interpretation of the Act by the Defendants would be

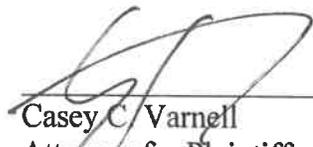
unreasonable if it determined that the Act authorizes the use of OT proceeds to fund public safety services and equipment given the plain and explicit language of the current Act and the historical legislation leading up to the same. Further, based on the information received from the Defendants through CCA's 2018 public records request, there exists no evidence of information presented to the County Commissioners which would have provided a basis for their judgment as to whether such OT expenditures met the TRE criteria of attracting tourists and business travelers, thereby increasing the use of lodging and other facilities that generate tax revenues.

As a final note, it is vital that this Court considers the relief being sought by the Plaintiffs in the underlying matter. The Plaintiffs are seeking a declaratory judgment that declares the Defendants' expenditures which are complained of to be unauthorized under the relative enabling legislation. In turn, the Plaintiffs are also seeking the order of a permanent injunction against the Defendants' future use of OT proceeds for any purposes deemed invalid by this Court, which purposes include those named within this motion. As a general rule, courts will grant preliminary injunctions upon the showing a *prima facie* case by the movant, where an injunction is the principal relief sought. *Jones v. Lassiter*, 169 N.C. 750, 86 S.E. 710 (1915).

**WHEREFORE**, Plaintiffs pray the Court for the issuance of an order enjoining the Defendants from the use of any occupancy tax ("OT") proceeds by Currituck County or its Tourism Development Authority for the purposes of funding police, emergency medical and fire services and equipment, as defined herein and in the accompanying Motion, in order to preserve the status quo until the rights of the parties can be fully determined at trial.

RESPECTFULLY SUBMITTED, this the 1<sup>st</sup> day of August, 2019.

SHARP, GRAHAM, BAKER and VARNELL, LLP



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GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

SESSION LAW 2004-95  
HOUSE BILL 1721

AN ACT TO ALLOW AN INCREASE IN THE CURRITUCK COUNTY OCCUPANCY TAX AND TO CHANGE THE PURPOSES FOR WHICH THE TAX MAY BE USED.

The General Assembly of North Carolina enacts:

**SECTION 1.** Section 1 of Chapter 209 of the 1987 Session Laws, as amended by Chapter 155 of the 1991 Session Laws and Chapter 155 of the 1999 Session Laws, is amended by adding a new subsection to read:

"(a2) Second Additional Occupancy Tax. – In addition to the tax authorized by subsections (a) and (a1) of this section, the Currituck County Board of Commissioners may levy a room occupancy tax of up to two percent (2%) of the gross receipts derived from the rental of accommodations taxable under subsection (a). The levy, collection, administration, and repeal of the tax authorized by this subsection shall be in accordance with the provisions of this act. Currituck County may not levy a tax under this subsection unless it also levies the tax under subsections (a) and (a1)."

**SECTION 2.** Section 1(e) of Chapter 209 of the 1987 Session Laws, as amended by Chapter 155 of the 1991 Session Laws, reads as rewritten:

"(e) Use of tax revenue. Currituck County shall use at least seventy-five percent (75%) of the net proceeds of the tax levied under subsection (a) of this section only for tourist-related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services. ~~tourism-related expenditures, including beach nourishment.~~ The remainder of the net proceeds of the tax levied under subsection (a) shall be deposited in the Currituck County General Fund and may be used for any lawful purpose. Currituck County may shall use at least two-thirds of the net proceeds of the tax levied under subsections (a1) and (a2) of this section, to the extent that they are needed, for capital costs, operation, and maintenance of the Currituck Wildlife Museum. Whatever is not needed for the capital costs, operation, and maintenance of the Currituck Wildlife Museum shall be used for tourist-related purposes. As used in this subsection, 'net proceeds' means gross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer. section to promote travel and tourism and shall use the remainder of those funds for tourism-related expenditures.

The following definitions apply in this subsection:

(1) Beach nourishment. – The placement of sand, from other sand sources, on a beach or dune by mechanical means and other associated activities that are in conformity with the North Carolina Coastal Management Program along the shorelines of the Atlantic Ocean of North Carolina and connecting inlets for the purpose of widening the beach to benefit public recreational use and mitigating damage and erosion from storms to inland property. The term includes expenditures for any of the following:

a. Costs directly associated with qualifying for projects either contracted through the U.S. Army Corps of Engineers or

- otherwise permitted by all appropriate federal and State agencies.
  - b. The nonfederal share of the cost required to construct these projects.
  - c. The costs associated with providing enhanced public beach access.
  - d. The costs of associated nonhardening activities such as the planting of vegetation, the building of dunes, and the placement of sand fences.
- (2) Net proceeds. – Gross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer, not to exceed three percent (3%) of the first five hundred thousand dollars (\$500,000) of gross proceeds collected each year and one percent (1%) of the remaining gross receipts collected each year.
- (3) Promote travel and tourism. – To advertise or market an area or activity, publish and distribute pamphlets and other materials, conduct market research, or engage in similar promotional activities that attract tourists or business travelers to the area; the term includes administrative expenses incurred in engaging in these activities.
- (4) Tourism-related expenditures. – Expenditures that, in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county. The term includes tourism-related capital expenditures and beach nourishment."

**SECTION 3.** Chapter 209 of the 1987 Session Laws, as amended by Chapter 155 of the 1991 Session Laws and Chapter 155 of the 1999 Session Laws, is amended by adding a new section to read:

**"Section 1.1. Currituck County Tourism Development Authority. – (a) Appointment and Membership. –** When the board of commissioners adopts a resolution levying a room occupancy tax under this act, it shall also adopt a resolution creating a county Tourism Development Authority, which shall be a public authority under the Local Government Budget and Fiscal Control Act. The Authority shall be composed of six members: five voting members and one ex officio nonvoting member. The ex officio nonvoting member shall be the county's designated travel and tourism representative. The voting members shall be as follows:

- (1) The county commissioner representing the Moyock Township.
- (2) The county commissioner representing the Crawford Township.
- (3) The county commissioner representing the Poplar Branch Township.
- (4) The county commissioner representing the Fruitville Township.
- (5) The at-large county commissioner.

(b) **Administration. –** The resolution creating the Authority shall designate one member of the Authority to serve as the initial chair and provide for the members' terms of office and for the filling of vacancies on the Authority. After the initial term, the Authority must elect a chair from among its members. The members of the Authority shall serve without pay. The Authority shall meet at the call of the chair and shall adopt rules of procedure to govern its meetings. The Finance Officer for Currituck County shall be the ex officio finance officer of the Authority.

(c) **Duties. –** The Authority shall expend the net proceeds of the tax levied under this act for the purposes provided in Section 1 of this act. The Authority shall promote travel, tourism, and conventions in the county, sponsor tourist-related events and activities in the county, and finance tourist-related capital projects in the county.

(d) Reports. – The Authority shall report quarterly and at the close of the fiscal year to the board of commissioners on its receipts and expenditures for the preceding quarter and for the year in such detail as the board may require."

**SECTION 4.** This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 13<sup>th</sup> day of July, 2004.

s/ Beverly E. Perdue  
President of the Senate

s/ James B. Black  
Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA  
1987 SESSIONCHAPTER 209  
HOUSE BILL 555AN ACT TO AUTHORIZE CURRITUCK COUNTY TO LEVY A ROOM  
OCCUPANCY AND TOURISM DEVELOPMENT TAX.

The General Assembly of North Carolina enacts:

Section 1. Occupancy tax. (a) Authorization and scope. The Currituck County Board of Commissioners may by resolution, after not less than 10 days' public notice and after a public hearing held pursuant thereto, levy a room occupancy tax of three percent (3%) of the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by a hotel, motel, inn, or similar place within the county that is subject to sales tax imposed by the State under G.S. 105-164.4(3), or from the rental of a campsite within the county. This tax is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose.

(b) Collection. Every operator of a business subject to the tax levied under this section shall, on and after the effective date of the levy of the tax, collect the tax. This tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records, and shall be paid by the purchaser to the operator of the business as trustee for and on account of the county. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business. The Currituck County Tax Collector shall design, print, and furnish to all appropriate businesses and persons in the county the necessary forms for filing returns and instructions to ensure the full collection of the tax. An operator of a business who collects the occupancy tax levied under this section may deduct from the amount remitted to the county a discount of three percent (3%) of the amount collected.

(c) Administration. The county shall administer a tax levied under this section. A tax levied under this section is due and payable to the county tax collector in monthly installments on or before the 15th day of the month following the month in which the tax accrues. Every person, firm, corporation, or association liable for the tax shall, on or before the 15th day of each month, prepare and render a return on a form prescribed by the county. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied. A return filed with the county tax collector under this section is not a public record as defined by G.S. 132-1 and may not be disclosed except as required by law.

(d) Penalties. A person, firm, corporation, or association who fails or refuses to file the return required by this section shall pay a penalty of ten dollars (\$10.00) for each day's omission. In case of failure or refusal to file the return or pay the tax for a period of 30 days after the time required for filing the return or for paying the tax, there shall be an additional tax, as a penalty, of five percent (5%) of the tax due in addition to any other penalty, with an additional tax of five percent (5%) for each additional month or fraction thereof until the tax is paid.

Any person who willfully attempts in any manner to evade a tax imposed under this section or who willfully fails to pay the tax or make and file a return shall, in addition to all other penalties provided by law, be guilty of a misdemeanor and shall be punishable by a fine not to exceed one thousand dollars (\$1,000), imprisonment not to exceed six months, or both. The Board of Commissioners may, for good cause shown, compromise or forgive the penalties imposed by this subsection.

(e) Use of tax revenue. Currituck County shall use at least seventy-five percent (75%) of the net proceeds of the tax levied under this section only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services. The remainder of the net proceeds shall be deposited in the Currituck County General Fund and may be used for any lawful purpose. As used in this subsection, "net proceeds" means gross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer.

(f) Effective date of levy. A tax levied under this section shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.

(g) Repeal. A tax levied under this section may be repealed by a resolution adopted by the Currituck County Board of Commissioners. Repeal of a tax levied under this section shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal resolution was adopted. Repeal of a tax levied under this section does not affect a liability for a tax that was attached before the effective date of the repeal, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal.

Sec. 2. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 18th day of May, 1987.

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 1999SESSION LAW 1999-155  
HOUSE BILL 665AN ACT TO MODIFY THE CURRITUCK COUNTY ROOM OCCUPANCY AND  
TOURISM DEVELOPMENT TAX.

The General Assembly of North Carolina enacts:

Section 1. Section 1 of Chapter 209 of the 1987 Session Laws, as amended by Chapter 155 of the 1991 Session Laws, reads as rewritten:

"Section 1. Occupancy tax. (a) Authorization and scope. The Currituck County Board of Commissioners may ~~by resolution, after not less than 10 days' public notice and after a public hearing held pursuant thereto,~~ levy a room occupancy tax of three percent (3%) of the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by a hotel, motel, inn, or similar place within the county that is subject to sales tax imposed by the State under G.S. 105-164.4(a)(3), or from the rental of a campsite within the county. This tax is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose.

(a1) Additional occupancy tax. In addition to the tax authorized by subsection (a) of this section, the Currituck County Board of Commissioners may levy a room occupancy tax of one percent (1%) of the gross receipts derived from the rental of accommodations taxable under subsection (a). The levy, collection, administration, and repeal of the tax authorized by this subsection shall be in accordance with the provisions of this act. Currituck County may not levy a tax under this subsection unless it also levies the tax under subsection (a).

(b) A tax levied under this act shall be levied, administered, collected, and repealed as provided in G.S. 153A-155. The penalties provided in G.S. 153A-155 apply to a tax levied under this section. ~~Collection. Every operator of a business subject to the tax levied under this section shall, on and after the effective date of the levy of the tax, collect the tax. This tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records, and shall be paid by the purchaser to the operator of the business as trustee for and on account of the county. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business. The Currituck County Tax Collector shall design, print, and furnish to all appropriate businesses and persons in the county the necessary forms for filing returns and instructions to ensure the full collection of the tax.~~

~~(c) Administration. The county shall administer a tax levied under this section. A tax levied under this section is due and payable to the county tax collector in monthly installments on or before the 15th day of the month following the month in which the tax accrues. Every person, firm, corporation, or association liable for the tax shall, on or before the 15th day of each month, prepare and render a return on a form prescribed by the county. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied. A return filed with the county tax collector under this section is not a public record as defined by G.S. 132-1 and may not be disclosed except as required by law.~~

~~(d) Penalties. A person, firm, corporation, or association who fails or refuses to file the return required by this section shall pay a penalty of ten dollars (\$10.00) for each day's omission. In case of failure or refusal to file the return or pay the tax for a period of 30 days after the time required for filing the return or for paying the tax, there shall be an additional tax, as a penalty, of five percent (5%) of the tax due in addition to any other penalty, with an additional tax of five percent (5%) for each additional month or fraction thereof until the tax is paid. Any person who willfully attempts in any manner to evade a tax imposed under this section or who willfully fails to pay the tax or make and file a return shall, in addition to all other penalties provided by law, be guilty of a misdemeanor and shall be punishable by a fine not to exceed one thousand dollars (\$1,000), imprisonment not to exceed six months, or both. The Board of Commissioners may, for good cause shown, compromise or forgive the tax penalties imposed by this subsection.~~

(e) Use of tax revenue. Currituck County shall use at least seventy-five percent (75%) of the net proceeds of the tax levied under subsection (a) of this section only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services. The remainder of the net proceeds of the tax levied under subsection (a) shall be deposited in the Currituck County General Fund and may be used for any lawful purpose. Currituck County may use the net proceeds of the tax levied under subsection (a1) of this section, to the extent that they are needed, for capital costs, operation, and maintenance of the Currituck Wildlife Museum. Whatever is not needed for the capital costs, operation, and maintenance of the Currituck Wildlife Museum shall be used for tourist-related purposes. As used in this subsection, 'net proceeds' means gross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer.

~~(f) Effective date of levy. A tax levied under this section shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.~~

~~(g) Repeal. A tax levied under this section may be repealed by a resolution adopted by the Currituck County Board of Commissioners. Repeal of a tax levied under this section shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal resolution was adopted. Repeal of a tax levied under this section does not affect a liability for a tax that was~~

~~attached before the effective date of the repeal, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal."~~

Section 2. County Administrative Provisions. Section 3(b) of S.L. 1997-102, as amended by Section 2 of S.L. 1997-255, Section 2 of S.L. 1997-342, Section 3 of S.L. 1997-364, Section 6 of S.L. 1997-410, and Section 2 of S.L. 1998-14, reads as rewritten:

"(b) This section applies only to Avery, Brunswick, Currituck, Davie, Madison, Nash, Person, Randolph, and Scotland Counties."

Section 3. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 7th day of June, 1999.

s/ Marc Basnight  
President Pro Tempore of the Senate

s/ James B. Black  
Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2007

H

D

HOUSE DRH50314-MC-115 (3/14)

Short Title: Modify Currituck County Occupancy Tax. (Local)

Sponsors: Representative Owens.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE OCCUPANCY TAX FOR CURRITUCK COUNTY.

The General Assembly of North Carolina enacts:

**SECTION 1.** Section 1(e) of Chapter 209 of the 1987 Session Laws, as amended by Section 1 of Chapter 155 of the 1991 Session Laws, and as amended by Section 2 of S.L. 2004-95, reads as rewritten:

"(e) Use of tax revenue. Currituck County shall use at least seventy-five percent (75%) of the net proceeds of the tax levied under subsection (a) of this section only for tourism related expenditures, including beach nourishment. Currituck County shall use at least two thirds of the net proceeds of the tax levied under subsections (a1) and (a2) of this section to promote travel and tourism and shall use the remainder of those funds for tourism related expenditures, tourist-related purposes, including construction and maintenance of public facilities and buildings; garbage, refuse, and solid waste collection and disposal, police protection, and emergency services. The remainder of the net proceeds shall be deposited in the Currituck County General Fund and may be used for any lawful purpose. As used in this subsection, "net proceeds" means gross

~~The following definitions apply in this subsection:~~

(1) ~~Beach nourishment. The placement of sand, from other sand sources, on a beach or dune by mechanical means and other associated activities that are in conformity with the North Carolina Coastal Management Program along the shorelines of the Atlantic Ocean of North Carolina and connecting inlets for the purpose of widening the beach to benefit public recreational use and mitigating damage and erosion from storms to inland property. The term includes expenditures for any of the following:~~

a. ~~Costs directly associated with qualifying for projects either contracted through the U.S. Army Corps of Engineers or~~

- 1 otherwise permitted by all appropriate federal and State
- 2 agencies.
- 3 b. ~~The nonfederal share of the cost required to construct these~~
- 4 ~~projects.~~
- 5 e. ~~The costs associated with providing enhanced public beach~~
- 6 ~~access.~~
- 7 d. ~~The costs of associated nonhardening activities such as the~~
- 8 ~~planting of vegetation, the building of dunes, and the placement~~
- 9 ~~of sand fences.~~
- 10 (2) ~~Net proceeds. Gross proceeds less the cost to the county of~~
- 11 ~~administering and collecting the tax, as determined by the finance~~
- 12 ~~officer, not to exceed three percent (3%) of the first five hundred~~
- 13 ~~thousand dollars (\$500,000) of gross proceeds collected each year and~~
- 14 ~~one percent (1%) of the remaining gross receipts collected each~~
- 15 ~~year.officer.~~
- 16 (3) ~~Promote travel and tourism. To advertise or market an area or~~
- 17 ~~activity, publish and distribute pamphlets and other materials, conduct~~
- 18 ~~market research, or engage in similar promotional activities that attract~~
- 19 ~~tourists or business travelers to the area; the term includes~~
- 20 ~~administrative expenses incurred in engaging in these activities.~~
- 21 (4) ~~Tourism related expenditures. Expenditures that, in the judgment of~~
- 22 ~~the Currituck County Board of Commissioners, are designed to~~
- 23 ~~increase the use of lodging facilities, meeting facilities, recreational~~
- 24 ~~facilities, and convention facilities in a county by attracting tourists or~~
- 25 ~~business travelers to the county. The term includes tourism related~~
- 26 ~~capital expenditures and beach nourishment."~~

27 SECTION 2. This act is effective when it becomes law.

STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
19-CVS-171

FILED  
2019 AUG -2 P 3:36  
CURRITUCK COUNTY, N.C.  
BY: W

GERALD COSTANZO, COROLLA CIVIC  
ASSOCIATION, ET AL.

Plaintiffs,

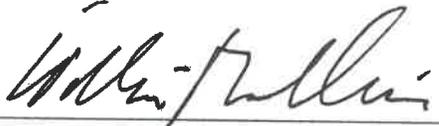
v.

CURRITUCK COUNTY, NORTH  
CAROLINA; THE CURRITUCK COUNTY  
TOURISM DEVELOPMENT AUTHORITY;  
DANIEL F. SCANLON II, CURRITUCK  
COUNTY MANAGER and BUDGET OFFICER,  
both in his official capacity and in his individual  
capacity, ET AL.

Defendants.

**VERIFICATION**

**William T. Collins**, being first duly sworn, depose and say: That he is a Plaintiff in the above-entitled action, that he has read the foregoing Motion for Preliminary Injunction and Brief in Support of Motion and that the same is true to his own knowledge and belief, except as to those matters and things stated on information and belief, and as to those, he believes them to be true.

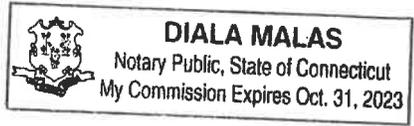
  
\_\_\_\_\_  
**William T. Collins**

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 27<sup>th</sup> DAY OF JULY, 2019.

  
\_\_\_\_\_

NOTARY PUBLIC

MY COMMISSION EXPIRES: 10/31/2023



STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
19-CVS-171

FILED  
2019 AUG -2 P 3:36  
CURRITUCK COUNTY, N.C.  
BY: WJ

GERALD COSTANZO, COROLLA CIVIC  
ASSOCIATION, ET AL.

Plaintiffs,

v.

CURRITUCK COUNTY, NORTH  
CAROLINA; THE CURRITUCK COUNTY  
TOURISM DEVELOPMENT AUTHORITY;  
DANIEL F. SCANLON II, CURRITUCK  
COUNTY MANAGER and BUDGET OFFICER,  
both in his official capacity and in his individual  
capacity, ET AL.

Defendants.

VERIFICATION

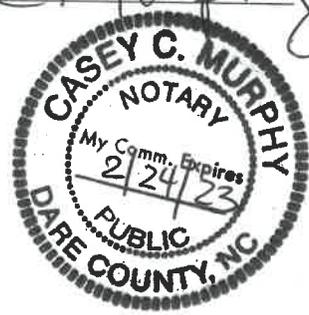
**Barbara Marzetti**, being first duly sworn, depose and say: That she is a Board Member of Corolla Civic Association, a Plaintiff in the above-entitled action, that she has read the foregoing Motion for Preliminary Injunction and Brief in Support of Motion and that the same is true to her own knowledge and belief, except as to those matters and things stated on information and belief, and as to those, she believes them to be true.

  
Barbara Marzetti

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 29 DAY OF July, 2019.

  
NOTARY PUBLIC

MY COMMISSION EXPIRES: 2/24/2023



STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

19-CVS-171  
2019 AUG -2 P 3: 36

CURRITUCK COUNTY, C.S.C.  
BY     W    

GERALD COSTANZO, COROLLA CIVIC  
ASSOCIATION, ET AL.

Plaintiffs,

v.

CURRITUCK COUNTY, NORTH  
CAROLINA; THE CURRITUCK COUNTY  
TOURISM DEVELOPMENT AUTHORITY;  
DANIEL F. SCANLON II, CURRITUCK  
COUNTY MANAGER and BUDGET OFFICER,  
both in his official capacity and in his individual  
capacity, ET AL.

Defendants.

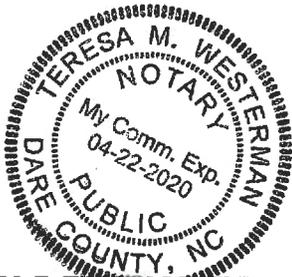
**VERIFICATION**

**Edward Cornet**, being first duly sworn, depose and say: That he is a Board Member of Corolla Civic Association, a Plaintiff in the above-entitled action, that he has read the foregoing Motion for Preliminary Injunction and Brief in Support of Motion and that the same is true to his own knowledge and belief, except as to those matters and things stated on information and belief, and as to those, he believes them to be true.



**Edward Cornet**

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 31 DAY OF July,  
2019.



NOTARY PUBLIC

MY COMMISSION EXPIRES: 4-22-2020